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BY

THOMAS JARMAN, ESQ.

The Seventh Edition

BY

CHARLES PERCY SANGER,

OF LINCOLN'S INN, BARRISTER-AT-LAW,

ASSISTED BY

IRENE COOPER WILLIS,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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THE LAW

WITH RESPECT TO

WILLS.

VOLUME II.

CHAPTER XIX.

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I.—Effect of Mistake.—" Sometimes," says Mr. Jarman (*a*), " a testator shows by the recitals in his will, that he erroneously supposes a title to subsist in a third person to property which, in fact, belongs to himself. Such recitals do not in general amount to a devise; for, as the testator evidently conceives that the person referred to possesses a title independently of any act of his own, he does not intend to make an actual disposition in favour of such person; and though it may be probable, or even apparent, that the testator is influenced in the disposition of his

Recitals, whether they create an actual gift.

(*a*) First ed., p. 460. Compare the rule as to the execution of special powers of appointment, Chap. XXIII, *post*, p. 799.

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property by this mistake, yet there is no necessary implication that, in the event of the failure of the supposed title, he would give to the person that benefit to which it is assumed he is entitled."

Thus, in *Wright* v. *Wyvell* (*b*), a testator bequeathed unto A., his wife, £600, to be paid to W., saying it was for payment of lands lately purchased of W., and was already estated as part of a jointure to A. his wife during her life, being of the value of £67 per annum; that of Wiskow, York, and Malton, the lands there amounting to the yearly value of £63, in all £130, which, being also estated upon A. his wife, was in full of her jointure. It appeared that these lands had not been settled on the wife. And it was held by Pollexfen, C.J., Rokeby, and Ventris (Powell, J., *dissentiente*), that these expressions did not amount to a devise to the wife, for it appeared "that the testator did not intend to devise her anything by the will, for he mentions that she was estated in it before." Powell, J., relied upon a case (*c*) in which "I have made a lease to J. S., at 10s. rent," was held to be a good devise; but the other Judges considered the case to be of little authority.

Wright v. *Hammond.*

So, where (*d*) J. S., tenant for life, with remainder to his wife for life, remainder to his own right heirs, expressed himself in his will as follows: "Item, my land at W. my wife Mary is to enjoy for her life, and after her death it of right goes to my daughter E. for ever, provided she has heirs." The Court held that the first clause was not a devise to the wife, for the lands were settled upon her for life; and what was said as to the daughter was only a declaration of the devisor what the condition of the estate was, and how she was to enjoy it; and he could not say of right who was to enjoy them, if she claimed under the will.

Dashwood v. *Peyton.*

Again, where (*e*) B., by his will, reciting that he was entitled for life, under the will of A., to the advowson of the rectory of D., with remainders over, "subject to a direction in the said will, that my brother J. D. shall be presented to said rectory

(*b*) 2 Vent. 56.

(*c*) Moore, 31.

(*d*) *Wright* v. *Hammond* (*Right* v. *Hamond*), 1 Stra. 427, 1 Com. Rep. 232, 8 Vin. Abr. 110, Devise, L. 2, pl. 32, 2 Eq. Ab. 338, pl. 11.

(*e*) *Dashwood* v. *Peyton*, 18 Ves. 27; and see *Doe* d. *Vessey* v. *Wilkinson*, 2 T. R. 209, cited *post*, p. 1360; *Lane* v. *Wilkins*, 10 East, 241. See also *Smith* v. *Maitland*, 1 Ves. jun. 362; *Langslow* v. *Langslow*, 21 Bea. 552; *Circuitt* v. *Perry*, 23 Bea. 275; *Box* v. *Barrett*, L. R. 3 Eq. 244; *Clibbon* v. *Clibborn*, 9 Ir. Jur. 381; *Harris* v. *Harris*, Ir. R. 3 Eq. 610; *Haverty* v. *Curtis*, [1895] 1 Ir. R. 23. But see also *Poulson* v. *Wellington*, 2 P. W. 533; *Wilson* v. *Piggott*, 2 Ves. jun. 351; both which, however, arose on dispositions by deed. *Circuitt* v. *Perry*, and the later case of *Re Bagot*, [1893] 3 Ch. 348, are referred to *post*, p. 1008, in connection with the question of residuary bequests.

when it shall next become vacant, which it is my wish may be complied with; now, I hereby declare it to be my desire and earnest wish that, in case upon the vacancy of the said living the said J. D. shall not be then living, or in case the said rectory shall again become vacant after the said J. D. shall have been presented to and accepted said presentation, then " A. P. was to be presented. The fact was, that, under the will of A., J. D. was only entitled to the presentation on a certain contingency, which had not happened. The question then arose, whether the expressions in the will of B. raised a gift in him by implication, so as to put the persons actually entitled under the will of A., who took benefits under the will of B., to their election. Lord Eldon decided in the negative, observing that he found no authority for holding mere recital, without more, to amount to gift, or demonstration or intention to give.

Adams v. *Adams*.

And in *Adams* v. *Adams* (*f*), a devise and bequest to trustees of real and personal estate, subject to the dower and thirds at common law of the testator's wife in and out of his real estates (the testator's interest therein being an equity of redemption and not liable to dower), upon trust to receive the income, and pay the same or the overplus thereof after deducting the dower or thirds of his said wife for the maintenance of his children, was held not to give the wife by implication a rentcharge equal to what dower out of the whole estate would have amounted to.

Nor, it seems, will a mistaken belief by a testator as to the ownership of property enlarge the operation of an express gift (*g*).

In *Re Lee* (*h*), E. L. by her will appointed a fund to her husband G. L. absolutely. G. L. in his will mistakenly recited that a moiety of this fund was payable at his death to the executors of J. B. P. Held that G. L. had simply specified a deduction from his estate which was unnecessary, and that all his estate, after payment of debts and legacies, was distributable amongst those entitled to residue.

Reference by testator to a disposition made in that his will.

" It seems, however, that if a testator unequivocally refer to a disposition as made in that his will, which, in fact, he has not made, the intention to make such a disposition, at all events, will be considered as sufficiently indicated " (*i*). In such cases " the Court has taken the recital as conclusive evidence of an intention to give by the will, and, fastening upon it, has given

(*f*) 1 Hare, 537; see also *Doolan* v. *Smith*, 3 J. & Lat. 547; *Ralph* v. *Watson*, 9 L. J. Ch. 328; cf. *Westcott* v. *Culliford*, 3 Hare, 265, where the words were more properly words of original charge than of recital.

(*g*) *Hounsell* v. *Dunning*, [1902] 1 Ch. 512. *Sed quære*, whether the *dictum* of Joyce, J., in this case is consistent with the decision in *Re Bagot*, [1893] 3 Ch. 348.

(*h*) 103 L. T. 103.

(*i*) Mr. Jarman, in the first edition of this work, p. 462.

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to the erroneous recital the effect of an actual gift," differing, in this respect, from the cases in which " the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, and in which the recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication " (*j*).

Thus, where (*k*) a testator bequeathed one moiety of certain leasehold estates to E.; and if she should die before twenty-one, to G.; and if he should die before a certain event, to another person; and after her death, to A.; and provided that in case A. should die without issue, and E. or G. should be then living, or either of them, the said moiety of his leasehold messuages, before given to the said A., should go to E. and G. Sir T. Sewell, M.R., thought it quite clear that the second devise related to the other moiety not before devised, as the manner in which it was given was inconsistent with the disposition of the first moiety, which A. was not to take until after the death of E. and G. He further held that the Court would imply a gift of the second moiety to A. and her issue (the issue taking, since there was no gift over except on the death of A. without issue), with contingent limitations over. There could, he said, be no doubt of the intention, and the words of gift being omitted by mistake, the Court would supply them.

Implication of bounty from direction to pay debt.

A mere direction to pay a debt which the testator supposes to be due from him, does not involve any intention of bounty, and therefore, if a testator directs his executors to pay " a debt of £300 due by me to A "; and he only owes A £200, this is not an implied legacy to A of £100 (*l*). But an intention of bounty may appear from the terms of the will. Thus, in *Re Rowe* (*m*), a testatrix who was executrix and residuary legatee of her deceased husband's will, bequeathed to her grandniece " the sum of £300 in addition to the sums owing to her from my late husband's estate," and it was held that this amounted to a bequest to the grandniece of two sums of £500 each, for which the husband had given her an I O U and promissory note, which were not enforceable for want of consideration (*n*).

Re Rowe.

(*j*) *Per* Wigram, V.-C., *Adams* v. *Adams*, 1 Hare, 540, and *per* Lord Brougham, *Yates* v. *Thomson*, 3 Cl. & Fin. 572. The difference appears to have been overlooked in *Hall* v. *Lietch*, L. R. 9 Eq. 376.

(*k*) *Bibin* v. *Walker*, Amb. 661. As to *Frederick* v. *Hall*, 1 Ves. jun. 396, qu. See also *Furniss* v. *Phear*, 36 W. R. 521, where the obliterated name of a legatee was supplied by a subsequent reference in the will; *ante*, p. 148.

(*l*) *Wilson* v. *Morley*, 5 Ch. D. 776.

(*m*) [1898] 1 Ch. 153. See *Whitfield* v. *Clemment*, 1 Mer. 402, not so clear a case.

(*n*) Compare *Re Hodgson*, [1899] 1 Ch. 666. These cases may be treated as illustrations of the rule *falsa demonstratio non nocet*; *post*, p. 1232 *seq.*

Assumption by testator that his will contains a devise.

"Implication," said Lord Westbury in *Parker* v. *Tootal* (*o*), "may either arise from an elliptical form of expression, which involves and implies something else as contemplated by the person using the expression, or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without of necessity involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction." The case in which this was said affords an example of the former kind of implication, a devise, "to the first son of T. severally and successively in tail male" being read as a devise "to the first and every other son"; otherwise the phrase "severally and successively" would have been without meaning.

Implication of the latter kind described by Lord Westbury is seen when from a direction that certain persons shall deal with the rents of an estate in a particular manner, a devise of the estate to those persons has been implied (*p*); or when from a direction to invest real and personal estate is implied a trust to sell the real estate (*q*).

But a gift which is confined by unambiguous terms to a specific part of a testator's property, as a bequest of "all his capital in ready money and bank billets," will not be extended so as to include the entire personalty by a mere introductory clause declaring the testator's intention to dispose of all his property. It would be different if the testator himself referred to the bequest as including all his property (*r*).

Jordan v. *Fortescue.*

An example of an erroneous reference in a codicil to a disposition made by the will operating as a gift occurs in *Jordan* v. *Fortescue* (*s*): under a gift by codicil of "£500, in addition to £1,500 before bequeathed" to the same person, there having, in fact, been only two legacies of £500 each bequeathed to him by will and first codicil, it was held that there was a gift by implication of £2,000. But it must be remembered that though words such as those used in the last case may by implication effect an increase in the amount of the first gift, yet

(*o*) 11 H. L. C. 143, 161.

(*p*) *See Ex p. Wynch*, 5 D. M. & G. 188, and cases there cited. See also *Newburgh* v. *Newburgh*, Sug. Law of Prop. 367; a devise of the estates in the omitted county (see above p. 463) was implied from the name and arms clause, the leasing power, and other parts of the context. And see *Langston* v. *Langston*, 2 Cl. & Fin. 194, and other cases, *ante*, pp. 561 *et seq.*

(*q*) *Affleck* v. *James*, 17 Sim. 121.

(*r*) *Wylie* v. *Wylie*, 1 D. F. & J. 410. Compare *Hounsell* v. *Dunning*, *supra*, note (*g*). See also cases cited Chap. XLV showing the inefficacy of the word "estate," occurring in the introductory clause of a will made before 1838, to pass the fee-simple.

(*s*) 10 Bea. 259; see also *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698; *Edmunds* v. *Waugh*, 4 Drew. 275; *Farrer* v. *St. Catherine's College*, L. R. 16 Eq. 19.

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the rule that a clear gift is not to be cut down by subsequent words of doubtful import prevents them from having any operation where their effect would be by implication to diminish the first gift (*t*). This case was followed in *Re Yates* (*u*), in preference to *Morgan* v. *Middlemiss* (*v*).

Intention to give what will make up a certain sum.

And where a testator expresses an intention to make up a person's existing fortune, derived either under his own will or from other sources, to a certain sum, and for that purpose gives a legacy which proves to be insufficient, the legatee shall, nevertheless, have the sum specified and intended for him. Thus, in *Ouseley* v. *Anstruther* (*w*), where a testator, reciting that under a settlement his wife would have an income of £1,560, directed his trustees to add an annuity of £440, so as to raise his wife's jointure to £2,000; the income under the settlement being less than was supposed, the wife was, nevertheless, held entitled to have it made up to £2,000. It does not follow, however, that in the converse case of the income being more than the testator supposed, the wife would have been entitled only to the £2,000, for a clear gift will not be cut down by subsequent words of doubtful import (*x*).

And in *Ives* v. *Dodgson* (*y*), a testatrix, upon a contingency which (as she showed by her will) she expected not to be (and which was not) ascertained until after her own death, bequeathed a life annuity of £40 to A; she then bequeathed to A £30 free of duty, and afterwards by codicil said, "I increase the immediate annuity of £30 left by my will to A to an annuity of £50 duty free." It was held by Sir W. James, V.-C., that the plain meaning of the words of the codicil was that A was to have an annuity of £50 in addition to the contingent annuity of £40.

In these cases, it will be noticed, there were words of gift as well as of recital.

Mr. Jarman continues (*z*): "And even where the testator has evidently mistaken the law respecting the devolution of his property, yet, if he has by his will shown very clearly an inten-

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(*t*) *Mann* v. *Fuller*, Kay, 624; *Gordon* v. *Hoffmann*, 7 Sim. 29, *ante*, p. 174. As to recitals in wills as to amounts of advances made by testators to their children, see *Re Aird's Estate*, 12 Ch. D. 291; *Re Taylor's Estate*, 22 Ch. D. 495; *Re Wood*, 32 Ch. D. 517; *Re Kelsey*, [1905] 2 Ch. 465. The statement in the text was referred to with approval by Joyce, J., in *Re Segelcke*, *infra*, note (*x*).

(*u*) 128 L. T. 619.

(*v*) 35 Bea. 278.

(*w*) 10 Bea. 453. Compare *Thompson* v. *Whitelock*, 5 Jur. (N.S.) 991. See also *East* v. *Cook*, 2 Ves. sen. 30.

(*x*) *Re Segelcke*, [1906] 2 Ch. 301, dissenting from Lord Hardwicke's *dictum* in *Milner* v. *Milner*, 1 Ves. sen. 106, which, however, was repeated by Leach, M.R., in *Trevor* v. *Trevor*, 5 Russ. 24.

(*y*) L. R. 9 Eq. 401.

(*z*) First ed. p. 463.

tion that it shall devolve according to such mistaken notion, the intention will prevail. An early case (*a*) presents a very nice question of this nature.

Reference to a person as heir held to create a devise by implication.

"A testator having issue by C. three daughters, S., A., and E., devised to C. for life all his freehold wherever, until S. his heir came to twenty-one, paying to the heir 10s. during the term, and to the rest, after fifteen years old, 20s. a-piece, and the heir to pay to A. and E. £100 a-piece, £40 at the decease of the wife, etc.; and if S. his heir died without heir before twenty-one, so that the lands descended and fell to A., then A. to pay to E., etc. It was argued that S. took nothing under the will by implication, there being no express devise to her. But, on the other side, it was contended that S. was sole heir; for, it was all one to devise to her as to make a stranger heir of his land; and here the daughter S. was not sole heir unless made so by the intent of the will, which six times called the eldest daughter his heir; otherwise A., the younger daughter, would have equal share in the land and also the legacies. Lord C.J. Hale—'The testator was mistaken in his intent that the eldest daughter was his heir, but intended his lands should go according to that mistake; also she that is called heir is to pay the portions to the younger daughters, and no provision is made for her. Therefore, albeit there is no express devise to S., yet, she being named his heir, this is sufficient to exclude the rest, and to make her sole heir'" (*b*).

But in *Gould* v. *Gould* (*c*) Romilly, M.R., declined to infer from the testator describing his nephew as his heir-at-law that he meant him to take under a devise to "my customary heir," although that construction was supported by another part of the will.

An erroneous recital or statement as to the devolution of property will not operate to prevent it from being included in a residuary gift. These cases are considered elsewhere (*d*).

It is explained in Chapter XXX, *post*, p. 1052, that a clear bequest made in consequence of a mistake on the part of the testator is, nevertheless, as a general rule, effective.

Misrecital of will by codicil.

The dispositions of a will may be modified by a codicil showing a clear indication of the testator's intention to make some disposition inconsistent with the dispositions of the will, even if the disposition in the codicil is preceded by an erroneous

(*a*) *Tilly* v. *Collyer*, 3 Keb. 589.
(*b*) See *Tayler* v. *Web*, Sty. 301, *ante*, p. 430, note (*l*); *Parker* v. *Nickson*, 1 D. J. & S. 177. Compare *Jackson* v. *Craig*, 15 Jur. 811.
(*c*) 32 Bea. 391.
(*d*) Chaps. XXV, *post*, p. 925, and XXIX, *post*, p. 1008.

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recital of the dispositions of the will. Thus in *Re Margitson* (*e*) a testator by his will gave to his daughter an estate tail in his real property, and an absolute interest in his personal property. By a codicil, after reciting that his daughter would take an estate for life in his property with remainder to her issue, he directed that the life estate should be for her separate use, that she should have a power of appointing a life estate to a husband, and that if she should have more than one son, and her eldest son should inherit certain property, then her second son should succeed to the property, given by the will; it was held that the estates given by the will were modified by the codicil.

" But the disposition of a will," as Mr. Jarman points out (*f*), " will not be disturbed by an erroneous recital of its contents in a codicil, unless a design to revoke or modify the disposition in the will can be fairly collected from the whole instrument.

Erroneous reference in codicil to the disposition of the will.

" Thus, where (*g*) a testator, after bequeathing certain legacies to his wife, devised to her for her life certain leasehold premises at Northwood, and he gave his leasehold estate at Wrentnall, and his estate at Northwood, after his wife's death, and the residue of his estate, to other persons. In a codicil, executed on the same day, he directed that the bequest to his wife in his will should be in full of all her claims on his estate, except the estate for life of his ' wife and her assigns, in the premises at *Wrentnall*, anything in the foregoing will to the contrary notwithstanding.' It was contended, that the widow was entitled to the Wrentnall estate, under her husband's codicil, it being manifest by the concluding clause that he intended to give her something to which she had no right by the will; but the Court decided against the widow's claim. Lord Kenyon said, that the intention must be collected from the will and codicil taken together, and it was impossible not to see that the word ' Wrentnall ' was written in the codicil instead of the word ' Northwood.' "

So in *Vaughan* v. *Foakes* (*h*), where a testatrix bequeathed the residue of her estate to A, and by a codicil, reciting that gift, and that A might die before her, she in that case appointed B and C her residuary legatees; and afterwards the testatrix made a second codicil to her former one, as follows :—" As the death

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(*e*) 48 L. T. 172.

(*f*) First ed. p. 464.

(*g*) *Skerratt* v. *Oakley*, 7 T. R. 492. On this case see *Darley* v. *Martin*, 13 C. B. 683, stated *post*, p. 605, and *Ormond Investment Co.* v. *Betts*, [1927] 2 K. B., at pp. 350, 351.

(*h*) 1 Kee. 58; see also *Bamfield* v. *Popham*, 1 P. W. 54, 2nd point; *Re Smith*, 2 J. & H. 594; *Re Arnold's Estate*, 33 Bea. 163; *Richardson* v. *Power*, 19 C. B. (N.S.) 780 (on same will); *Mackenzie* v. *Bradbury*, 35 Bea. 617; *Cosby* v. *Millington*, 38 L. J. C. P. 373; *Nugent* v. *Nugent*, 8 Ir. Ch. R. 78. Compare the cases of additional legacies given by codicil, *ante*, p. 601.

of Mrs. W. [the mother of B and C] has taken place, and as her two children will ultimately become my residuary legatees, the £15 she was to have I give to D." It was held by Lord Langdale, M.R., that the first codicil was not disturbed by the second. "There is a misrecital," he said, "of what she had previously given; she recites that as an absolute which is only a contingent gift; if the word *may* had been used, instead of *will*, the recital would have been in exact conformity with the prior gift."

Misrecital of disposition in the same instrument.

But this principle of construction is not confined to the case of a will and codicil; it has also been applied to a misrecital occurring in the same instrument as the disposition sought to be disturbed. Thus in *Smith* v. *Fitzgerald* (*i*), where a testator bequeathed several legacies to be paid out of the debt owing to him from the Nabob of A., and if any of the legatees died before him he gave their legacies to S., and "after all the legacies are paid (except those mentioned from the Nabob's debt, as they may require time) all such balance as shall remain overplus (exclusive of the Nabob's willed to S.) to be equally divided among the trustees," it was held by Sir W. Grant, M.R., that the residue of the debt not exhausted by the legacies was not given to S. by implication. He said: "The language refers to something as already done, something that he had given or supposed he had given to S. If in the preceding part there was nothing that could in any way answer the description of what he here says he had willed to S., there would then be room for the application of the doctrine, that a declaration by a testator that he had given something is sufficient evidence of an intention to give it, and amounts to a gift; but the question here is, whether he did not mean to describe, however inaccurately, that which he had before actually given. Without denying that the recital of a gift as antecedently made may amount to a gift, the Court ought to see very clearly that there is nothing in the will to which the recital can refer, before it is turned into a distinct bequest."

Smith v. *Fitzgerald.*

Ambiguity in will controlled by recital in codicil.

Where, however, the terms of the prior disposition are themselves ambiguous, their construction may properly be guided by a recital, couched in more precise language, in a codicil. Thus, in *Darley* v. *Martin* (*k*), where a testator bequeathed leaseholds to A for life, and after her death to her issue, and "in default of such issue" to B.; and, by a codicil, recited that he had

(*i*) 3 V. & B. 2; see also *Philipps* v. *Chamberlaine*, 4 Ves. 51.
(*k*) 13 C. B. 683; see also *per* Lord Brougham, 10 Cl. & Fin. 17; *Grover* v. *Raper*, 5 W. R. 134; *Re Venn*, [1904] 2 Ch. 52.

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bequeathed the leaseholds to B. after the death of A. and "in default of her leaving lawful issue"; it was held, that the gift over in the will being capable of importing a bequest over if no issue were living at the death, it ought to be inferred that the testator employed it in that sense, because in the codicil he referred to it as if it were a gift over in default of A's leaving issue.

1. Doctrine of implication as to real estate.

II.—Implication from Devises and Bequests on Death of a Person simply.—1. *As to Real Estate* (*l*).—"It is a well-known maxim," says Mr. Jarman (*m*), "that an heir-at-law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed (*n*). In the application of this principle one chief topic of controversy has been, how far a devise to any person, in the event of the non-existence or on the decease of another, indicates an intention to make the last-named person a prior object of the testator's bounty. In such cases it is probable that the person, whose non-existence is made the contingency on which the devise over is to fall into possession, is placed in this position for the purpose of taking the property in the first instance; and this probability is, of course, greatly strengthened, if the devisee is the person on whom the law, in the absence of disposition, would cast the property. Hence it has become a settled distinction, that a devise *to the testator's heir* after the death of A, will confer on A an estate for life by implication; but that, under a devise to B, *a stranger*, after the death of A, no estate will arise to A by implication (*o*). This is an exact illustration of the difference between necessary implication and conjecture. In the former

Devise to the heir after the death of A gives A an estate by implication.

(*l*) The reader will bear in mind that after 1925 realty does not descend to the heir, but that all property of an intestate is distributable in accordance with the provisions of the Administration of Estates Act, 1925, so that the doctrine of implication as to real estate will not apply to wills coming into force after 1925; and apparently the doctrine of implication as to personal estate will in such case apply to all kinds of property, but with the modifications arising from the new scheme of distribution provided for by the Administration of Estates Act, 1925.

(*m*) First ed. p. 465. The leading case on the doctrine in question is *Gardner* v. *Sheldon*, Vaughan, 259; Tudor, L. C. (4th ed.), p. 388.

(*n*) 1 V. & B. 466; "necessary implication is that which leaves no room to doubt," *per* Lord Mansfield, in *Jones* v. *Morgan*, Fearne, C. R. App. No. III; and see 3 Ves. 113. "There is hardly any case where implication is of necessity, but it is called necessary, because the Court finds it so to answer the intention of the devisor," *per* Lord Hardwicke, *Conyton* v. *Helyar*, 2 Cox, 348, cited by Knight-Bruce, L.J., 6 D. M. G. 554.

(*o*) Year Books 13 Hen. 7, fol. 17; Bro. Ab. Dev. pl. 521; 8 Vin. 214, pl. 5; 2 Freem. 270; T. Jon. 98; Vaugh. 263; 1 Eq. Ab. 197, pl. 6; 1 Vern. 22; 2 Vern. 572; 5 Ves. 804; 18 Ves. 40; 1 Mer. 414; 1 S. & St. 544; 5 B. & Ald. 722; 9 B. & Cr. 218; but see *contra*, 1 P. W. 472; 2 Eq. Ab. 343, pl. 5, 363, pl. 14, which seems inconsistent with, and is overborne by, the mass of authorities. The point, indeed, was not definitely disposed of.

case, the inference that the testator intends to give an estate for life to A is irresistible, as he cannot, without the grossest absurdity, be supposed to mean to devise real estate to his heir at the death of A, and yet that the heir should have it in the meantime, which would be to render the devise nugatory. On the contrary, where the devisee is not the heir, however plausible may be the conjecture, that by fixing the death of A as the period when the devise to B was to take effect in possession, the testator intended A to be the prior tenant for life, yet it is *possible* to suppose that, intending the land to go to the heir during the life of A, he left it for that period undisposed of. In some cases, indeed, we find it laid down without any qualification, that a devise to B upon the death of A, raises an implied estate in A; but such *dicta*, even if accurately reported (which is often doubtful), cannot weigh against the current of authorities grounded on acknowledged principles of law (*p*).

Devisee need not be described as heir.

" Of course, it is not essential to the doctrine that the will should describe the devisee as the heir apparent or heir presumptive of the testator. Thus, a devise ' to my eldest son B. after the death of A.,' would raise an implied estate for life in A., the fact being that B. is the heir apparent, though not designated as such. The authorities do not distinctly inform us, however, whether, in order to raise the implication, the devise must be to the person who, according to the state of events at the making of the will, would be the testator's heir, or the person who eventually becomes such. The former seems to be the preferable doctrine; for to treat it as applying to the eventual heir, would be to construe the will according to subsequent events, in opposition to a fundamental principle of construction. If, therefore, a testator having two sons, A and B, devise real estate to B (the younger son) after the decease of his (the testator's) wife, this would not, it is conceived, give to the wife an estate for life by implication, though it should happen that, by the decease of A, the elder son, without issue in the testator's lifetime, the younger son (*i.e.*, the devisee) had become his heir. On the other hand, if a testator, whose issue was an only daughter, devised real estate to such daughter after the death of his wife, and it happened that he had a son afterwards born, who survived him, the sound conclusion would seem to be, that the wife *would* take an implied estate for life, though the ulterior devisee was not in event the testator's heir; the result, in short, being that the

Whether devisee must be heir *at the death.*

(*p*) *Ex p. Rogers*, 2 Mad. 449. See also *Den* d. *Franklin* v. *Trout*, 15 East, 394, where, however, the person in whose favour it was said the implied gift would have been raised, was himself heir, and the point, therefore, could not have arisen.

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implication occurs wherever the express devise is to the person who is the testator's heir apparent or presumptive at the date of the will and not otherwise (*q*). Perhaps, when the distinction between a devise to the heir and to a stranger was originally established, the difficulty attending the application of the doctrine to an heir or heiress presumptive, who is liable to be superseded by the birth of a son of the testator, was not sufficiently considered.

To one of several coheirs.

"It has been said that the implication arises in the case of a devise as well to one of several coheirs, as to a sole heir; and therefore, that where a man devises to one of his two daughters (his coheiresses), after the death of his wife, she (the wife) takes an estate for life by implication (*r*). This, it must be admitted, is a considerable extension of the doctrine, and carries it beyond the principle on which it is founded, since there seems to be not the same absurdity in supposing a testator to give to *one* of his coheiresses after the death of another person, intending it to descend to *all* in the meantime, as where the devisee is the same and the *only* individual upon whom the intermediate interest would have descended. The point, too, rests rather on *dictum* than decision, for the case in which Lord Cowper advanced this position was decided upon another point, and it is not to be found in the contemporary reports of the same case; but it was referred to *arguendo* as a settled rule of law in another case" (*s*).

Hutton v. *Simpson*, however, is not really an authority on the point, for it appears from the fuller report in Gilbert that some of the lands were expressly devised to the wife for life, and that after her death all the lands were devised to the daughters successively; the distributive construction was therefore adopted (*t*).

Re Willatts.

In *Re Willatts*, the testator gave his wife power "to sell all property and land belonging to me, and at her death what is left to be divided between my two daughters by my second wife." He had five daughters, who were his coheiresses. It was held by Farwell, J. (*u*), that the gift being to two only of the coheiresses, the wife did not take an estate for life by implication, or any

(*q*) See acc. *per cur. Ralph* v. *Carrick*, 5 Ch. D. 984; 11 Ch. D. 873, *post*, p. 609.

(*r*) *Hutton* v. *Simpson*, 2 Vern. 722; s.c. nom. *Simpson* v. *Hornsby*, Gilb. Eq. Rep. 115.

(*s*) *Willis* v. *Lucas*, 1 P. W. 472.

(*t*) *Post*, pp. 610 *et seq.* See *Dyer* v. *Dyer*, 1 Mer. 414. The point was decided as to personal estate in *Re Springfield*, [1894] 3 Ch. 603, following the principle laid down in *Ralph* v. *Carrick*, *post*, p. 609.

(*u*) [1905] 1 Ch. 378.

other interest, but the Court of Appeal (*x*) held that on the true construction of the will the wife took an estate for life, with power to expend any part of the capital as she might think fit, what was left at her death going to the two daughters.

Devise to heir and others after the death of A.

In cases which are the converse of the last, *viz.*, where there is a devise to the heir and other persons after the decease of A, the implication does not arise, because, as Mr. Jarman points out (*y*), "there is no incongruity in the supposition that the testator intended the heir to take a share at the period in question, and the entirety in the meantime." Thus in *Ralph* v. *Carrick* (*z*), a testator gave all his real and personal property to his executors, with full power to sell and convert, and upon trust out of the proceeds to pay debts and legacies, and directed that in the event (which happened) of his death without lawful issue, and after the death of his wife and payment of debts and legacies, the whole residue of his property real and personal should be divided in specified proportions among the children of his late aunts (naming them), the descendants of any child then dead taking the share of its deceased parent; and he directed the surplus proceeds of his real estate to be invested to provide for the jointure payable to his wife under their marriage settlement. It was held that, although the testator's coheirs and next-of-kin were included among the children of his aunts, the wife did not take a life estate by implication. Sir C. Hall, V.-C., relied on the circumstance of the gift being to an unascertained class, and also on the clause expressly providing for payment of the wife's jointure out of the very fund in which she claimed a life estate, as repelling the implication. But the L.JJ. (affirming the decision of the V.-C.) proceeded entirely on the general principle that a devise to the heir and another after the death of A will not raise a life estate by implication in A: for as heir he takes the whole, while as devisee he takes a share only. The same principle must, it should seem, govern the case of a devisee after the death of A to one of several coheirs.

Ralph v. *Carrick*.

Distinction where there is an express anterior devise of part to the person on whose death devise is to take effect.

Mr. Jarman next proceeds to deal with a number of cases which were decided by the rule of construction known as *reddendo*

(*x*) [1905] 2 Ch. 135. The order was made by consent.

(*y*) First ed., p. 468.

(*z*) 5 Ch. D. 984; 11 Ch. D. 873. The earlier cases of *Blackwell* v. *Bull*, 1 Keen, 176 (referred to with implied disapprobation by Mr. Jarman, 1st ed. 468); *Bird* v. *Hunsdon*, 2 Sw. 342, and *Humphreys* v. *Humphreys*, L. R. 4 Eq. 475, some of which related to personal estate, or a mixed fund of real and personal estate, are referred to in the judgment of Hall, V.-C.; in so far as they profess to lay down a doctrine inconsistent with the decision in *Ralph* v. *Carrick*, they may be considered as overruled. As to *Blackwell* v. *Bull*, *Cockshott* v. *Cockshott*, 2 Coll. and *Barnet* v. *Barnet*, 29 Bea. 239, see *post*, p. 625.

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singula singulis, and in some of which the question of implication did not really arise. "Where," he says (*a*), "there is an anterior express devise for life of part of the lands to the person on whose decease the devise in question is to take effect, the implication has been sometimes avoided by having recourse to what may, for convenience of distinction, be called the distributive construction, by which the words *after the death* are applied exclusively to the lands devised expressly for life; and the words of devise, without these expressions of postponement, are applied to the rest of the property, which, therefore, passes immediately to the devisees: a construction which, doubtless, was adopted in the first instance on account of the improbability that a testator should intend a person to whom he had expressly given part, to take the rest by implication. But the rule seems not to have been restricted (as this reasoning would imply) to cases in which the devise over is to the heir, but has obtained where such devise was to a stranger, and in which, as the estate would, if the devise were postponed, devolve to the heir in the meantime, and not belong to the devisee for life by implication, there would seem to be no reason for denying to the words of postponement their full effect, in regard to all the subjects of devise.

The distributive construction.

Cook v. *Gerrard*.

"Thus, in *Cook* v. *Gerrard* (*b*), where the testator, Sir R. Kempe, being seised of demesne lands in fee, and also of the reversion of other lands expectant on the death of A, directed that his wife should have the demesne lands for one year after his death; and then, after stating that he was desirous to continue the capital messuage in the name and blood of the Kempes, he devised the demesnes and the *reversion* to B, habendum immediately from the expiration of one year next after his decease, and the decease of A, for the life of B, he doing no waste. The testator further directed that B should, after the death of A, pay three annuities of £20 each by half-yearly payments. The testator died, and the year expired. It was contended that, in order to effect the intention of the testator, the words must be taken distributively: First, because if the lands descended to the testator's daughter and heir, she might change her name by marriage, and then his intention that the demesne lands should remain in the name of the Kempes would be defeated. Secondly, if A died within the year after the testator, the annuities given by the will could not be paid, unless B took the land immediately

(*a*) First ed., 469. It will be noticed that in *Cook* v. *Gerrard* and *Doe* v. *Brazier* no question arose as to whether the person on whose decease the devise was to take effect took an estate by implication: these cases merely illustrate the doctrine of distributive construction.

(*b*) 1 Saund. 183, cited 9 B. & Cr. 225.

after the death of A notwithstanding the year was not expired (*c*). And, thirdly, if the demesne lands should descend to the heir in the meantime, until the death of A, then he might commit what waste he pleased, and there would be no means to prevent it, which would be directly against the true meaning of the testator. The Court of K. B. held that the words of the will should be taken distributively, and that B had good title to the demesne lands after the expiration of the year, and before the death of A.

Simpson v. *Hornsby.*

" So, in *Simpson* v. *Hornsby* (*d*), where a testator devised to his wife for life all his lands in J., *and after the death of his wife*, he devised all his lands in J., *and certain other lands, and all other his real estate whatsoever*, to his daughter B. and the heirs of her body, with remainder to his daughter J. for life, with remainder to his first and other sons in tail. Lord Cowper was of opinion that the wife took nothing by implication, and that she was entitled to a life estate in only those lands which were expressly devised to her; and that the rest of the real estate was intended to pass by the will immediately to B.

Doe v. *Brazier.*

" Again, in *Doe* d. *Annandale* v. *Brazier* (*e*), where the testator gave to B the rents of a messuage situate in A, for his life, *and after the decease of the said B*, he gave the same rents, *together with* the rents of all his other houses and lands in A aforesaid, unto certain persons for their lives and the life of the survivor, with remainder over. The question was, whether these devisees were entitled to the *other* lands at A immediately on the testator's decease, or not until after the death of B; and it was decided that the words ' from and after the decease of the said B ' were to be confined to the lands devised to B for his life, and did not postpone the interest of the devisees in question in the rest until that period (*f*).

Aspinall v. *Petvin.*

" A different construction, however, prevailed in *Aspinall* v. *Petvin* (*g*), where a testator devised his real estate to trustees, in

(*c*) This argument supposes, that if both were postponed for the life of A, then both would be postponed for the year.

(*d*) Gilb. Eq. R. 115, 120, s.c. *Sympson* v. *Hornsby*, 1 Pre. Ch. 439, 452, s.c. *Hutton* v. *Simpson*, 2 Vern. 722; stated from R. L., 9 B. & Cr. 228; see also *Boon* v. *Cornforth*, 2 Ves. sen. 277, where, however, the construction was aided by the context.

(*e*) 5 B. & Ald. 64.

(*f*) See also *Dyer* v. *Dyer*, 1 Mer. 414; *Drew* v. *Killick*, 1 De G. & S. 266 (where the words of the will seemed to point to the distributive construction); *Simmons* v. *Rudall*, 1 Sim. (N.S.) 115 (devise in fee with executory gift over to strangers of that " together with " the residue).

(*g*) 1 S. & St. 544. " It was ingeniously argued in this case that, as J. was heir, as well to the testator *as to W.*, in the events on which the estate was given to him, namely, the death to W. without issue, it came within the principle of the case of an estate given to the heir after the death of the widow; but the answer to this reasoning is, that in those events the vacant interest did not *necessarily* devolve upon J., as W. in his lifetime might have devised or otherwise alienated it, and, consequently, the argument founded on

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trust to pay one moiety of the rents to his wife E. for life, and the other moiety to his son W. (who was his heir-at-law), *and after the death of his said wife*, upon trust to convey the said hereditaments unto W. in fee; but if he died without issue in the lifetime of the wife, then, upon trust, *after the death of the wife*, to convey the same to testator's nephew J. in fee. W. died without issue in the lifetime of the wife; and the question was, whether J. was entitled immediately to the moiety of the rents not expressly devised to the wife, and, if not, whether she did not take it by implication (*h*). Sir J. Leach, V.-C., after very clearly laying down the general rule as before stated, considered this to be the common case of a devise to a stranger after the death of A.; and that, accordingly, no estate was raised in E. by implication, but the moiety in question for her life descended to the testator's heir-at-law.

Remarks on *Aspinall* v. *Petvin.*

"It is remarkable that the point suggested by the class of cases under consideration was not presented to the view of the Court in this case, namely, that the words referring to the death of the wife applied exclusively to the moiety before devised to her, and did not prevent W. (*i*) from taking the other moiety immediately; but, perhaps the frame of the will scarcely admitted of such a construction. The words 'after the death of my wife' had been just before used in reference to both moieties in the devise to the son, and the terms of the *executory trust* seemed to import that no conveyance was to be made to J. until the death of the wife.

Distributive construction not the general rule.

"This decision, therefore, appears not to clash or interfere with the preceding cases, which might seem to have established the distributive construction as the ordinary rule; but we are taught not so to consider them by a decision, in which all the cases in favour of this construction were treated as standing on special grounds, and as constituting an exception to the general rule.

King v. *Ringstead.*

"The case here alluded to is *King* v. *Inhabitants of Ringstead* (*k*), where a testator devised to the widow of his late son T. M. part of a messuage, to hold to her and her assigns for the term of her natural life, if she should so long continue a widow; *and from and after her decease, or day of marriage*, he gave the same and *other real property therein mentioned*, unto the four children of his late son T. M., deceased, their heirs and assigns

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the absurdity of his taking both did not apply." (Note by Mr. Jarman.) But see *Doe* d. *Driver* v. *Bowling*, 5 B. & Ald. 722.

(*h*) "No arguments appear to have been advanced in favour of the hypothesis, that if the widow did not take, it descended to the heir."

(*i*) Thus in Mr. Jarman's text; but "W." seems to be a misprint for "J."

(*k*) 9 B. & Cr. 218. See *Rhodes* v. *Rhodes*, 7 App. Cas. 192.

for ever. It was contended, on the authority of the preceding cases, that the words were to be construed distributively, and, consequently, that the children took an immediate estate in possession in the property not devised to the wife; but the Court, after taking an elaborate view of those cases, and showing that in each of them the intention of the testator, as collected from the context of the will, required such a construction, considered that they did not apply to the will under discussion, where the words must be construed in their ordinary grammatical sense. It was held, therefore, that, until the death or marriage of the son's widow, the estate not devised to her descended to the testator's heir-at-law.

Remarks upon *King* v. *Ringstead.*

"It will be perceived that, as in this case the widow took no implied estate (the express devise on her decease or marriage not being to the heir of the testator), the construction adopted by the Court did not involve the difficulty of giving by implication to a person, in the lands not expressly devised to her, an estate corresponding to that which she derived in the lands so devised, in opposition to the maxim, *expressio unius est exclusio alterius*. Had it been attended with this result, the conclusion of the Court might have been different. Possibly the distributive construction will, in future, be (as it ought originally to have been) restricted to such cases; but, considering how extremely slight is the difference of language in the will which was the subject of adjudication in *King* v. *Ringstead*, and in some of the preceding cases, particularly *Simpson* v. *Hornsby*, it must be confessed that *King* v. *Ringstead* does not place the doctrine on such a footing as to exclude future controversy."

King v. *Ringstead* followed.

In *Attwater* v. *Attwater* (*l*) a testator gave to his cousins A and B his freehold house and premises, for their use during the life of each; and at the decease of both gave the same to C, together with his copyhold and leasehold property at N. Sir J. Romilly, M.R., said that although there was considerable conflict between the authorities, he considered that the case was governed by the rule laid down and settled by *King* v. *Ringstead*; that C therefore took nothing in the copyholds and leaseholds until after the decease of both A and B, and that the customary heir (who was also sole next-of-kin) took the intermediate interest.

However, a few years later, in *Lill* v. *Lill* (*m*), where after

(*l*) 18 Bea. 330. See also *Davenport* v. *Coltman*, 9 M. and W. 481, 12 Sim. 588, where, however, the distributive construction was not suggested, and the income during the wife's life was not claimed by the daughters.

(*m*) 23 Bea. 446, distinguished in *Jennings* v. *Hanna*, [1904] 1 Ir. R. 540.

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King v. *Ringstead* not followed.

gifts to A, B and C for their several lives, there was a gift " after their decease " of the same property, together with all the residue of the testator's estate, to the children of X, Romilly, M.R., applied the distributive construction, holding that " after their decease " merely meant that the gift to the children of X was subject as to the specifically devised property to the life interests of A, B and C. The learned Judge pointed out that " it would be a very strained and inconvenient construction to arrive at the other conclusion " (*n*). And in *Rhodes* v. *Rhodes* (*o*), the Privy Council, in applying the distributive construction to the will before them, referred to *R.* v. *Ringstead* in terms of covert disapprobation.

Effect of residuary devise in excluding the implication arising from devise to heir.

Mr. Jarman continues (*p*) : " The position that a devise to the heir after the death of A creates in A an implied estate for life, supposes that the will does not contain a residuary devise; for a clause of this nature would, by disposing of such intermediate estate, and thereby intercepting the descent to the heir, clearly exclude all ground for the implication. Thus, if a testator devises Whiteacre to his heir apparent or heir presumptive after the death of his wife, and in the same will devises the residue of his real estate to A (a stranger), since the estate for life, not included in the devise to the heir, would, if no implied gift were raised, pass to A as real estate not otherwise disposed of, which might possibly be intended, the residuary devisee, and not the wife, would, it is conceived, take the estate during her life (*q*).

Application of doctrine to residuary devises.

" Another remark is, that where the will contains a residuary disposition of real estate, a devise of particular lands to the residuary devisee, to take effect in possession on the decease of another person, supplies exactly the same argument for implying an estate for life in that person, as a similar devise, in the cases already discussed, to the heir; for to suppose that the testator intends lands, which he has specifically devised to the residuary devisee at the death of A, to go to him in the meantime under the residuary clause, involves precisely the same absurdity as to suppose that an heir is intended to take immediately what is expressly given to him at a future period; and therefore, in the case supposed, A would, undoubtedly, have an estate for life by implication."

(*n*) *Attwater* v. *Attwater* was apparently not cited, so that the implied condemnation by the M.R. of his decision in that case was unconscious.

(*o*) 7 A. C. 192. *Re Browne's Will Trusts*, [1915] 1 Ch. 690, is an instance of the distributive construction.

(*p*) First ed. p. 474.

(*q*) *Stevens* v. *Hale*, 2 Dr. & Sm. 22; *James* v. *Shannon*, Ir. R. 2 Eq. 118. See *Scalé* v. *Rawlins*, [1892] A. C. 342, *post*, p. 653.

Doctrine of implication in regard to personal estate.

2. *Doctrine of implication in regard to personal estate.*—Mr. Jarman continues (*r*): "The general principles before stated, as governing the doctrine of implication in regard to real estate, it is conceived, are applicable to bequests of personal estate, including terms for years; although certainly the reason on which the doctrine is professedly founded, namely, that the heir is not to be disinherited by any implication other than a necessary one, applies exclusively to real estate (*s*).

"In an early case (*t*), it was held by three justices, that if a man gave a term to his son after the death of the wife of the testator, this shall not raise any estate in the wife, because it does not appear that his intent was so, inasmuch as the son ought not to have it by the law by the death of the testator without any devise, but the executor.

Doe v. *Summerset.*

"But in *Doe* d. *Bendale* v. *Summerset* (*u*), where A possessed of a term of ninety-nine years, determinable on the lives of his daughter B. and J. S., bequeathed the premises to his daughter M. after the death of his daughter B., during the life of J. S.; Willes and Blackstone, JJ., held that B. took an estate for life by implication. A strong probable implication was, they said, sufficient: it need not be a necessary implication. Willes, J., it is said, spoke slightingly of the case in *Moore*; and Blackstone, J., still more slightingly of the case in *Croke James*, which, he observed, was not determined, but was only upon a collateral point.

Observations upon *Doe* v. *Summerset.*

"If *Doe* v. *Summerset* is to be considered as identified with a proposition that the bequest of a term of years to B after the death of A gives a life interest to A by implication, it is as difficult to reconcile it with *Horton* v. *Horton* as with sound principle."

It was indeed followed by Stuart, V.-C., in *Humphreys* v. *Humphreys* (*x*), but both cases were in effect overruled by *Ralph* v. *Carrick* (*y*), which shows that the analogy between a devise of real estate to the heir, and a gift of personal estate to the

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(*r*) First ed. p. 477.

(*s*) It may be doubted whether there was any difference in this respect between real and personal estate, for the true reason of the doctrine above stated by Mr. Jarman is that no person's interest should be displaced by conjecture, and this applies equally to next-of-kin: *Pickering* v. *Stamford*, 3 Ves. 492; *ante*, p. 525.

(*t*) *Horton* v. *Horton*, Cro. Jac. 74: s. c. nom. *Burton* v. *Horton*, 8 Vin. Ab. 214, Dev. (Pa.) pl. 3 (a case before the Executors Act, 1830; see Chap. XXI). See also *Rayman* v. *Gold*, Moore, 635, where, however, the point did not arise, as the wife, at whose death the property was devised, was appointed executrix, and became entitled *quacunque via*.

(*u*) 5 Burr. 2608. The correct name of the case is *Roe* d. *Bendale* v. *Summerset*.

(*x*) L. R. 4 Eq. 475.

(*y*) 5 Ch. D. 984, 11 Ch. D. 873, stated *ante*, p. 609.

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next-of-kin, after the death of A, is complete. If, therefore, a testator bequeaths personalty after the death of A to his (the testator's) next-of-kin, A takes a life interest by implication (*z*). But if the gift after A's death is to strangers (*a*), or is to the testator's next-of-kin along with other persons, or to persons who happen to be some (but not all) of his next-of-kin, this does not give A a life estate by implication (*b*).

In *James* v. *Shannon* (*c*) a testator gave all his real estate, including chattels real, in trust for B and her heirs; if B died under the age of twenty-one years and unmarried, he gave all his property to A; he bequeathed a legacy of £500 to A; it was contended that B took an absolute interest in the pure personal estate by implication, defeasible on her death under twenty-one and unmarried, but it was held that there was nothing to give her any interest in the personalty by implication, and that in any case any presumption in her favour was excluded by the provision made for her by the will.

Bird v. *Hunsdon.*

Mr. Jarman appears (*d*) not to have approved of the decision in *Bird* v. *Hunsdon* (*e*), where a testator directed, after payment of debts and legacies, the residue of his money to be put into government security, and the interest to be paid to bring up and educate M., adding: "the said M. to have the interest so long as she continues single and no child; and when it shall please God to call her, that money shall come to my brother's and sister's children, all share alike." M. married and had a child; nevertheless, she was held to be entitled to the income during the remainder of her life. Sir T. Plumer, M.R., observed, that the testator contemplated three periods: "First, he gives the interest for maintenance, that is, during minority; and, again, for maintenance after minority, while she lives single and has no child. To the third period, the interval between her marriage and her death, there are no words expressly applicable; but the interest being first given to a favoured object, and the capital not given over till the death of that person, the Court is driven to the necessity of saying either that there is intestacy during the remainder of her life, or that she is to take during her whole life. The latter seems the more reasonable alternative."

(*z*) *Stevens* v. *Hale*, 2 Dr. & Sm. 22. The cases of *Cock* v. *Cock*, 21 W. R. 807, and *Davies* v. *Hopkins*, 2 Bea. 276, appear to have been decided on this principle.

(*a*) See *Cranley* v. *Dixon*, 23 Bea. 512.

(*b*) *Ralph* v. *Carrick*, 11 Ch. D. 873; *Re Springfield*, [1894] 3 Ch. 603; *Woodhouse* v. *Spurgeon*, 52 L. J. Ch. 825; *Greene* v. *Flood*, 15 L. R. Ir. 450.

(*c*) Ir. R. 2 Eq. 118, approved in *Harris* v. *Du Pasquier*, 26 L. T. 689.

(*d*) First ed. p. 479.

(*e*) 2 Sw. 342. See *Blackwell* v. *Bull*, 1 Kee. 176.

The decision has been frequently cited in support of claims to a life interest by implication, but does not appear to have been followed in any modern case of authority (*f*).

Implication may be rebutted.

3. *Implication may be rebutted.*—No implication of a life estate, in the cases above referred to, arises where the gift after the death of the *cestui que vie* is to the testator's heir (or next-of-kin) and there is a residuary devise (or bequest) to some other person (*g*), or where the gift takes the form of an appointment under a power, and the instrument creating the power contains a gift over in default of appointment (*h*). In a clear case, such as that of a devise of land to the testator's heir after the death of A, the fact that the testator gives other property to A does not prevent A from taking an estate for life in the land by implication (*i*). But in a doubtful case, the fact that the will makes an express provision for the person on whose death the gift is to take effect (*k*) tends to rebut any implication of a life interest. The implication does not arise if the will, after a direct gift to a class of persons, directs that no division shall take place until the death of A (*l*).

As to devises in the first instance to survivors.

4. *Gifts to Survivors.*—Mr. Jarman continues (*m*): "As a devise to a stranger after the death of A creates no estate in A by implication in the meantime, it might seem to follow that a devise to the survivor of several persons would not raise an estate by implication in the whole during their joint lives; but, in the actual state of the authorities, it would be hazardous to advance any such proposition, seeing that, in one instance at least, a different construction prevailed, though certainly not without some aid from the context. A testator (*n*) devised lands at T. to trustees, in trust to receive the rents and profits during the lives of his four daughters and the survivor of them;

(*f*) *Sarel* v. *Sarel*, 23 Bea. 87; *Brown* v. *Jarvis*, 2 D. F. & J. 168; *Ralph* v. *Carrick*, *supra*.

(*g*) *Stevens* v. *Hale*, 2 Dr. & Sm. 22. Compare *Cranley* v. *Dixon*, 23 Bea. 512.

(*h*) *Henderson* v. *Constable*, 5 Bea. 297.

(*i*) *Per* Vaughan, C.J., in *Gardner* v. *Sheldon*, Vaughan, 259, citing 13 Hen. VII.

(*k*) *Stevens* v. *Hale*, *Cranley* v. *Dixon*, *supra*, notes (*g*) and (*z*); *James* v. *Shannon*, Ir. R. 2 Eq. 118. Compare *Cockshott* v. *Cockshott*, 2 Coll. 432, *post*, p. 625.

(*l*) *Barnet* v. *Barnet*, 29 Bea. 239. The M.R. seems to have treated the direction as meaningless and nugatory.

(*m*) First ed. p. 475.

(*n*) *Saunders* v. *Lowe*, 2 W. Bl. 1014. For other cases in which the implication arising from the whole will was held to be equivalent to, and to supply the place of a direct gift, see *White* v. *Barber*, 5 Burr. 2703; *Browne* v. *De Laet*, 4 Br. C. C. 527; *Crowder* v. *Clowes*, 2 Ves. jun. 449; *Wainewright* v. *Wainewright*, 3 Ves. 558.

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and ' *afterwards* to pay such rents and profits to and among such *survivor*, and the child or children of such my daughters who shall first happen to die; and from and immediately after the decease of my said four daughters, my will is, that they do sell the premises, and pay the monies arising therefrom, in four equal parts ' to the children of his daughters. By a subsequent clause, he bequeathed his chattels among his children, except his daughter H., who was only to receive three shillings a week during her life, or ' until her distributory share were exhausted,' out of his estate at T., for her separate use. The Court was clearly of opinion that the testator never intended to leave all his daughters without any provision until three of them were dead; and with reference to the subsequent clause, which showed that his daughter H. was in his opinion entitled for life, they held all the daughters to take.

As to implication of devise to survivors.

" Cases the converse of the preceding have sometimes occurred, namely, where the income is expressly disposed of during the joint lives of several co-devisees or co-legatees only, with a gift over on the decease of the survivor, thus leaving unprovided for the destination of the intermediate interest accruing in the interval between the determination of the joint lives and the death of the survivor. In several such cases (*o*), the interest in question has been held to belong to the survivors, either under an implied gift to them, or in virtue of the right of survivorship incident to a joint tenancy; and the latter seems to have been the chosen ground of determination, though this result was only attainable by the rejection of words which, unless controlled by the context, would have had the effect of making the co-devisees or co-legatees tenants in common.

" In *Townley* v. *Bolton* (*p*), the bequest was in these words : ' I give to my sister M. T. and her husband G. S. T. £50 per annum Long Annuities *for their joint lives*, and *after their decease*, to go to my own nephew, C. P.' Sir J. Leach, M.R., held that the gift over being after the decease of the husband and wife, it was plain that the testator intended that the survivor should be entitled.

(*o*) *Tuckerman* v. *Jeffries*, 4 Bac. Abr. Gwillim's ed. 467; *Armstrong* v. *Eldridge*, 3 Br. C. C. 215; *Pearce* v. *Edmeades*, 3 Y. & C. 246; all stated *post*, Chap. XLIV; *Cranswick* v. *Pearson*, 31 Bea. 624; *Kelsey* v. *Ellis*, 38 L. T. 471; *Chatfield* v. *Berchtoldt*, 18 W. R. 887; *Re Richerson* (No. 2), [1893] 3 Ch. 146; *Re Stanley's Settlement*, [1916] 2 Ch. 50; *Re Tate*, [1914] 2 Ch. 183, stated *post*, p. 620. But see *Re Drakeley's Estate*, 19 Bea. 395; *Stevens* v. *Pyle*, 28 Bea. 388; and other cases cited *post*, p. 1774.

(*p*) 1 My. & K. 148; see also *McDermott* v. *Wallace*, 5 Bea. 142; *Moffatt* v. *Burnie*, 23 L. J. Ch. 591; *Draycott* v. *Wood*, 8 L. T. 304; *Day* v. *Day*, Kay, 703; *Jennings* v. *Hanna*, [1904] 1 Ir. R. 540.

"Here, too, it is doubtful whether the survivor became entitled by the effect of the implication of a gift in remainder for life, expectant on the determination of the joint lives, or as surviving joint tenant for life, the words 'for their joint lives' (which otherwise would have determined the interest of both on the death of either) being rejected. The latter appears to have been the ground taken in the arguments at the bar" (*q*).

So in *Re Buller* (*r*) a gift of income to A, B and C in equal sums for life and "on their deaths" over, was held to make the income payable to the survivors and survivor. And in *Re Telfair* (*s*) where there was a gift of income to A and B "in equal parts, that is to say, that they shall each receive the half amount of the interest during their natural lives," with a gift over after "their deaths," was held to entitle the survivor by implication to the whole income during her life.

A narrower construction prevailed in *Rownd* v. *Pickett* (*t*) where a testator gave A and B "each a moiety" of certain income "and at the death of the last survivor" gave the property over: it was held by Bacon, V.-C., that on the death of A there was an intestacy as to one moiety of the income.

In *Armstrong* v. *Eldridge*, and some other cases (*u*) in which a gift of the whole income to the survivors and survivor of two or more tenants for life was implied, the gift over after the death of the tenants for life was to their children, and this did not affect the construction. But in other cases the Court has laid hold of slight indications of an intention in favour of the children, and has held that on the death of each tenant for life his share goes to his children (*x*).

Annuity to several for lives of them and survivor.

In *Jones* v. *Randall* (*y*), a testator bequeathed an annuity, upon trust for A for life, and after her death to pay and divide the same amongst the children of A who should happen to survive her, in equal shares if more than one child, and if but one child, then to such only child; such annuity to be paid during the lives of such children, and the life of the survivor of them. It was contended that the survivors were entitled by implication; but Sir T. Plumer, M.R., held that the argument, that because the annuity was for the life of the survivors, there-

(*q*) As to gifts to two persons for their joint lives, see *post*, p. 1773.
(*r*) 74 L. T. 406.
(*s*) 86 L. T. 496.
(*t*) 47 L. J. Ch. 631.
(*u*) *Pearce* v. *Edmeades*, 3 Y. & C. 246; *Alt* v. *Gregory*, 8 D. M. & G. 221; *Begley* v. *Cook*, 3 Dr. 662; *Re Tate*, [1914] 2 Ch. 182, and other cases cited *post*, pp. 1691 *seq.* See, also, *Re Stanley's Settlement*, [1916] 2 Ch. 50; and *Re Browne's Will Trusts*, [1915] 1 Ch. 690.
(*x*) *Hawkins* v. *Hamerton*, 16 Sim. 410; *Doe* d. *Patrick* v. *Royle*, 13 Q. B. 100.
(*y*) 1 Jac. & W. 100.

fore the survivors were to take, amounted only to conjecture; the words in question only described how long the annuity was to last; they determined the subject-matter of the bequest, regulating the duration, but not the persons to participate in it: and the children took as tenants in common an annuity for their lives and for the life of the survivor.

Bryan v. *Twigg.*

So in *Bryan* v. *Twigg* (*z*), a bequest of an annuity to the children of J. B. equally share and share alike, for and during the term of their joint natural lives or the life of the survivor of them, was held by Sir J. Rolt, L.J., to make the children tenants in common of an annuity which was to endure until the death of the survivor; so that on the death of one his share went to his representatives. With reference to *Armstrong* v. *Eldridge* and similar cases (*a*), he said that where the duration of the annuity was not clearly defined, a gift over on the death of the survivor was material, but was immaterial where the duration of the annuity had already been distinctly marked out as extending till the death of the survivor; and that it was important to observe that in none of those cases were the representatives of the deceased annuitants parties to the suit.

Re Tate.

In *Re Tate* (*b*) the testator devised real estate in trust to pay the income to his children in equal shares during their lives, or to their issue in case any of them should die before the others of them, and from and after the decease of all his children in trust for sale, and to divide the proceeds between his grandchildren in equal shares *per stirpes*. He left three children surviving—A, his heir-at-law who was alive in 1913 and had two infant children; B who died in 1910 leaving one child; and C who died in 1911 without issue. Sargant, J., held that there was a sufficient indication of an intention to create cross-remainders between the three children including the issue of any deceased child, and that during the remainder of A's life, A and the child of B were entitled equally to C's one-third share of income. It will be noticed that this goes further than the previous cases in extending the implication to the issue. In the course of his judgment Sargant, J., says: "If the words had been such as they are, only omitting the substitution of the issue of a deceased child for his or her parent, there is, in my opinion, ample authority to show that cross-remainders for life would have been implied between the children. I need only

(*z*) L. R. 3 Ch. 183. See also L. R. 3 Eq. 433 (similar bequest in the same will); *Eales* v. *Earl of Cardigan*, 9 Sim. 384; *Kelsey* v. *Ellis*, 38 L. T. 471; and *post*, pp. 1103, 1173.

(*a*) *Vide ante*, n. (*u*).

(*b*) [1914] 2 Ch. 182. Nothing turns on the fact that the property was not personalty but realty.

refer to *Armstrong* v. *Eldridge* (*c*), *Pearce* v. *Edmeades* (*d*), and *Re Richerson* (*No.* 2) (*e*), where Chitty, J.'s decision in Chambers was afterwards confirmed by him in Court. That being so, is there any difference in the present case because of the words substituting issue for a deceased parent? In my opinion there is no difference. I think that the testator is intending that the property shall be kept together as a whole until the death of the survivor of his children and that the income shall go amongst the children who survive either by themselves or by their respective issue, the issue being substituted for his or her parent. It is clear that they are substituted for the parent in respect of original shares, and if so I see no reason why they are not equally so substituted in respect of an accruing share given over by way of cross-remainder. Otherwise there would be an hiatus, which seems to me contrary to the general intention of the testator which he has sufficiently indicated that the children or issue of the children shall together take all the income of the estate, and that on the death of the survivor of the children the whole property shall go amongst their children."

Implication from express gift on death combined with some contingency.

III.—Implication from Gift on Death combined with some Contingency, etc.—Mr. Jarman continues (*f*): "Hitherto the doctrine of implication has been viewed chiefly in its application to the simple case of devise or bequest on the decease of some person or persons; but it is obvious that the principle may come under consideration in a somewhat more complex form, as where the event, upon which the express devise is to take effect, is the death of a person, combined with some other contingency. For instance, in the case of a devise to B in the event of A dying under age; in which case, as there is no devise to A in the alternative event of his attaining his majority, the question arises, whether he can take the fee (*g*) by implication in such event. If B were the testator's heir apparent or presumptive, there would be no difficulty in arriving at the affirmative conclusion; the case then being evidently analogous to that of a devise to the heir, to take effect in possession on A's decease, which, we have seen, raises an estate for life in A. By parity of reason, it would seem that a devise to a stranger, in the event of A dying under age, supplies no more valid ground for holding A to take an estate in fee by implication,

(*c*) 3 Br. C. C. 215.
(*d*) 3 Y. & C. Ex. 246.
(*e*) [1893] 3 Ch. 146.
(*f*) First ed. p. 480.
(*g*) As to the old law, see *Doe* v. *Cundall*, 9 East, 400.

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than is afforded for the implication of an estate for life to a person on whose decease the lands are devised to a stranger: for a testator *may* intend the fee to descend to the heir on the alternative contingency of A attaining his majority. And, perhaps, the authorities, rightly considered, do not militate against this hypothesis, for though an estate in fee was held, in one instance, to arise by implication under such a devise to a person who was not the testator's heir (*h*), yet the construction was founded on reasoning partly derived from the context.

Gift implied from limitation over if the object died under twenty-one.

"Thus, in *Goodright* d. *Hoskins* v. *Hoskins* (*i*), a testator bequeathed unto his son Richard certain leasehold premises called S., to hold the same unto his said son Richard until his (R.'s) son Thomas should attain the age of twenty-one years, and no longer; but in case his said son Thomas should die in his minority, then the testator gave the said leasehold premises unto John and Richard, sons of the said Richard, or either of them, attaining the age of twenty-one years as aforesaid; and he desired that his premises at S. might be quitted and delivered up as aforesaid by his said son Richard; and the testator, in a certain event, revoked, but otherwise confirmed, ths said bequest of S. and the other legacies given to his son Richard's family. Thomas attained twenty-one, and was held to be entitled: Lord Ellenborough relying much upon the direction that the premises should be *quitted and delivered up as aforesaid* by the testator's son Richard, that is, when Richard's son Thomas came of age, to Thomas; 'for to whom else' (said his Lordship) 'could Richard deliver up the possession in that event?' (*k*).

Remark upon *Goodright* v. *Hoskins*.

"But might not these words (which merely imported *by* whom the premises were to be delivered up) have been satisfied by their delivery up to *any* person entitled under or *dehors* the will? Unless Thomas were to become entitled at twenty-one, the limitation over, in case he died under that age, was certainly very absurd, and the case may be considered as somewhat analogous in principle to those in which a devise has been enlarged to a fee by such a devise over.

Davis v. *Davis*.

"This case was much relied on in *Davis* v. *Davis* (*m*), in support of the argument for raising an implied gift to the testator's daughter, from the following words:—'It is my wish

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(*h*) Mr. Jarman's description of the case, it will be seen, is not quite accurate, as the property in question was leasehold.

(*i*) 9 East, 306.

(*k*) Lord Ellenborough also relied on *Roe* v. *Summerset*, which is clearly bad law; see *ante*, p. 615.

(*m*) 1 R. & M. 645.

that my brother S. be my executor, to arrange, dispose of, and settle all my affairs; and I appoint him guardian to my daughter.' Sir J. Leach, M.R., decided in favour of the implication. He said that it was plain it was not the intention of the testator that his brother should take a beneficial interest, but that he should only arrange and settle his affairs; and, from his appointment as guardian to the daughter, it was to be implied that the arrangement and settlement was to be for her benefit; but Lord Brougham, on appeal, reversed this decree, his Lordship conceiving that there was nothing in the language or provisions of the will from which a bequest to the daughter could be safely and reasonably implied. He observed that the cases of *Newland* v. *Shephard* (*n*) and *Goodright* v. *Hoskins* (the former of which had been often questioned (*o*) and the latter had been rested by Lord Ellenborough on special grounds), fell far short of this."

Absolute gift at twenty-one implied from limitation until twenty-one and gift over on death under that age.

The analogy suggested above is closer where there is in the first place an estate devised to be enlarged. Thus in *Cropton* v. *Davies* (*p*), where a testator devised three houses to trustees upon trust, as to the first, for his daughter A, her heirs and assigns; as to the second, for his daughter B, her heirs and assigns; and, as to the third, to apply the rents for the advancement and benefit of his granddaughter C until she attained twenty-one, but in case she should die under that age, then he devised the same to A and B and their heirs as tenants in common: all the residue of his real and personal estate he devised to X, Y, and Z. C attained twenty-one, and the Court of C. P., without saying that the devise alone would have raised a fee by implication, thought that, looking to it and to the other provisions together, the intention was clear to give C the whole interest in the third house, to go over to A and B only in an event which had not happened. If this were not so, the strange consequence would follow that if C died under twenty-one the house would go over to A and B, whereas if she attained twenty-one it would go over to the residuary legatees, who were other persons. Such an intent the Court thought could not be presumed from the structure and language of the will.

(*n*) 2 P. W. 194. In this case (which is often cited), a testator gave the residue of his real and personal estate to trustees, upon trust to apply the income for the maintenance of his grandchildren during minority, but went no further. Lord Macclesfield—"The intention is most plain, that the grandchildren should have the surplus, both of the real and personal estate, after their age of twenty-one."

(*o*) 3 Atk. 316. "I say nothing as to whether it was rightly decided": *per* Wood, V.-C., 2 J. & H. 128.

(*p*) L. R. 4 C. P. 159.

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In *Tomkins* v. *Tomkins* (*q*) there was nothing but a bare devise "to his brother in trust for his eldest son B till he should attain twenty-one, and, if he should die before twenty-one, then a devise over"; yet it was held that on attaining twenty-one B took the whole by implication. So, in *Gardiner* v. *Stevens* (*r*), where leaseholds were bequeathed "in trust for A and B till B is twenty-five years old, and in case they, A and B, should die before B attains twenty-five," then over, it was held by Wood, V.-C., that, on B attaining twenty-five, A and B became absolutely entitled in equal moieties. And in *Wilks* v. *Williams* (*s*) the same Judge treated it as clear that upon a devise or bequest of real or personal estate, upon trust for the child or children of any person until they attain twenty-one, followed by a gift over to a third person in case the children do not live to attain twenty-one, the children, if they live to attain twenty-one, take absolutely. The case itself went somewhat further. The testatrix desired her trustees to invest the residue, and gave the interest to A and B equally, and at their decease the dividends were "to be continued to their children till they come to the age of twenty-one." There was no gift over, but the testatrix added, "I constitute and appoint C and D trustees for the said A and B and their children." The children were held to take absolutely on attaining twenty-one; for the trust during minority was complete without the last clause, which therefore must be looked upon as indicating that, after the children attained twenty-one, the trust for their benefit was still to continue.

When this implication fails.

But, of course, the children will not take an absolute interest by implication, if in the same event there is an express gift to them of a less interest (*t*). And it has been held that the event upon which the gift over is to take effect must exactly correspond with that upon which the limited trust is to cease. If the gift over depends on a further collateral event, as on death under twenty-one and unmarried, the implication does not arise (*u*). And where (*x*) the trust during minority was for the minor and his mother, with a gift over to her if he died under twenty-one, Sir R. Kindersley, V.-C., held that there was not enough to show that the minor, if he attained twenty-one, was to be benefited exclusively of his mother.

(*q*) As cited by Lord Mansfield, 1 Burr. 234.
(*r*) 30 L. J. Ch. 199.
(*s*) 2 J. & H. 125. In *Paylor* v. *Pegg*, 24 Bea. 105, it was held that the son took by descent.
(*t*) *Savage* v. *Tyers*, L. R. 7 Ch. 356.
(*u*) *Ibid.*
(*x*) *Fitzhenry* v. *Bonner*, 2 Drew. 36.

Other examples of estates by implication arising from a testator having provided for only one of two contingencies will be found in *Re Betty Smith's Trusts* (*y*) and *Re Blake's Trust* (*z*). In the latter case a testator gave personalty in trust for a married woman for life, and after her decease, if she left children, in trust for her husband for life, and after his decease upon trust to divide it among the children, but if no child, then upon trust, after the decease of the husband and wife, for other persons absolutely: it was held that the husband took a life estate by implication after the death of the wife, although there were no children.

Other examples of contingency, expressly provided for, not occurring.

In *Isaacson* v. *Van Goor* (*a*), the testator declared a trust of the income of his residuary estate for the separate use of G. (one of three married daughters) during the joint lives of herself and his sons-in-law I. and F. (the husbands of the other two); and after the death of I. and F. or either of them he directed that their or his widows or widow should participate equally with G. in the said income, so that the same should be enjoyed by his said daughters, and the survivors and survivor of them during their or her lives or life, for their separate use. And upon the death of the last survivor, he gave "the principal or capital" of the said stock funds and securities equally between his grandchildren then living who should attain twenty-one. G. died, leaving her sisters and their husbands her surviving. Held, that the income until both daughters, or one of their husbands, should die, was not disposed of by implication or otherwise, but went to the next-of-kin.

It is hardly necessary to say that if the scheme of a testator's will shows a clear intention to give A a life estate in his property, effect will be given to that intention, even in the absence of express words. Thus, in *Cockshott* v. *Cockshott* (*b*), the testator disposed of the various portions of his property among his children, without making any express provision for his wife, except that in the event of her ceasing to occupy a certain farm belonging to the testator, his sons should pay her £25 a year during widowhood; all the provisions in favour of the children were expressly directed not to take effect so long as she remained a widow, and it was held by Knight Bruce, V.-C., that she took an interest during widowhood in all the testator's estate.

Implication of life estate from scheme of whole will.

Hall, V.-C., seems to have approved of this decision in *Ralph* v. *Carrick* (*c*). He also seems to have thought that the

(*y*) L. R. 1 Eq. 79.
(*z*) L. R. 3 Eq. 799.
(*a*) 42 L. J. Ch. 193.
(*b*) 2 Coll. 432.
(*c*) 5 Ch. D., at p. 995. See also *Barnet* v. *Barnet*, 29 Bea. 239, where Romilly, M.R., refused to apply the principle of *Cockshott* v. *Cockshott*.

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decision in *Blackwell* v. *Bull* (*d*) and similar cases might be supported on the ground that "the interest of the widow was more or less connected with the carrying on of a business and supporting a family, which seems to have been a sort of indication as to how the property was to be enjoyed during her life."

In *Acheson* v. *Fair* (*e*), personal property was given "in trust to the use of A to be disposed of by him" by deed or will among certain persons: it was held that A took a life estate by implication, chiefly on the ground that an express estate for life in other property had previously been given to him.

Gift of "what is left" at the death of A.

In *Re Willatts* (*f*) a testator appointed his wife A and X executors of his will, and after giving his wife all his household effects absolutely proceeded: "and at my death A to have power to sell all property and land belonging to me, and at her death what is left to be divided between M and N": it was held by the Court of Appeal (reversing Farwell, J.) that this gave A a life interest, with power to expend any part of the capital as she might think fit, and that M and N were entitled to what might remain at A's death.

No implication that *equitable* is to be co-extensive with *legal* disposition.

IV.—Implication of Trust.—"Where a testator gives several distinct subjects of disposition to trustees, and then proceeds to dispose of the equitable or beneficial interest in terms applicable to one of those subjects only, there is no necessary implication that he intended the legal and equitable disposition to be co-extensive, though it may be highly probable that he did so, and more especially when the omitted subject is convenient (though not essential) to the enjoyment of the other (*g*).

Stubbs v. *Sargon.*

"As in *Stubbs* v. *Sargon* (*h*), where a testatrix devised to trustees and their heirs her copyhold dwelling-house (wherein she principally resided), garden and ground, *together with the furniture and effects therein*, and the coach-house and stable thereto belonging, and also the ten cottages, and two new cottages built by her, with their appurtenances, at L., upon trust, that the trustees and the survivors, etc., and the *heirs* or assigns of the survivor, should pay the rents of the said *hereditaments* to her niece S. S., the wife of G. S., or permit and suffer her to use and occupy the said *hereditaments* during her life, to the intent that the same hereditaments, and

(*d*) 1 Keen, 176; *ante*, p. 609.
(*e*) 3 Dr. & W. 512.
(*f*) [1905] 1 Ch. 378; 2 Ch. 135, and see the case cited on another point, *ante*, p. 608. The order was made by consent.
(*g*) Mr. Jarman (1st ed.), p. 483.
(*h*) 2 Kee. 255, 3 My. & Cr. 507; compare this case with *Ackers* v. *Phipps*, 9 Bli. (N.S.) 430; 3 Cl. & Fin. 665.

the rents, issues, and profits thereof, might be for her separate use; and after her decease to G. S. for his life; and after his decease, upon trust, that the trustees and the survivors and survivor of them, and the *heirs* or assigns of such survivor, should be possessed of and interested in the said hereditaments, in trust for such of the testatrix's nephews and nieces, or grand-nephews and grand-nieces, as S. S. should appoint; and in default of appointment, upon trust that the said trustees and the survivors and survivor of them, or the heirs or assigns of such survivor, should sell and dispose of the said hereditaments and premises (*i*). And the testatrix directed that the produce of such sale should constitute part of her residuary personal estate. The will contained a general residuary clause (*k*). Lord Langdale, M.R., held that the furniture and effects did not pass to S. S., but belonged to the residuary legatees, the testatrix having, in the statement of the trusts, employed words only applicable to the real estate; and Lord Cottenham, on appeal, was of the same opinion, observing that it was probable the testatrix intended that the furniture and effects should accompany the copyholds, but she had omitted to declare such to be her intention.

Omission to dispose of equitable interest not cured by implication.

"So, in *Jackson* v. *Noble* (*l*), where a testator gave certain freehold, *copyhold*, and leasehold estates (particularly describing them) and £1,000 Three per Cent. stock, to trustees, their heirs, executors, administrators and assigns, to hold the last-mentioned *freehold and leasehold* estates and stock unto the trustees, their heirs, executors, administrators and assigns, in trust for his daughter A for life, for her separate use; and after her decease, upon trust, to convey and assign the several last-mentioned freehold and leasehold estates and £1,000 stock unto the heirs, executors, administrators and assigns of A. And the testator empowered his daughter to grant leases of the freehold and leasehold estates so given to her. Lord Langdale held that as the testator had omitted all mention of the copyhold estates after the devise to the trustees, he could not consider them as comprised in the trust."

Implication from discretionary trust.

In many cases where property is given to trustees with power to apply it for the benefit of A, in terms which imply that the exercise of the power is left to the discretion of the trustees, it has been held that a trust is created for the benefit of A,

(*i*) "The addition of the word 'premises,' in this instance, afforded ground for extending the ultimate trust, unless restricted by the preceding trust to the furniture; but as the proceeds under this trust were to form part of the residuary personal estate, the point was immaterial."

(*k*) "This fact is to be assumed, but is not stated in the report."

(*l*) 2 Kee. 590.

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whether the trustees exercise the power or not. These cases are considered in another chapter (*m*).

Gifts implied from powers of selection or distribution.

V.—Implication from Powers.—(1) *Powers of Selection or Distribution.*—" Implied gifts may be and often are created by powers of selection or distribution in favour of a defined class of objects; for where property is given (*n*) to a person for life, and after his or her decease to such children, relations, or other defined objects as he or she shall appoint, or among them in such shares as the donee shall appoint, and there is no express gift over to these objects in default of appointment, such a gift will be implied; the presumption being, that the testator could not have intended the objects of the power to be disappointed of his bounty, by the neglect of the donee to exercise such power in their favour " (*o*).

Power must be in the nature of a trust.

But the implication only arises where there is some indication that the testator intends the class (or some of the class) to take : in other words, where the power is in the nature of a trust (*p*); it does not arise from a mere power of appointment. Thus in *Re Weekes' Settlement* (*q*) a testatrix bequeathed to her husband a life interest in certain real property, and gave him " power to dispose of all such property by will amongst our children "; the will contained no gift over in default of appointment; there were children, but the husband died intestate without having exercised the power, and it was held that there was no gift to the children by implication. It follows that the implication does not arise where the donee of the power has a discretion whether he shall exercise it or not (*r*). Nor does it arise where the objects of the power are vague and uncertain (*s*), or where the testator expressly says that he does not intend to provide for them by his will (*t*), or where the whole beneficial interest in the property is given to a person in the first instance, with a

Where implication does not arise.

(*m*) Chap. XXIV, *post*, p. 862 *seq.*

(*n*) The same rule applies where the power of selection or distribution is created by the exercise by the testator of a general power vested in him : *White* v. *Wilson*, 1 Drew. 298.

(*o*) Mr. Jarman (1st ed.), p. 485. The early cases of *Crossling* v. *Crossling*, 2 Cox, 396, and *Duke of Marlborough* v. *Godolphin*, 2 Ves. Sen. 61, which are opposed to this construction, would probably be decided differently at the present day : see Sugd. Pow. (8th ed.), 592.

(*p*) See *Wilson* v. *Duguid*, 24 Ch. D. 244; *Re Walford*, 55 Sol. J. 384; *Moore* v. *Ffolliot*, 19 L. R. Ir. 499.

(*q*) [1897] 1 Ch. 289, followed in *Re Combe*, [1925] Ch. 210, where *Re Hughes*, [1921] 2 Ch. 208, is explained; *Healy* v. *Donnery*, 3 Ir. C. L. Rep. 213. See also *Ahearne* v. *Ahearne*, 9 L. R. Ir. 144; *Re Hall*, [1899] 1 Ir. R. 308; *Clibborn* v. *Horan*, [1921] 1 Ir. R. 93.

(*r*) *Re Eddowes*, 1 Dr. & Sm. 395. Some passages in the judgment of Wood, V.-C., in *Joel* v. *Mills*, 3 K. & J. 458, seem to be not quite consistent with principle. See Chap. XXIV, *post*, p. 862.

(*s*) *Bernard* v. *Minshull*, Johns. 276.

(*t*) *Carberry* v. *M'Carthy*, 7 L. R. Ir. 328.

superadded power to appoint to certain objects (*y*). But the fact that the property is given to the donee of the power for her sole and separate use does not prevent the implication (*z*).

The leading authorities usually cited for the proposition stated by Mr. Jarman are *Brown* v. *Higgs* (*a*), and *Harding* v. *Glyn* (*b*). In *Brown* v. *Higgs* the bequest was, "to such children of my nephew S., as my nephew I. shall think most deserving, and that will make the best use of it, or to the children of my nephew W., if any such there are, or shall be." I. died in the lifetime of the testator. Sir R. P. Arden, M.R., and subsequently Lord Eldon, after great consideration, held the children to be entitled under the implied trust. And this decision was affirmed in D. P.

Brown v. *Higgs.*

"And the implication, it seems (*c*), is not repelled by the circumstance that the testator has expressly given the property to the persons who are objects of the power, in the event of the donee dying before him (*d*); which event, it is to be observed, would have prevented the power from arising; so that the express gift and the implied one are alternative and not inconsistent.

Implied gift in one, not precluded by express gift in another, event.

"An express gift over in default of appointment, in favour of either the objects of the power or any other person, of course precludes all implication" (*e*), even if the gift over is void for

Implication precluded by express gift in same event.

(*y*) *Brook* v. *Brook*, 3 Sm. & G. 280. See *Re Brierley*, 43 W. R. 36, where a testator gave property to his wife for life, with a power of appointing part of it among his relatives or next-of-kin, and made her residuary legatee, and it was held that this did not amount to an absolute gift to her with a superadded power of appointment. In *Gray* v. *Gray*, 11 Ir. Ch. R. 218, the decision did not turn wholly on the words of the will.

(*z*) *Re Haly's Trusts*, 23 L. R. Ir. 130.

(*a*) 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.

(*b*) 1 Atk. 469. See also *Doyley* v. *Att.-Gen.*, 2 Eq. Ca. Abr. 195; *Longmore* v. *Broom*, 7 Ves. 124; *Birch* v. *Wade*, 3 V. & B. 198; *Cruwys* v. *Colman*, 9 Ves. 319; *Forbes* v. *Ball*, 3 Mer. 437; *Witts* v. *Boddington*, 3 B. C. C. 95; *Walsh* v. *Wallinger*, 2 R. & My. 78; *Grieveson* v. *Kirsopp*, 2 Kee. 653; *Jones* v. *Torin*, 6 Sim. 255 (as to which see *ante*, p. 587, n. (*o*)); *Martin* v. *Swannell*, 2 Bea. 249; *Fenwick* v. *Greenwell*, 10 *ib.* 412; *Fordyce* v. *Bridges*, 10 Bea. 90; 2 Phil. 497; *Burrough* v. *Philcox*, 5 My. & Cr. 72; *Faulkner* v. *Lord Wynford*, 15 L. J. Ch. 8, *S.C.*, *Falkner* v. *Lord Wynford*, 9 Jur. 1006; *Penny* v. *Turner*, 15 Sim. 368; 2 Phil. 493; *Alloway* v. *Alloway*, 4 D. & War. 380; *Salusbury* v. *Denton*, 3 K. & J. 535; *Joel* v. *Mills*, *ib.* 474; *Reid* v. *Reid*, 25 Bea. 469; *Izod* v. *Izod*, 32 Bea. 242; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Re Haly's Trusts*, 23 L. R. Ir. 130; *Acheson* v. *Fair*, 3 Dr. & W. 512.

(*c*) Mr. Jarman, first ed. p. 485.

(*d*) *Kennedy* v. *Kingston*, 2 J. & W. 431.

(*e*) *Pattison* v. *Pattison*, 19 Bea. 638; *Roddy* v. *Fitzgerald*, 6 H. L. C. 823; *Goldring* v. *Inwood*, 3 Gif. 139; *Re Lyons and Carroll*, [1896] 1 Ir. R. 383. In *Re Jeffery's Trusts*, L. R. 14 Eq. 136, Malins, V.-C., is reported as having laid down a different rule of construction in such cases, *viz.*, that the words "in default of such appointment" must be read as "in default of children" notwithstanding that there is an express gift over; but the decision of the Vice-Chancellor, if correctly reported, and intended to be of general application, is overruled by the decision of the Court of Appeal in

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remoteness (*f*). But a residuary gift is not a gift over for the purposes of the foregoing proposition (*g*). And a gift over in default of objects of the power does not prevent an implication in their favour from arising (*h*).

Objects of power and implied gift must be identical.

"A gift arising *by implication* from a power of selection or distribution," as Mr. Jarman points out (*i*), "applies to the persons who are objects of the power, and to them only; and consequently, if the appointment is to be testamentary, the gift takes effect in favour of the objects living at the decease of the donee, to the exclusion of any who may have died in his lifetime, and who of course could not have been made objects of an appointment by will" (*j*). Consequently if all the objects die in the donee's lifetime, no gift at all can be implied (*l*). On the other hand, if the power is exercisable by any writing, the objects of the power will take even if they predecease the donee (*k*), unless upon the true construction of the instrument creating the power the objects of it are required to be living at a deferred period, in which case the implied gift in default will also be to those persons only (*l*).

"And it should seem," Mr. Jarman continues (*m*), "that a gift arising by implication from a power of selection or distribution in favour of *relations*, will apply exclusively to the relations living at the death of the donee, even though the power is not in terms confined to an appointment by will" (*n*). But

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Richardson v. *Harrison*, 16 Q. B. D. 85; see the observations of Lord Esher, M.R., at p. 103, where the passage in the text is cited by his lordship as rightly laying down the law on this point.

(*f*) *Re Sprague*, 43 L. T. 236.

(*g*) *Re Brierley*, 43 W. R. 36; where the general doctrine was much discussed; *Re Hall*, [1899] 1 Ir. R. 308.

(*h*) *Butler* v. *Gray*, L. R. 5 Ch. 26.

(*i*) First ed. p. 486.

(*j*) *Walsh* v. *Wallinger*, 2 R. & My. 78; as to *Kennedy* v. *Kingston*, 2 J. & W. 431, and *Freeland* v. *Pearson*, L. R. 3 Eq. 658, see 13 Ch. D. 189. In *Falkner* (or *Faulkner*) v. *Wynford*, 15 L. J. Ch. 8, the power was to appoint by deed or will, and, consequently, the gift by implication was not restricted to the objects living at the decease of the donee. See also *Wilson* v. *Duguid*, 24 Ch. D. 244. As to what words create a testamentary power of appointment, see *post*, p. 768. An express gift in default of appointment applies to the same class of persons as a simple gift unconnected with any power: *Pattison* v. *Pattison*, 19 Bea. 638; *Richards* v. *Davies*, 13 C. B. (N.S.) 69, 861.

(*k*) *Wilson* v. *Duguid*, 24 Ch. D. 244; *Cole* v. *Wade*, 16 Ves. 27.

(*l*) *Halfhead* v. *Shepherd*, 28 L. J. Q. B. 248; *Re White's Trusts*, Johns. 656; *Re Phene's Trusts*, L. R. 5 Eq. 346; *Winn* v. *Fenwick*, 11 Bea. 438; *Stolworthy* v. *Sancroft*, 33 L. J. Ch. 708; *Lambert* v. *Thwaites*, L. R. 2 Eq. 151; *Re Veale's Trusts*, 4 Ch. D. 61; *Moore* v. *Ffolliot*, 19 L. R. Ir. 499.

(*m*) First ed. p. 486.

(*n*) *Att.-Gen.* v. *Doyley*, 4 Vin. Abr. 485; and see the observations of Chitty, J., on this case, in *Wilson* v. *Duguid*, 24 Ch. D. 251. See also *Harding* v. *Glyn*, 1 Atk. 469, cited 5 Ves. 501; *Birch* v. *Wade*, 3 V. & B. 198. The case of *Pope* v. *Whitcombe*, as reported, 3 Mer. 689, is *contra*, in regard to a power of distribution; but as corrected from R. L., Sugd. Pow. 8th ed., pp. 663, 953, is an authority on the same side. *Finch* v. *Hollingsworth*, 21 Bea. 112, and *Re Patterson*, [1899] 1 Ir. R. 324, are to the same effect.

whether this principle applies except where the donee of the power is also tenant for life, is not clear (*o*).

Carthew v. *Enraght*.

In *Carthew* v. *Enraght* (*p*) the testator directed his trustees after the death of A to divide £1,000 equally between such ten of the descendants of a certain person as the trustees should think fit; there were only six descendants living at A's death: it was held that the £1,000 was divisible among them equally.

Power to appoint to one person only of a class.

Lord St. Leonards doubted who would be the proper person to take by implication, in the case of a power to appoint to one only of a class (*q*), and previous editors of this work have drawn from his remarks the conclusion that in such a case, "if any gift could be implied in default of appointment, it ought to be to one person only of the class; but as no gift can be implied to one more than another, it seems that none of the class can take by implication" (*r*).

But the Court would no doubt avoid this construction if possible. In *Sinnott* v. *Walsh* (*s*) a testator gave freeholds to his two sons, and directed that if either of his sons should die without issue, his part of the property should fall "to whatever existing member of my family he may be disposed to will it to." This term was held to be *nomen collectivum*, authorising a testamentary appointment to one or more persons, and the power not having been exercised, the property went to the testator's three children living at the date of his will.

Mode of division.

The persons in whose favour a gift by implication takes effect usually take as tenants in common in equal shares (*t*). In the absence of a trust for conversion out and out, they take the property as they find it (*u*).

Where a person has a power to direct part of a fund to be applied to charitable purposes and to divide the remainder among the testator's relatives, and the donee of the power dies without having exercised it, the bequest is not void for uncertainty, but the Court will divide the fund in equal moieties, and give half to charitable purposes and half to the testator's relatives (*v*).

(*o*) The question is considered more in detail *post*, p. 1620.

(*p*) 20 W. R. 743.

(*q*) Sugden on Powers, 8th ed. 593. In this edition the last sentence of the paragraph as printed is unintelligible. In the 6th ed. it runs as follows: "Which one would be the proper *cestui que trust*, or the person in whose favour the implied gift was made?"

(*r*) Messrs. Wolstenholme and Vincent in the 3rd ed. of this work, p. 516.

(*s*) 5 L. R. Ir. 27; *Re Kieran*, [1916] 1 Ir. R. 289.

(*t*) *Re White's Trusts*, Johns. 656; *Wilson* v. *Duguid*, 24 Ch. D. 251. In *Willans* v. *Townshend*, [1910] 1 Ir. R. 177, they took as joint tenants.

(*u*) *Walter* v. *Maunde*, 19 Ves. 424.

(*v*) *Salusbury* v. *Denton*, 3 K. & J. 529; *Re Clarke*, [1923] 2 Ch. 407. See Chap. IX, p. 223.

If the subject of the implied gift resulting from a power of selection or distribution be real estate of inheritance, the implication confers an estate in fee, if the power authorises the limitation of estates in fee (*w*).

Life interest not implied in donee from power of distribution.

Although a power of selection or distribution is usually preceded by the reservation of a life interest to the donee, yet such a gift, where omitted, will not be implied. Thus, it was decided that where a testatrix, after bequeathing her property to her mother, requested her to leave £500 to each of her (the testatrix's) sister A's children (and some legacies to other persons), and the remainder to her sister B, "to dispose of among her children as she may think proper," B herself took no interest (*x*).

Distinction where there is a direct gift.

But a gift arising by implication must be distinguished from those cases where there is a direct gift to a class, coupled with a power of selection or distribution: in such a case the property vests in all the members of the class, subject to being divested by an exercise of the power, and therefore the gift is not restricted to those members who are living at the decease of the donee. Thus, in *Lambert* v. *Thwaites* (*y*) real estate was settled upon trust for the children of W. in such shares as he should by will appoint: there were seven children living at the date of the settlement, one of whom died before W., who died without having executed the power; it was held that the representatives of the deceased child were entitled to his share.

Discretionary power.

(2) *Other Powers.*—A gift is sometimes implied from a power of transferring property to a certain person, or of settling or applying it for his benefit. Thus, in *Wheeler* v. *Warner* (*z*), a testator bequeathed a fund to trustees upon trust for his daughter while she remained single, and he declared that if she married with the consent of the trustees, they should transfer to the husband for his sole use such part of the fund, not exceeding one-third, as they thought proper; the daughter married during the testator's lifetime, and it was held by Leach, M.R., that the husband was entitled to one-third of the fund.

Power of disposition.

But a mere power does not give rise to any gift by implication. Thus, in *Bull* v. *Vardy* (*a*), a testator empowered

(*w*) *Bradley* v. *Cartwright*, L. R. 2 C. P. 511. And see *Casterton* v. *Sutherland*, 9 Ves. 445; *Crozier* v. *Crozier*, 3 D. & War. 383; *Whitelaw* v. *Whitelaw*, 5 L. R. Ir. 120.

(*x*) *Blakeney* v. *Blakeney*, 6 Sim. 52. See *Hudlestone* v. *Gouldsburg*, 10 Bea. 547; *Ramsden* v. *Hassard*, 3 Br. C. C. 236.

(*y*) L. R. 2 Eq. 151. Compare *Carthew* v. *Enraght*, 20 W. R. 743, *ante*, p. 631.

(*z*) 1 S. & S. 304. Followed by Malins, V.-C., in *Tweedale* v. *Tweedale*, 7 Ch. D. 633.

(*a*) 1 Ves. jun. 270.

his wife "to give away at her death £1,000; to A and B £100 each, the rest to be disposed of by her will." It was held that in the absence of a disposition by the wife, A and B were not entitled to anything.

Absolute interest subject to discretionary power.

The distinction stated above with reference to powers of selection or distribution, applies also to the kind of powers now under consideration. Thus, in *Lancashire* v. *Lancashire* (*b*), the testator devised real estates to two persons upon trust in either of two events to settle the same or such part thereof as they should think proper upon S. L. and her children, with remainder to the use of A. L. and her heirs, and as to such parts as the trustees should not think fit so to settle, with respect to which the testator gave them absolute discretion, upon trust to convey the same to S. L., her heirs, etc., absolutely. S. L. died after the happening of one of the events, but before any settlement was made: it was held that the will contained an absolute gift to S. L., subject to being intercepted by an exercise of the discretion vested in the trustees, and that this not having been exercised, the heir at law of S. L. was entitled.

Implication of estates tail.

VI.—Implication of Estates Tail before 1926.—Mr. Jarman observes (*c*): "No implication of an estate tail can arise from words importing a failure of issue, in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an indefinite failure of issue be very distinctly marked (*d*),

Effect of Wills Act, s. 29, upon the implication of estates tail.

as the statute 1 Vict. c. 26, s. 29, provides, that such words shall be held to mean a failure of issue in the lifetime or at the death of the person referred to, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; and it is also provided, that the act shall not apply to cases where the words import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue (*e*).

Distinction where prior devise is in fee or indefinite, and where expressly for life.

"Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of

(*b*) 1 De G. & Sm. 288, on appeal, 2 Ph. 657.

(*c*) First ed., p. 496. Mr Jarman's treatment of the law before the Wills Act is omitted.

(*d*) In *Crumpe* v. *Crumpe*, [1900] A. C. 127, where there was a gift over in the event of S. M. dying without male issue him surviving, the Court held that S. M. took an estate tail, not by implication from these words, but because upon the true construction of the whole will the testator's intention to give S. M. an estate tail was clear.

(*e*) See this section of the statute further observed upon, *post*, p. 1915

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inheritance, it will generally happen, in cases in which, according to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death; and this, no doubt, was the effect contemplated and designed by the legislature. A different and less desirable result, however, will occur where the prior devise being expressly for life, will not be enlarged by the statute to a fee simple; while, on the other hand, the words importing a failure of issue will nevertheless be restricted.

"Thus, if by a will subsequent to 1837, real estate be devised to A for life, and in case he should die without issue, to B, A will take an estate for life only, with a contingent remainder to B, to take effect in the event of A's dying without leaving issue at his decease; whether in such case the issue, if any, living at the decease of A, would take the fee by implication, will remain to be decided (*f*). . . .

"If, in a will which is subject to the new law (*ff*), property, real or personal, is given in the event of death without issue of a person to whom no preceding interest is given, the effect is simply to create a contingent gift to take effect on this event (*g*), leaving the property in the alternative event undisposed of; for, in such cases there is, of course, the same difficulty in raising an implied gift to the issue living at the death, as where the gift in question is preceded by a life interest in the person whose failure of issue is made the contingency on which such gift is to take effect.

Effect where there is no prior gift.

"If, however, the devisee on the contingency of the failure of issue of another, were the heir apparent or the heir presumptive of the testator, an argument would arise for implying a fee simple in the parent or ancestor of the issue, in order to avoid the supposition (so stultifying to a testator) that he intends to give to a person at a future time, that which will intermediately devolve to him by act of law, without providing for its destination in the meantime."

Example of estate tail being implied since the Wills Act.

In *Neville* v. *Thacker* (*h*), there was a devise to the testator's son T. "during his life, and to his eldest son, and his heirs in

(*f*) This point is referred to *post*, p. 649, where the continuation of Mr. Jarman's remarks is given.

(*ff*) The Wills Act, 1837.

(*g*) The reader will of course bear in mind the provisions of section 134 of the Law of Property Act, 1925, replacing section 10 of the Conveyancing Act, 1882.

(*h*) 23 L. R. Ir. 344.

tail male; and in default of issue male," then to the testator's other sons for life and their issue in tail male " and in default of male issue," over : it was held that the words " in default of male issue " meant an indefinite failure of male issue, and that T. took an estate for life, with remainder to his eldest son in tail male, with remainder to T. in tail male.

The new law. s. 130 of the Law of Property Act, 1925.

Since in the case of wills coming into operation after 1925 estates tail can only be created by formal words as in a deed (*k*) it would seem that as regards wills estates tail will not be implied.

s. 51 of the Administration of Estates Act, 1925.

The provisions of section 51, sub-section 3 of the Administration of Estates Act, 1925, may here be mentioned. If an infant dies after 1925 unmarried and he would equitably be entitled under a settlement or will to a vested estate in fee simple the settlement or will is to be construed as if the infant had an estate tail.

Introductory remarks.

VII.—Implication of Cross-Remainders before 1926.— (1) *Among Devisees in Tail or for Life.*—Mr. Jarman remarks (*l*) : " Where lands are devised to several persons as tenants in common in tail, with remainder over, the question arises, whether, upon the determination of the entail in each share, such share devolves upon the other co-devisees in tail, or immediately goes over to the remainder-man of the entirety. Such reciprocal limitations to the tenants in common in tail, *inter se*, are, in professional language, denominated cross-remainders. It is settled that in wills, as distinguished from deeds (*m*), they need not be limited expressly (though in correctly drawn wills they are never omitted), but may be implied from the context. To show what expressions have been held, in judicial construction, sufficient to raise such implication, is the object of the present chapter.

General principle of the cases.

" The principle has been long admitted, that wherever real estate is devised to several persons in tail as tenants in common, and it appears to be the testator's intention that not any part is to go over until the failure of the issue of all the tenants in common, they take cross-remainders in tail among themselves. The great struggle has been to determine when the words *in*

What expressions raise cross-remainders.

(*k*) Law of Property Act, 1925, s. 130. See *post*, p. 1812.

(*l*) First ed., vol. II, p. 457. This Section formed Chap. XLII in the original work.

(*m*) *Edwards* v. *Alliston*, 4 Russ. 78; *Doe* v. *Birkhead*, 4 Exch. 110. The latter case, though not impugning the principle stated in the text, overrules the former on another ground. And see *Doe* v. *Wainewright*, 5 T. R. 427; *Doe* v. *Dorvell*, *ib.* 518. As to marriage articles see *Duke of Richmond's Case*, 2 Coll. Jur. 347. See note (*k*), *supra*.

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default of such issue, or other expression, used to connect the devise in tail with the succeeding limitation, may be construed to demonstrate such an intention. In order to place this subject fully before the reader, it will be convenient briefly to trace the steps by which the rule has been gradually placed on, or rather restored to, its present enlarged and liberal footing; and then to state the general conclusions which the cases warrant."

General observations upon the cases.

Mr. Jarman then proceeds to state and discuss critically an anonymous case in Dyer (*n*), *Holmes* v. *Meynel* (*o*), *Wright* v. *Holford* (*p*), *Phipard* v. *Mansfield* (*q*), *Atherton* v. *Pye* (*r*), *Watson* v. *Foxon* (*s*), *Roe* d. *Wren* v. *Clayton* (*t*), *Doe* d. *Gorges* v. *Webb* (*u*), *Green* v. *Stephens* (*w*), *Doe* d. *Southouse* v. *Jenkins* (*x*), *Livesey* v. *Harding* (*y*), which clearly establish the general principle that if land is devised to two or more persons as tenants in common in tail, "and if they happen to die without issue," or "in default of such issue," then over, cross-remainders between them will be implied. The same authorities have also settled that the construction is not affected by the number of the devisees, or by the fact that the limitation is to the devisees and the heirs of their "respective" bodies (*z*).

Mr. Jarman continues (*a*): "Here closes the long line of cases establishing the operation of the words 'in default of such issue,' and other similar expressions, to raise cross-remainders among devisees in tail. It may seem to be extraordinary that so large an assemblage of decisions should have grown up

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(*n*) 303 b, 13 Eliz., sometimes erroneously referred to as *Clache's Case*, as to which see below, p. 639 (devise over if all the devisees died without issue).

(*o*) T. Raym. 452, 2 Show. 136 (in case the devisees died without issue).

(*p*) Cowp. 31, 2 Ed. 239 nom. *Wright* v. *Lord Cadogan*; Amb. 468 nom. *Wright* v. *Englefield* (to daughters in tail, and for default of such issue).

(*q*) Cowp. 797 (to three in tail, and in default of such issue).

(*r*) 4 T. R. 710 (class gift to daughters in tail and in default of such issue).

(*s*) 2 East, 36 (class gift to children, and the heirs of their respective bodies, and for default of such issue). See also *Staunton* v. *Peck*, 2 Cox 8, where Lord Kenyon, then M.R., had made a similar decision in regard to the word "respective," but without the same explicit denial of the doctrine respecting it.

(*t*) 6 East, 628; affirmed in D. P. 1 Dow. 384, Sug. Prop. 283 (several stocks of issue).

(*u*) 1 Taun. 234 (devise to three in tail respectively, and in default, etc.).

(*w*) 12 Ves. 419, 17 Ves. 64 (to B, C, and D and their several and respective heirs for ever, and in default of such issue over).

(*x*) 3 M. & Pay. 59; 5 Bing. 469 (for want of issue males).

(*y*) 1 R. & My. 636 (and for default of such issue).

(*z*) More recent cases to the same effect are *Powell* v. *Howells*, L. R. 3 Q. B. 655; *Hannaford* v. *Hannaford*, L. R. 7 Q. B. 116; *Stanhouse* v. *Gaskell*, 17 Jur. 157. And see the general principle stated in *Re Hudson*, *post*, p. 647.

(*a*) First ed. vol. II, p. 474. It has not been thought necessary to set out the cases referred to by Mr. Jarman, as the principles are now well established. The reader is referred to the earlier editions of this work.

in relation to a point which appeared to have been determined more than two centuries ago (*b*); but the reluctance evinced by some of the Judges of an early day to admit the implication between more devisees than *two*, the pertinacious retention, in terms at least, of the distinction in regard to that number, by several of their successors until a much later period, and more particularly the exception to the implication-doctrine, founded on the words 'several' and 'respective,' introduced by *Comber* v. *Hill* (*c*), *Williams* v. *Browne* (*d*), and *Davenport* v. *Oldis* (*e*) (which was too absurd to be submitted to even with such reiterated adjudication in its favour), are the sources from which the controversies have sprung that have rendered one of the simplest doctrines of testamentary construction in our books one of the most voluminous.

"Lord Kenyon's attack upon *Comber* v. *Hill* and that line of cases, in *Watson* v. *Foxon*, was certainly bold, recognised as they had repeatedly been by his immediate predecessor; but as his Lordship's decision has been since, after much consideration, confirmed in *Doe* v. *Webb* (*f*) and *Green* v. *Stephens* (*g*), we may confidently hope that the argument founded on the words 'several' or 'respective' (*h*), or the exploded distinction in regard to the number of the devisees (which is equally untenable upon principle and authority), will never more be seriously advanced in a court of justice."

Cross-remainders implied from gift over on failure of issue at death.

Cross-remainders have also been implied where the gift over was on failure of issue at a particular period. Thus, in *Maden* v. *Taylor* (*i*), where a testator devised freehold property in trust for his nieces A, B, C, and D, as tenants in common for life, and after the death of any of them, in trust as to her part for her children and the heirs of their bodies; and in case any of the nieces should die without leaving issue living at her death, then for the survivors or survivor of the nieces, and the heirs of her and their body and bodies; and in case all the nieces but one should die without leaving lawful issue, then for such only or surviving niece and the heirs of her body; and in case

(*b*) See *Anon.* Dyer, 330 b; *Holmes* v. *Meynel*, T. Raym. 452, 2 Show. 136; and *Taaffe* v. *Conmee*, 10 H. L. C., at pp. 80-81 (*per* Lord Westbury, C.).

(*c*) 2 Stra. 969; Lee's Cas. t. Hardwicke, 22.

(*d*) 2 Stra. 996.

(*e*) 1 Atk. 579.

(*f*) *Ante*, p. 636.

(*g*) *Ibid.*

(*h*) But although the mere fact that the original limitation is to two or more persons and the heirs of their respective bodies, does not prevent the implication of cross-remainders, it must not be inferred that the use of the word "respective" in the gift over would be without effect: see *Turner* v. *Frederick*, 5 Sim. 466, *post*, p. 646.

(*i*) 45 L. J. Ch. 569.

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of a total failure of issue of the nieces (which was held still to mean at the death), then for testator's right heirs. Sir G. Jessel, M.R., said that the true rule was laid down in *Doe* v. *Webb* (*j*), that you must ascertain whether the testator intended the whole estate to go over together. If you once found that to be intended, you were not to let a fraction of it descend to the heir at law in the meantime. You were to assume that what was to go over together, being the entire estate, was to remain subject to the prior limitations until the period when it was to go over arrived. He thought that principle applied to a case like that before him, where it was plain in one event the whole estate was to go over together, although it was possible that another event might happen in which that intention might be disappointed. He therefore held that cross-remainders must be implied between the children of each niece; otherwise, while the particular event was still in suspense, a fraction might, by the death of one child without issue, descend to the heir at law.

Cross-remainders, raised by the words "remainder" or "reversion."

In *Doe* d. *Burden* v. *Burville* (*k*), cross-remainders were implied from a devise to several persons as tenants in common in tail, "with remainder" over. In *Pery* v. *White* (*l*), on the other hand, the same Judge (Lord Mansfield) held that cross-remainders were not raised by a limitation of the reversion following a devise to several for life as tenants in common, with remainder to their sons "successively" in tail male, etc. The learned Judge thought that "successively" was synonymous with "respectively," and the decision therefore seems to have turned on the exploded doctrine as to the effect of the word "respective" (*m*), and not on any distinction between the words "remainder" and "reversion." Mr. Jarman remarks (*n*), "So far as the case of *Pery* v. *White* rests upon the force of the word *respective*, it is now clearly overruled."

Cross-remainders implied among devisees for life.

Cross-remainders may also be implied among devisees for life. Thus, in *Ashley* v. *Ashley* (*o*), a testator devised real estate to the use of his daughter A for her life, and after the determination of that estate, to the use of trustees to preserve, and after her decease, to the use of all and every the child or

(*j*) 1 Taunt. 234.
(*k*) 2 East, 47n, 13 Geo. 3.
(*l*) Cowp. 777, 18 Geo. 3.
(*m*) See *Doe* d. *Gorges* v. *Webb*, 1 Taunt. 234; *Green* v. *Stephens*, 12 Ves. 419; 17 Ves. 64.
(*n*) First ed. vol. II. p. 477.
(*o*) 6 Sim. 358, as to which see *ante*, p. 322, n. (*q*). See also *Pearce* v. *Edmeades*, 3 Y. & C. 246; *Walmsley* v. *Foxhall*, 1 D. J. & S. 451, 605, as to the share of the child that died without issue.

children lawfully begotten and to be begotten on the body of A, to take as tenants in common and not as joint tenants; and for want of such issue of A, then to the use of another daughter and her children in like manner. The Master reported that the children of A took life estates only, without cross-remainders between them; but on the latter point, Shadwell, V.-C., expressed a strong opinion against the finding of the Master. He observed that but one subject was given throughout; the expression "for want of such issue" meant want of issue whenever that event might happen, either by there being no children originally, or by the children ceasing to exist. Accordingly he declared that the children of A took estates for life as tenants in common, with cross-remainders between them for life.

Executory trusts.

Cross-remainders are more readily implied in executory trusts than in direct devises. It may be further remarked, in regard to such trusts, that in *Horne* v. *Barton* (*p*), where a testator devised his real estate to trustees and their heirs, upon trust for the use and benefit of all and every his children who should live to attain the age of twenty-one years or be married, which should first happen, in equal shares or proportions undivided, for their respective lives, with remainder to their issue severally and respectively in tail general, with cross-remainders, and the testator directed his trustees to execute a settlement accordingly; Sir W. Grant, M.R., held that cross-remainders were to be inserted, not only as between the children respectively, but also as between the families.

Whether express cross-limitation excludes implication.

It was held in *Clache's Case* (*q*), that cross-remainders could not be implied where there were express cross-limitations among the devisees in tail in certain events. A testator devised a messuage to his daughter A. and her heirs for ever, and his principal messuage he gave to T. his youngest daughter and her heirs, and if she died before the age of sixteen, A. then living, he willed that A. should enjoy the principal messuage to her and her heirs for ever; and, if A. should die having no issue, T. living, then he willed that T. should enjoy the share of A. to her and her heirs for ever; and if both his daughters should die having no issue, then the testator devised all his said messuages over to the two daughters of H. C. T. died having attained sixteen, without issue, which raised the question whether cross-

(*p*) Coop. 257, 19 Ves. 398. But see same double implication in case of a direct devise, *Roe* v. *Clayton*, 6 East, 628.

(*q*) Dy. 330 b.

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remainders could be implied between the daughters; and the Court held that they could not; for the testator never intended that the principal house should go to A., unless T. had died within the age of sixteen years; and no implication of cross-remainders could arise when an express and special gift and limitation was made by the devisor himself. Dyer thought there was no entail, but a fee simple conditional: but the other three Judges were of a contrary opinion.

Vanderplank v. *King.*

The doctrine of *Clache's Case* was much canvassed in *Vanderplank* v. *King* (*r*), in which Sir J. Wigram, V.-C., decided, after much consideration, than the introduction of an express limitation of cross-remainders among another class of devisees in the same will did not repel the implication; observing, that an express gift of cross-remainders in one event did not preclude the Court from giving cross-remainders by implication in another, where either case was clearly within the scope of all the reasoning upon which Courts have proceeded in implying cross-remainders.

Rabbeth v. *Squire.*

Vanderplank v. *King* is clearly distinguishable from *Clache's Case* (*s*). The latter case was followed in *Rabbeth* v. *Squire* (*t*), where a testator devised real and personal estate in trust to pay the rents of one-fifth part to each of his five sons and daughters for life, and after the death of each, to his or her children whom he or she should leave at his or her death, in equal shares (for life, as it was held), but if he or she should leave none, then in trust for the other sons and daughters for their lives and the issue of such as should be dead, as before directed, and when all his children should be dead the testator gave the whole property in trust for all the children of his five children equally in fee. A daughter of the testator died leaving a son, who died before the last survivor of the testator's five children. The share of the deceased daughter not being expressly disposed of in the interval after the death of her son, it was contended that cross-remainders to the other children of the testator and their children must be implied; but it was held otherwise by Sir J. Romilly, and on appeal by Lord Chelmsford, the testator having himself expressed the event in which such remainders should take effect in favour of those objects, viz., on the death of a child without leaving a child living at his or her death.

(*r*) 3 Hare, 1. See also *Atkinson* v. *Holtby*, 10 H. L. C. 313, and *Fitzgerald* v. *Fitzgerald*, 12 Ir. C. L. R. 551.

(*s*) See *per* Sir E. Kay, J., in *Re Hudson*, L. R. 20 Ch. D. at p. 412, *post*, p. 647.

(*t*) 19 Bea. 77, 4 De G. & J. 406. As to implying cross-remainders among tenants for life, see *ante*, p. 638.

Again, in *Atkinson* v. *Barton* (*u*) the M.R. said the rule in *Clache's Case* was that cross-remainders cannot be implied between objects where there are express cross-remainders between the same objects in different events; and he applied the rule to the case before him, refusing to imply cross-remainders between several stocks or branches of issue on the ground that there were express cross-remainders between the individuals of each stock or branch. But this was going beyond *Clache's Case*, and involved a denial of *Vanderplank* v. *King*, which in *Rabbeth* v. *Squire* the M.R. had clearly distinguished: and his decision was reversed by the L.JJ., K. Bruce and Turner.

Turner, L.J., on *Clache's Case.*

Sir G. Turner, indeed, went further: he denied that *Clache's Case* (*v*) had laid down the supposed rule, and he thus stated the result of the cases: "Cross-remainders are to be implied or not to be implied according to the intention. The circumstance of such remainders having been created between the same parties in particular events is a circumstance to be weighed in determining the intention, but is not decisive upon it" (*w*).

Implication not excluded by partial express limitation, on the context.

There is, perhaps, no great practical difference between the rule thus stated and the rule deduced from *Clache's Case;* for no rule of construction is decisive, the intention as shown by the context being in every case the ultimate test. Thus, in *Coates* v. *Hart* (*x*), where a testator gave the income of one-fourth of his residuary estate to each of four individuals for life, and if either of them should die under twenty-one and without issue, his share of income to go to the survivors for life; and from and after the death of either of the four leaving issue, the principal, to the

(*u*) 31 Bea. 277, 3 D. F. & J. 339. The decision of the L.JJ. was varied in D. P., *Atkinson* v. *Holtby*, 10 H. L. C. 313, but the particular question here discussed in the text was not affected by such variation.

(*v*) He said, that the decision in that case proceeded upon an express limitation over (not stated above), in case T. should die having no children, and not upon a cross-remainder having been before created in a different event, and that it decided "that a cross-remainder could not be implied against an express limitation." Now, the limitation here alluded to is contained in the following clause, which follows the statement in the text: "Provided always that if A. do marry I. H., then testator wills all her part to T. and to her heirs for ever; provided also that if T. die having no children then he willeth all the premises to the said two daughters of H. C.," *i.e.*, if the first proviso took effect, whereby T. would get "all the premises" (both houses), then both houses were to go over if she died having no children. But A. "refused I. H. and took to husband G.," so that (it is submitted) the L.J.'s "express limitation" did not come into operation. Hence, doubtless, its omission from the text, and (it may be added) from the statement of *Clache's Case* by Vaughan, C.J., Vaugh. 259.

To prevent a misconception which some of Sir G. Turner's remarks are calculated to produce, it should be added that Mr. Jarman was himself the author of the whole of vol. II of "Powell on Devises," and that the present treatise was published by him twelve years before *Rabbeth* v. *Squire* was heard.

(*w*) See also *per* Wood, V.-C., *Re Clark's Trusts*, 32 L. J. Ch. 525; and *per* Kay, J., *Re Hudson*, 20 Ch. D. at pp. 414, 415.

(*x*) 3 D. J. & S. 504.

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income whereof their deceased parent had been entitled, was given to such issue; and the testator also gave to such issue the share of the principal to the income whereof their deceased parent would have been entitled if he had survived any other of the four who should afterwards die without issue (not repeating "and under twenty-one"); and if all the four should die without either of them leaving issue, the whole residue was given to other persons. One of the four attained twenty-one and died without ever having a child. It was held that her share of the income belonged to the others by implication for their lives. The clause immediately preceding the ultimate gift over, followed at it was by the gift over only in the event of all four dying without leaving issue, appeared to Sir G. Turner, L.J., to furnish a necessary inference that the survivors were to take during their lives the income of the share to the income of which any of the four dying without leaving issue had been entitled. Sir J. K. Bruce, L.J., thought the age which the deceased legatee attained was immaterial, and that whether she died before or after twenty-one the ulterior enjoyment of the income was intended to be the same.

Whichever way the rule is stated, the result in this case must on the context have been the same.

In the case of executory trusts, express limitation not exclusive of implication.

It has been long settled that, in regard to executory trusts (*y*), an express direction to insert cross-remainders among another class of objects, or even an express cross-limitation among the same objects, does not exclude the implication.

Thus, in *Burnaby* v. *Griffin* (*z*), where a testatrix devised her real estate to trustees, upon trust to pay one moiety of the rents to her sister E. for life, and after her decease, the testatrix directed the trustees to convey and settle the said moiety unto and upon the daughters of E. as tenants in common in tail general, "with cross-remainders for the benefit of such daughters," remainder to the younger sons of E. successively in tail male, remainder to the eldest son in tail general; and as to the other moiety, upon trust for the testatrix's niece C. for life, "with the same limitations to her daughters and sons as to the children of E."; and if C. should depart this life without leaving any issue of her body living at her decease, the testatrix directed that her sister E. should receive all the rents for life; and in case E. and C. should die without issue of their respective bodies, or all such issue should die without issue, she then gave

(*y*) As to such trusts, see *post*, p. 879.

(*z*) 3 Ves. 266, 268, 274; that is, an express limitation to E in default of C's issue did not exclude an implied reciprocal limitation to C in default of E's issue.

her real estate to four cousins. Lord Hardwicke decreed that, in the settlement to be executed under this trust, cross-remainders were to be inserted not only between the children of E. and C. *inter se*, but between the two families.

Conclusions from the cases before 1926.

Mr. Jarman states the conclusions from the cases as follows (*a*) :—

"1st. That under a devise to several persons in tail, being tenants in common, with a limitation over for want or *in default of such issue*, cross-remainders are to be implied among the the devisees in tail.

"2ndly. That this rule applies whether the devise be to two persons or a larger number, though it be made to them '*respectively*,' and though in the devise over the testator have not used the words 'the said premises,' or 'all the premises,' or 'the same,' or any other expression denoting that the ulterior devise was to comprise the entire property, and not undivided shares (*b*).

"3rdly. That the rule applies, in regard to executory trusts at least, though there be an *express* direction to insert cross-remainders among *another* class of objects, or a limitation over among some of the *same* objects; and even in direct devises an express limitation of cross-remainders among *another* class of objects has been held not to repel the implication.

"4thly. That the word 'remainder,' following a devise to several in tail, will raise cross-remainders among them (*c*).

"5thly. That it is no objection to the implication of cross-remainders that there is an inequality among the devisees whose issue is referred to; some of them being tenants in tail, and others tenants for life, with remainder to their issue in tail (*d*).

"6thly. That a devise to the children of A. for life and *for want and in default of such issue* then over, creates cross-remainders by implication for life among such devisees" (*e*).

(*a*) First ed. vol. II, p. 479.

(*b*) See the author's first and second conclusion adopted, *Taaffe* v. *Conmee*, 10 H. L. C. 81, 85; *Hannaford* v. *Hannaford*, L. R. 7 Q. B. 116.

(*c*) As to "reversion," see *ante*, p. 638.

(*d*) *Vanderplank* v. *King*, 3 Hare, 1. "In this case the inequality was produced by the application of the *cy-près* doctrine in regard to the member of a class who was born after the death of the testator, and is therefore an important case in reference to that doctrine, as to which *vide ante*, vol. I. p. [264]. See also Lewis on the Law of Perpetuity, 426." (Note by Mr. Jarman.)

* Implication of cross-remainders not affected by Wills Act.

* (*e*) "The reader will probably have inferred, from the absence throughout the present chapter of any allusion to the failure of issue clause in the recent Statute of Wills, that the writer conceives that the enactment does not affect the implication of cross-remainders from expressions of this nature [that is, such expressions as those referred to in the first five conclusions above stated]. Such undoubtedly is his opinion; in support of which it will

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It may be added that the first rule applies, though the ulterior devise is on failure of issue at a particular period (*f*).

New law. Cross-remainders in tail not implied after 1925.

In the case of wills coming into operation after 1925, section 130 of the Law of Property Act, 1925 provides that estates tail can only be created by the like expressions which in a deed would create an estate tail in freehold land. Since cross-remainders will not be implied in a deed (*g*), cross-remainders in tail will not, apparently, be implied in wills after 1925, but it will still be possible to create cross-remainders for life by implication as in the case of personalty.

Cross-executory limitations not to be implied.

(2) *Among Devisees in Fee of Realty or Legatees of Personalty.*—Mr. Jarman remarks (*h*) :—"The question whether cross-executory limitations can be implied among devisees *in fee* arises when real estate is devised to several persons in fee, with a limitation over in case they all die under a given age, or under any other prescribed circumstances; in which case it is by no means to be taken as a necessary consequence of the doctrine respecting the implication of cross-remainders among devisees *in tail*, discussed in the last chapter, that reciprocal executory limitations will be implied among such devisees in fee. The principal difference between the two cases seems to be this :—In the case of a devise to several persons in tail, assuming the intention to be clear that the estate is not to go over to the remainder-man until *all* the devisees shall have died without issue, the effect of not implying cross-remainders among the tenants in tail would be to produce a chasm in the limitations, inasmuch as some of the estates tail might be spent, while the ulterior devise could not take effect until the failure of *all* (*i*). On the other hand, in the case of limitations in fee of the realty, and of absolute interests in personalty (both which are clearly

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be sufficient to observe, that section 29 expressly excepts out of the statutory rule of construction, cases in which a contrary intention appears by the will, by reason of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise. Here an express estate tail is, by the prior devise, given to the person whose issue is referred to by the words, 'in default of such issue,' etc., from which the cross-remainders are implied; and hence it is clear that this point of construction remains wholly untouched by the enacted doctrine." (Note by Mr. Jarman.)

(*f*) See *Maden* v. *Taylor*, 45 L. J. Ch. 569, *ante*, p. 637.

(*g*) *Edward* v. *Alliston*, 4 Russ. 78; *Doe* v. *Dorvell*, 5 T. R. 518; but they may be created by apt words: *Doe* v. *Birkhead*, 4 Ex. 110; *Doe* v. *Wainwright*, 5 T. R. 427. Equitable cross-remainders in quasi tail in a term *pur auter vie* may be implied in a deed: *Re Battersby's Estate*, [1911] 1 Ir. R. 453.

(*h*) First ed. vol. II, p. 481.

(*i*) "Indeed, it should seem that the doctrine against perpetuities would have presented an obstacle to its taking effect at all." (Note by Mr. Jarman.)

governed by the same principle), as the primary gift includes the testator's whole estate or interest, and that interest remains in the objects in every event upon which it is not divested, a partial intestacy can never arise for want of a limitation over.

"To introduce cross-limitations among the devisees in such a case would be to divest a clear absolute gift upon reasoning merely conjectural; for the argument, that the testator could not intend the retention of the property by the respective devisees to depend upon the prescribed event not happening to the whole, however plausible, scarcely amounts to more than conjecture. He *may* have such an intention; and if not, the answer is, voluit sed non dixit.

"If, therefore, a gift is made to several persons in fee-simple as tenants in common, with a limitation over in case they *all* die under age, the share of one of the devisees dying during minority will devolve upon his representatives, unless and until the whole die under age."

Where interests are vested.

The general principle therefore is, that if a testator gives the whole of his interest in land or personalty to several persons as tenants in common, in such a way that they take vested interests, with a gift over upon the death of all in certain events, cross-limitations will not be implied, because in no case can there be a partial intestacy (*k*).

Class gift.

So in the case of a contingent gift to a class—as where property is given to such of the children of A as attain twenty-one, with a gift over in the event of A not having any child who attains twenty-one—the property either goes to those who acquire vested interests, or it passes under the gift over, and no question of implying cross-limitations can arise (*l*).

Contingent gift to several nominatim.

But if the gift is to two or more named persons as tenants in common, and the interests given are contingent, with a gift over in the event of all dying before their interests become vested, the event of one dying before attaining a vested interest is not provided for, and this affords a ground for implying cross-limitations to supply the gap (*m*).

(*k*) *Skey* v. *Barnes*, 3 Mer. 335; *Templeman* v. *Warrington*, 13 Sim. 267; *Cohen* v. *Waley*, 15 Sim. 318; *Baxter* v. *Losh*, 14 Bea. 612; *Bromhead* v. *Hunt*, 2 J. & W. 459; *Edwards* v. *Tuck*, 23 Bea. 268; *Beaver* v. *Nowell*, 25 Bea. 551; *Re Rubbins*, 78 L. T. 218; 79 L. T. 313. The decision in *Beauman* v. *Stock*, 2 Ba. & Be. 406, is contrary to principle. Some of the cases above cited are stated and commented upon at length in earlier editions of this work.

(*l*) *Mair* v. *Quilter*, 2 Y. & C. C. C. 465.

(*m*) *Scott* v. *Bargeman*, 2 P. W. 68; *Graves* v. *Waters*, 10 Ir. Eq. R. 234. In *Mackell* v. *Winter*, 3 Ves. 236, 536, where there was an express clause of accruer in certain events, but not in all, there was a difference of opinion between Sir R. P. Arden, M.R., and Lord Loughborough on the question whether the shares were vested or not. The M.R. adhered to his opinion in *Booth* v. *Booth*, 4 Ves. 402. Mr. Jarman appears to have

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Gift to several for life, with remainder to issue.

Vested interest not divested.

Separate gifts over.

Again, where property is given to several named persons as tenants in common during their respective lives, with separate remainders to their issue, and if they all die without leaving issue, then over, cross-limitations will be implied between the primary legatees (or devisees) and their families (*n*).

But cross-limitations will not be implied so as to divest a vested interest (*o*).

In *Turner* v. *Frederick* (*p*) a testator gave two shares of his residuary real and personal estate upon trust for his two daughters A. and L. "respectively" for their lives, and after the decease of his said daughters "respectively" in trust for the maintenance of their "respective" children until such children should "respectively" attain the age of twenty-one, and then to divide the principal amongst such children "respectively" as should attain that age, but if all the children of his said daughters "respectively" or both of them, should die under the age of twenty-one, then "the said trust money" was to be held upon the trusts therein mentioned. A. survived the testator and died leaving children who attained twenty-one; then L. died without issue; it was held that cross limitations were not to be implied, and that as the ultimate trust failed for uncertainty, there was an intestacy as to L.'s share. In this case the repeated use of the words "respective" and "respectively" showed that the testator intended the shares to devolve independently of one another, while the partial intestacy was not caused by any gap in the limitations, but by the failure of the testator to describe the ultimate legatees with sufficient clearness.

Accrued shares.

In *Sutton* v. *Sutton* (*q*) land held for a long term of years was appointed to three persons in severalty, with express cross-remainders in the event of any of them dying without leaving issue living at the time of his decease, and a gift over providing that if all of them should die without leaving issue living at the death of the survivor, then the lands appointed to them, and also the part or portions of the said lands which should come to the survivors or survivor by reason of any of them dying

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disapproved of the decision in *Scott* v. *Bargeman*, and to have considered it inconsistent with *Schenck* v. *Legh*, 5 Ves. 452, 9 Ves. 300; *Bayard* v. *Smith*, 14 Ves. 470; and *Skey* v. *Barnes*, *supra*, but his views have not been adopted by the Courts. See *Vize* v. *Stoney*, 1 Dr. & W. 348; *Graves* v. *Waters*, *supra*.

(*n*) *Re Clark's Trusts*, 32 L. J. Ch. 525; *Re Ridge's Trusts*, L. R. 7 Ch. 665. As to the cases where a gift of income to A and B in equal shares for their lives creates a joint tenancy, see *post*, p. 1773.

(*o*) *Re Clark's Trusts*, 32 L. J. Ch. 525.

(*p*) 5 Sim. 466.

(*q*) 30 L. R. Ir. 251.

without leaving issue living at his death, should go to certain persons therein named. It was held that cross-remainders were not to be implied with reference to the accrued shares.

Re Hudson.

In *Re Hudson* (*r*) the principle on which cross executory limitations are implied was fully considered. In that case a testator gave his real and personal estate to trustees upon certain trusts for the benefit of his wife, and, subject thereto, upon trust during the lives of his five children and the survivors to divide the income into five equal parts, and to pay one-fifth to each, if living, or, if dead, to their respective children or issue, the latter taking equally between them in classes the fifth share which their parent if living would have taken; and if any of the testator's children died without leaving children or issue, or such issue should fail during the period aforesaid, the share of such children or issue should belong to the others of the testator's children and their issue in the same way as their original shares, and this clause was to apply to accruing as well as original shares; and upon the death of the last surviving child upon trust to divide the whole property among the testator's grandchildren *per stirpes*. The five children were living at the testator's death in 1862; one of them died in 1863, leaving seven children, one of whom died in 1871, leaving one child only, a daughter, who died unmarried during the period. Kay, J., after reviewing the cases, said :—

"I deduce from these authorities the following rules :—

Rules as to the implication of cross-limitations.

"1. Cross executory limitations in the case of personal estate, like cross-remainders of real estate, are only implied to fill up a hiatus in the limitations, which seems from the context to have been unintentional.

"2. They cannot be implied—as of course cross-remainders could not—to divest an interest given by the will.

"3. The existence of other cross-limitations between different persons does not prevent the implication.

"4. But where such express cross-limitations are in favour of the very persons to whom the implied cross-limitations would convey the property, that circumstance is of weight in determining the intention.

"Instances in which such a gap occurs are :—

"(a) Where there is a gift to several named persons for their respective lives as tenants in common, and a gift over after the death of the survivor (*s*) :

(*r*) 20 Ch. D. 406. See also *Re Rubbins*, 78 L. T. 218; 79 L. T. 313, referred to *post*, pp. 1690, 1776.

(*s*) *Draycott* v. *Wood*, 8 L. T. (N.S.) 304.

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"(b) Where in a similar gift there are limitations over of the shares of the tenant for life to their respective children or issue for limited interests, as for life or in tail, and then a gift over on failure of issue of them all:

"(c) And generally where, there being such a gift over, the preceding limitations do not provide for every event except that contemplated by the gift over, but leave some gap which would occasion an intestacy as to part of the estate.

"In this case there is a cross-limitation upon failure of any *stirps* to the other *stirpes*, but there is no cross-limitation between the individuals of the same *stirps*, where the Court is asked to imply one. Therefore the difficulty which arose in *Clache's Case* and *Rabbeth* v. *Squire* does not exist here." And his Lordship, after observing that where there is an ambiguity it is proper to look at the consequences of either construction, and pointing out that it was hardly possible to believe that it was intended that any part of the income should go to the legal personal representatives of deceased grandchildren, held that the great granddaughter took only a life interest, and that the intention was, in the event which had happened of her death leaving no issue, that her share should go equally among her uncles and aunts, and the issue of deceased uncles and aunts *per stirpes*, and that the necessary cross-limitations to effect this must be implied.

Re Mears.

In *Re Mears* (*t*), the testator bequeathed personal estate to pay the income to his three daughters equally for life, and after the decease of any of them leaving issue to pay a third part of the capital of the trust fund to her children, and in the event of any of his daughters dying without leaving issue the survivors or survivor were to take her share of the income for life, and in case all his daughters should die without leaving issue the capital of the trust fund was to be divided among his next-of-kin. Two of the daughters died, one leaving issue. The third daughter died subsequently without issue. Eve, J., held that no cross-limitation could be implied in favour of the issue of a daughter, so that there was an intestacy as to two thirds of the capital.

Estate tail not implied from words referring to issue at death.

VIII.—Implication of Gifts to Children and Issue.—Even under the law before the Wills Act, where land was devised to a person for life, with a devise over to take effect in the event of his dying without issue living at his death, this had no effect in enlarging his estate for life into an estate tail (*u*), because,

(*t*) [1914] 1 Ch. 694.

(*u*) See *Lethieullier* v. *Tracy*, 3 Atk. 774, 793; *Jenkins* v. *Hughes*, 8 H. L. C., at p. 593; *Coltsmann* v. *Coltsmann*, L. R. 3 H. L. 121.

as Mr. Jarman points out (*v*), "the event described is not that by which an estate tail is necessarily extinguished, for such an estate determines on the failure of issue at *any* time. The only question, in such a case, would be, whether the words would raise an estate by implication in the issue living at the death. Lord Hardwicke suggested a point of this nature in *Lethieullier* v. *Tracy* (*x*), but the case did not require its determination. It is clear that, where the estate previously devised is in fee, no such implication arises; but this is not quite conclusive, inasmuch as the motive to imply an estate tail in such cases is much less cogent, since the alternative construction gives the prior devisee an estate in fee simple in the event of his leaving issue; whereby he is enabled to make a provision for such issue, if he leaves any: so that the scheme of disposition which is thus imputed to the testator is reasonable, and wholly free from the inconvenience and objection which attach to a similar construction where the devise is for life only, in which the effect of rejecting the implication is, that, in the event of the first taker leaving issue, the property is undisposed of, as it cannot go to either himself, his issue, or the ulterior devisee."

As to implying an estate in the issue.

The effect of section 29 of the Wills Act, as already mentioned (*y*) is that if real estate is devised to A for life and in case he should die without issue, to B, A will take an estate for life only, with a contingent remainder to B, to take effect in the event of A's dying without leaving issue at his decease. "Whether in such case," says Mr. Jarman (*z*), "the issue, if any, living at the decease of A would take the fee by implication, will remain to be decided. Such a construction would certainly be convenient, as avoiding the palpable absurdity of making the estate of the ulterior devisee depend on the contingency of there not being issue; and yet, in the alternative event, giving the property neither to A himself, nor to such issue, but leaving it to devolve to the heir-at-law or residuary devisee (as the case may be) of the testator. There is, however, no authority for implying an estate in the issue living at the death (*a*), and the contrary conclusion seems rather more consistent with principle." This view is supported by *Monypenny* v. *Dering* (*b*), where it was argued that a devise over in default of issue of A, a tenant for life, to some only of whose issue an estate was expressly given, showed that the intention must have been that not some only but all the issue should take; but Sir J. Wigram, V.-C., said, that, admitting such to

(*v*) First ed. vol. I, p. 490.
(*y*) *Ante*, p. 633.
(*a*) *Ante*, p. 648.
(*x*) 3 Atk. 796.
(*z*) First ed. vol. I, p. 497.
(*b*) 7 Hare, 588.

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be the intention, it furnished no sufficient ground for supplying estates by purchase to the omitted issue. He had asked for but did not get any authority for such a proposition. It seems quite clear that no implication in favour of the issue would be made at the present day (*c*).

Personal estate.

It has long been settled that "if a sum of money is bequeathed to A B for life, and if he dies leaving no issue, then to another, that does not raise any implication in favour of the issue of A B; though, if he dies leaving issue, the gift over does not take effect" (*d*). Accordingly in *Ranelagh* v. *Ranelagh* (*e*), where legacies were given to several persons during their lives, with a gift over in case of the demise of any of them without issue, it was held by Lord Langdale, M.R., that the issue took nothing by implication.

The same rule applies where an absolute interest, and not merely an estate for life, is given. Thus in *Dowling* v. *Dowling* (*f*) a testator gave his residuary personal estate upon trust for his four sons, "at the decease of either without lawful issue, such share to revert to the remainder then living, or their child or children": it was held by the Court of Appeal that there was no gift by implication to the children of any who might die leaving issue.

Lapse.

The rule also applies even where the testator obviously intends to guard against lapse. Thus in *Cooper* v. *Pitcher* (*g*) a testator bequeathed a legacy to A, and by a codicil provided that if A should die in his (the testator's) lifetime without issue, his legacy should go to other persons. A died in the testator's lifetime leaving a child: it was held that the child was not entitled to the legacy. So in *Re Coleman and Jarrom* (*h*) a testator devised freehold property "to all and every the children of my late brother J. C., who shall be living at my decease or who shall have died in my lifetime leaving issue living at my death"; one child of J. C. died in the testator's lifetime leaving issue living at the testator's death; it was held by Jessel, M.R., that they took nothing by implication.

(*c*) See *Scalé* v. *Rawlins*, [1892] A. C. 342.

(*d*) *Per* Lord Gifford in *Greene* v. *Ward*, 1 Russ. 262.

(*e*) 12 Bea. 200; *Webster* v. *Parr*, 26 Bea. 236; *Neighbour* v. *Thurlow*, 28 Bea. 33; *Re Hayton's Trusts*, 4 N. R. 54; *Seymour* v. *Kilbee*, 3 L. R. Ir. 33.

(*f*) L. R. 1 Eq. 442; 1 Ch. 612. The interest of each son was held to be absolute, subject to being divested in the event of his dying without leaving issue.

(*g*) 4 Ha. 485.

(*h*) 4 Ch. D. 165.

As to implying gifts to children from devise over in default of them.

Mr. Jarman continues (*i*): "As no implied estate [to the issue] arises (as we have seen) from a limitation over in case of the prior devisee or legatee dying without leaving issue at his decease, it should seem that there is the same absence of authorised ground for implying a gift to *children* from a similar limitation over in default of these objects.

"Accordingly, in several cases (*k*), it has been considered that a bequest to a person, and if he shall die without having children, or without leaving children, (which means without having had a child born, or without leaving a child living at his decease) (*l*), does not raise an implied gift in the children; but the parent takes an absolute interest, defeasible on his dying without having had, or without leaving a child, as the case may be. The rejection of the implication in such a case is not (as already pointed out) productive of any absurdity; for it supposes the testator, by making the interest of the legatee indefeasible on his having or leaving a child, to intend that if there are children, he shall have the means of providing for them.

Where the prior gift to the parent is expressly for life.

"But it seems that where the language of the will necessarily confines the interest of the parent to his life, the Courts will lay hold of slight circumstances to raise a gift in the children, and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that the property is not to go to the child, if there be one, or its parent.

Ex p. Rogers.

"Thus, where (*m*) a testator having by his will bequeathed

(*i*) First ed. vol. I, p. 499.

(*k*) *Weakley* d. *Knight* v. *Rugg*, 7 T. R. 322; *Doe* d. *Barnfield* v. *Wetton*, 2 B. & P. 324. "In *Weakly* v. *Rugg*, leasehold property was bequeathed to A, and in case she died without having children, then over; and it was held that A, on the birth of a child, was absolutely entitled, the only question discussed being, whether the words meant 'without having a child born,' or 'without leaving a child living at the death.' In *Doe* v. *Wetton*, the devise was to A, her heirs and assigns for ever: but if she should die leaving no child, lawful issue of her body, living at the time of her death, then over. Here the only contested point was, whether the first taker had an estate tail, or an estate in fee defeasible on her dying without issue living at her decease; and the Court decided in favour of the latter construction. Lord Eldon, C.J., observed, 'if she had any children living at the time of her death, the estate being given to her in fee, she would have abundant power to provide both for children and grandchildren. *Nothing, however, is given to them by this will: they are merely named in the description of the contingency on which the estate is to go over.*'" (Note by Mr. Jarman.) See also *Abram* v. *Ward*, 6 Hare, 165, and *post*, p. 1912, as to gifts over on death without leaving issue.

(*l*) Some such words as "then over," seem to have been accidentally omitted by Mr. Jarman here.

(*m*) *Ex p. Rogers*, 2 Mad. 449. "Some of the positions advanced in the judgment in this case must be received with an implied qualification." (Note by Mr. Jarman.) See the remarks on *Ex p. Rogers* in *Lee* v. *Busk*, 2 D. M. & G. 810, and *Webster* v. *Parr*, 26 Bea. 236.

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£1,000 to his niece A, by a codicil, reciting that she had married indiscreetly, and that he intended to withdraw the legacy out of her power to dispose of it, and out of the power of her husband so to do, did therefore direct his executors to secure his said niece the interest of the said £1,000 independently of her husband, by placing out that sum in trust for his niece, she to enjoy the interest or dividends during her life, *and at her decease, without child or children*, the principal and interest to be divided among such of her sisters as should be then living. Sir T. Plumer, M.R., was of opinion that by the combined effect of the will and codicil, he was justified in saying that the children took the legacy by necessary implication.

Remark on *Ex p. Rogers.*

"Here, the implication was evidently aided by the testator's prefatory expressions in the codicil, which showed that he did not intend to deprive his niece of the legacy bequeathed by the will, but merely to qualify it in a manner suited to her altered condition."

Ex p. Rogers followed.

Again, in *Kinsella* v. *Caffrey* (*n*), where a testator gave £50 a year each to L. and T. for their lives, and on the death of either leaving issue (construed children) his annuity to go to such issue; but if L. or T. should die leaving no issue at his death, his annuity was to go to the survivor for his life, and if both should die leaving no issue, or leaving such and such issue should die under twenty-one, both annuities were to sink into the residue. T. died unmarried, and afterwards L. died, leaving children. It was held by C. Smith, M.R., Ir., that L.'s children were entitled by implication to T.'s annuity. He stated the general rule thus: "First, where there is an indefinite bequest to the parent and if he die without having or leaving children, to B. In that case it is clear that the children do not take any interest by implication. Secondly, if there is a bequest to the parent for life, and if he die without having or leaving children, to B: if the parent dies leaving children, they are not entitled by implication (*o*). Thirdly, if, however, in a case such as I have last mentioned, there are matters on the face of the will to raise an inference in favour of the children, the Court is at liberty to consider these circumstances in connection with the bequest over, in the event of the parent dying without having or leaving children, although such bequest over, by itself, is not sufficient to justify the Court inferring a gift in favour of the children."

(*n*) 11 Ir. Ch. Rep. 154. See *Champ* v. *Champ*, 30 L. R. Ir. 72 (deed).

(*o*) See *Sparkes* v. *Restal*, 24 Bea. 218. In *Wetherell* v. *Wetherell*, 4 Giff. 51, 1 D. J. & S. 134, the grandchildren appear to have taken by express gift, and not by implication.

Accordingly, in *Scalé* v. *Rawlins* (*p*), where a testator gave freehold property upon trust for his niece for life, and after her decease, "she leaving no child or children," he gave it to other persons, it was held that there was no gift by implication to her two children who survived her.

It follows from the general rule as above stated, that if a testator bequeaths property to A, "but if he shall die in my lifetime without leaving children," then to B, and A dies in the testator's lifetime leaving children, they take nothing by implication (*q*).

In *M'Clean* v. *Simpson* (*r*), there was a bequest to A, with a direction that if he died before the will took effect, "without leaving any children lawfully to inherit," his share should fall into residue; he died before the testator, leaving children, and it was held that they took the bequest by implication.

Whether a gift to all after-born children is implied in a gift to posthumous children.

Doe v. *Haslewood*.

It was decided in one case, that a devise by a testator, "in case his wife should be enceinte with one or more children at the time of his death, to such child or children," implied a gift to any children born after the date of the will though before the testator's death, on the ground that it was impossible to suppose the father would provide for a posthumous child, leaving children *in esse* unprovided for (*s*). But in *Doe* d. *Blakiston* v. *Haslewood* (*t*), the Court of C. P. unanimously overruled that decision, thinking that in such a case the testator never contemplated the birth of children in his lifetime, and never intended to provide for them by his will: the will was made in contemplation of a particular combination of circumstances, which not having happened, the will failed. However, in a subsequent case (*u*), Blackburne (L.C., Ir.), though not called upon to decide the point, expressed a preference for the elder authority.

Trust for infants during minority.

IX.—Miscellaneous Cases.—In *Newland* v. *Shephard* (*x*), an absolute gift of real and personal estate to the testator's grandchildren was implied from a direction to the trustees to apply the "produce" and interest for their maintenance and benefit during minority. But the decision has been questioned (*y*). In

(*p*) [1892] A. C. 342, affirming the decision of the Court of Appeal in *Re Rawlins' Trusts*, 45 Ch. D. 299. See also *Re Hayton's Trusts*, 4 N. R. 54.

(*q*) *Addison* v. *Busk*, *Lee* v. *Busk*, 14 Bea. 459; 2 D. M. & G. 810; *Cooper* v. *Pitcher*, 4 Ha. 485.

(*r*) 19 L. R. Ir. 528.

(*s*) *White* v. *Barber*, 5 Burr. 2703.

(*t*) 10 C. B. 544.

(*u*) *Re Lindsay*, 5 Irish Jurist, 97; see also *Alleyne* v. *Alleyne*, 2 Jo. & Lat. 544; *Goodfellow* v. *Goodfellow*, 18 Bea. 356; *Browne* v. *Groombridge*, 4 Madd. 495. *Post*, p. 1675.

(*x*) 2 P. W. 194.

(*y*) *Ante*, p. 623.

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Atkinson v. *Paice* (*z*), *Peat* v. *Powell* (*a*), and *Hale* v. *Beck* (*b*), absolute interests were implied from gifts to trustees in trust for A until he should attain twenty-one (*c*). But these cases seem to be of doubtful authority. In *Re Hedley's Trusts* (*d*) a testatrix gave her residue to a trustee upon trust for her daughter till she should attain the age of twenty-one or marry, and it was held by Hall, V.-C., that there was no implied gift of the capital to her.

Implication arising from a series of limitations.

Where a will contains a series of limitations, or trusts, in favour of a class of persons, such as the testator's own children (*e*), or the children of another person, or even in favour of persons who are strangers in blood to one another (*f*), from which it appears that the testator intended the limitations or trusts to be similar, words may be supplied to produce this result. The cases have been already considered (*g*).

Beneficial gift to executor.

The cases in which, before 1926, executors took the residue of their testator's estate for their own benefit, without any gift to them, are considered elsewhere (*h*).

If a testatrix gives her residue to her executors beneficially, and by codicil appoints an additional executor, this will not entitle him to share in the residue (*i*).

Devise to executors implied from trust for sale.

Before the Land Transfer Act, 1897, if a testator directed (expressly or impliedly) that his land should be sold, and appointed executors to act in carrying out the intentions of his will, this gave them the legal estate, and they could make a good title on a sale (*k*).

Trust for conversion not executed.

Where a testator gives property upon trust for sale, and directs the proceeds of sale to be invested, and the proceeds to be paid to A for life, with power to postpone conversion, the general rule is that, until conversion, A is by implication entitled to the income of the unconverted property (*l*).

Trust for sale not implied.

A gift of property to A absolutely, followed by a direction that on any sale of it A shall pay B £1,000 out of the proceeds, does not create any implied trust or obligation to sell (*m*).

(*z*) 1 Br. C. C. 91.
(*a*) 1 Ed. 479.
(*b*) 2 Ed. 229.
(*c*) See also *Tunaley* v. *Roch*, 3 Dr. 720.
(*d*) 25 W. R. 529.
(*e*) As in *Sweeting* v. *Prideaux*, 2 Ch. D. 413, *ante*, p. 564.
(*f*) As in *Mellor* v. *Daintree*, 33 Ch. D. 198.
(*g*) *Ante*, pp. 563 *seq.* See also *Davies* v. *Hopkins*, 2 Bea. 276.
(*h*) *Post*, p. 696, and *ante*, p. 474.
(*i*) *Hillersdon* v. *Grove*, 21 Bea. 518, referred to *ante*, p. 164, n. (*u*), and *post*, p. 661.
(*k*) *Davies to Jones and Evans*, 24 Ch. D. 190, following principle laid down in *Oates* v. *Cook*, Burr. 1684; *Bush* v. *Allen*, 5 Mod. 63; *Doe* v. *Gillard*, 5 B. & Ald. 785; *Anthony* v. *Rees*, 2 Cr. & J. 75.
(*l*) See *post*, p. 725.
(*m*) *Re Elliot*, 12 T. L. R. 497.

Revocation.

A testator devised land to his son A contingently on his attaining twenty-six, the rents to be applied for his maintenance in the meantime; if A died before attaining twenty-six, the land was to go to another son, B, and the testator appointed his daughter residuary devisee. By a codicil the testator revoked all gifts in favour of A, and in lieu thereof gave him a rent-charge: A attained twenty-six: it was held that B did not take any interest in the land, and that it went to the residuary devisee (*n*).

Conjecture not sufficient.

Except in those cases in which a definite rule of construction has been established (*o*), a gift will not be implied from mere conjecture, however probable it may be that if the contingency had been brought to the testator's mind he would have provided for it (*p*).

Implication of gift to next-of-kin, etc.

If a testator declares that his heir-at-law shall not take any part of his real estate, or that none of his next-of-kin shall take any part of his personal estate, this is nugatory and void (*q*), and cannot operate by implication so as to give the Crown a right to the real or personal estate (*r*). But a declaration excluding one or some only of the next-of-kin, if made in clear and appropriate language (*s*), is valid, and operates as a gift by implication to the rest of the share of those who are excluded (*t*). The question whether the widow of a testator is excluded from participation in undisposed-of personalty by a provision being made for her in satisfaction of all claims on the testator's estate, is discussed elsewhere (*u*).

Devise of easement by implication.

There may be an implied gift of an easement by a devise of land, corresponding to an implied grant by deed. Thus, if the owner of land devises part of it to A and part to B, and B can only reach his part by going over A's part, he is entitled, by implication, to use a way used by the testator for the purpose of access to the land during his lifetime (*w*). So where a

(*n*) *McKay* v. *McKay*, [1901] 1 Ir. R. 109.

(*o*) Such as the rules discussed in the earlier sections of this chapter.

(*p*) *Morrison* v. *Morrison*, 2 Y. & C. C. C. 652.

(*q*) The general principle is stated in *Pickering* v. *Lord Stamford*, 3 Ves. 492, *ante*, p. 525. See also *post*, p. 682.

(*r*) *Per* Stuart, V.-C., *Lett* v. *Randall*, 3 Sm. & G. at p. 89, citing *Att.-Gen.* v. *Henchman*, 3 Myl. & K. 485.

(*s*) In *Sykes* v. *Sykes*, L. R. 3 Ch. 301; *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129; *Gould* v. *Gould*, 32 Bea. 391; and *Re Holmes*, 62 L. T. 383, the respective testators did not express their intention with sufficient clearness.

(*t*) *Vachell* v. *Breton*, 5 Br. P. C. 51; *Lett* v. *Randall*, 3 Sm. & G. 83; *Bund* v. *Green*, 12 Ch. D. 819; *Re Taylor*, 52 L. T. 839. The case of *Johnson* v. *Johnson*, 4 Bea. 318 (if it decided the point) may be considered overruled. *Vachell* v. *Breton* was a strong decision and its principle would probably not be extended at the present day.

(*u*) *Ante*, p. 525.

(*w*) *Pearson* v. *Spencer*, 3 B. & S. 761. As to the rights of the parties where there are several ways, or no way, see *Bolton* v. *Bolton*, 11 Ch. D. 968.

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testator being the owner of a house and an adjoining field devises the house to A and the field to B, B is not entitled to obstruct the light coming to the windows of the house over the field (*x*).

Exclusion by implication.

Where there is a gift to persons as a class, the question sometimes arises whether a particular person is excluded from the class, by implication from the context. In *Hanna* v. *Bell* (*y*) an eldest son was held to be excluded from a gift of residue to "all my children who shall attain twenty-one," the gift over being supposed to show that he was not included in the class: the wording of the will was special. In *Reay* v. *Rawlinson* (*z*) the testator made a very informal will, by which in effect he devised the D. estate to his sister's eldest son, and directed the rest of the estate to be sold and divided equally among his sister's family (meaning her children); it was held that the eldest son was not excluded.

In *Re Graham* (*a*) a testatrix, after giving life interests to her parents, bequeathed her estate to her husband, but if he should have predeceased both her parents then to her husband's children whether by herself or his first wife. The husband survived both the parents but predeceased the testatrix. Eve, J., held that there was no implication of a gift over to the children, so that there was an intestacy.

(*x*) *Phillips* v. *Low*, [1892] 1 Ch. 47.
(*y*) 7 Ir. Ch. 208.
(*z*) 29 Bea. 88.
(*a*) [1929] 2 Ch. 127.

CHAPTER XX.

GIFTS BY REFERENCE.

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I.—Construction of Gifts by Reference.—The effect of referential expressions of certain kinds will be discussed in subsequent chapters of this treatise. Executory trusts are part of the subject of Chapters XXIV and XL. Additional and substituted legacies (which sometimes take the form of gifts by reference) are discussed in Chapter XXX, and the effect of accruer clauses in Chapter LV. Referential expressions.

Leaseholds or chattels personal are sometimes bequeathed to or in trust for "such person or persons as shall be entitled to" certain real estate, either under the same will, or under some other settlement. The most important cases of this description occur where the real estate is limited by way of strict settlement, and in such cases the only question which usually arises is as to the time when and the person in whom the leaseholds or chattels absolutely vest. This question is discussed later (*a*). Cases also happen where the real estate is not devised in strict settlement, but is subject to simpler limitations, as where it is settled on a person for life, with remainder to his children absolutely. In such cases the question arises how far the rules governing the real estate apply to the leaseholds or chattels. Thus, in *Holmes* v. *Prescott* (*b*), a testator devised freeholds, as to one-fifth to J. H. for life, with remainder to all and every her child and children who, being a son or sons, should attain twenty-one, and bequeathed leaseholds upon trust for such person or persons as from time to time should be entitled to the freeholds, and to go in the same manner, or as near thereto as the rules of law and equity would permit. J. H. died, leaving one child, W. H., a son, who was then under

Personal estate bequeathed so as to follow real estate.

Holmes v. *Prescott.*

(*a*) *Post*, p. 669.
(*b*) 33 L. J. Ch. 264.

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twenty-one, but subsequently attained that age. The will having been made before the Contingent Remainders Act, 1877, the devise of the freeholds failed as to W. H., but two questions arose as to the leaseholds, namely: (1) Whether W. H. took a share of the corpus of the leaseholds, and (2) whether he took a share of the intermediate rents of the leaseholds. Wood, V.-C., answered the former question in the affirmative, and the latter in the negative. It was argued that as the leaseholds were given to the person entitled to the freeholds, it followed that if W. H. did not take the freeholds he could not take the leaseholds, but the V.-C. said that the freeholds and leaseholds were given to the same person, and although there was a rule of law which prevented the gift of the freeholds taking effect, there was no such rule as to the leaseholds. With regard to the intermediate rents, on the other hand, the V.-C. held that this reasoning did not apply: "it is one thing to say that when, by operation of law, limitations fail in taking their complete effect as to real estate, it is not necessary that they should so fail as to personal estate; and it is another thing to say that when the legal construction would give a certain interest in the real estate, you can, under a limitation like this, adopt a different construction as to the leaseholds, or hand them over to any other person than to him who, by construction, would take the real estate. It appears to me that there is a substantial difference between the two points as to whether or not the limitations would fail as to the corpus, and whether or not the interim income would be taken by the persons actually entitled to the real estates under these limitations, in the event of my considering that the gift of the freeholds is contingent." The V.-C. came to the conclusion that the gift of the freeholds was contingent, and it followed that W. H. was not entitled to any share of the interim rents of the leaseholds, although if the trusts of the leaseholds had been declared directly, and not by reference, he would have been entitled to his share of the rents (*c*).

Distinction between corpus and income.

Where leaseholds are bequeathed to follow real estate, and there is a gap in the limitations, so that the vesting of the real estate is suspended, the interim income of the leaseholds, in accordance with the general rule stated elsewhere (*d*), falls into residue. Thus, in *Hodgson* v. *Bective* (*e*), real estate was devised to the second son of A for life, with remainder to his issue in tail male, and in default of such issue to B; the lease-

Interim income of leaseholds bequeathed so as to follow real estate.

(*c*) See Chap. XLII.
(*d*) Chaps. XXV, p. 924, XXIX, p. 1006.
(*e*) 1 H. & M. 376. The report in 32 L. J. Ch. 489 is better.

holds were bequeathed upon trust to correspond to the limitations of the real estate: A having no second son, the vesting was suspended during A's lifetime: it was held by Wood, V.-C., that the interim income of the chattels real fell into the general residue of the testator's personal estate (*f*).

Legatee described by reference.

Personal property is sometimes given by will to a person described by reference to the limitations of a settlement of land; if the limitations of the settlement are subsequently altered, the question who is entitled to the legacy may be a difficult one (*g*).

Exception from gift of person "entitled" to other property.

Personal property is sometimes given to a class of persons, with the exception of any member who becomes entitled to certain specified property. It seems that as a general rule such a clause will be construed in the same way as if it were a shifting clause, or clause of forfeiture; that is to say, the words will be construed according to their primary and natural meaning (*h*). Thus, if there is a gift to the children of the person who at the death of the testator shall be tenant for life of a certain estate, "other than an eldest or only son for the time being entitled in tail in remainder expectant on the death of his parent," this exception does not exclude an only son who, by reason of a forfeiture committed by his father, has never become tenant in tail in remainder (*i*). But a different principle of construction applies in the case of portions under a settlement, for if the portions are limited by a person *in loco parentis*, in favour of children, except an eldest son, becoming entitled to the estate under the settlement, the doctrine of *Chadwick* v. *Doleman* applies (*j*). It follows that if a younger son succeeds to the estate, not under the settlement, but by descent, the ordinary principle of construction applies (*k*).

Meaning of "entitled."

"Entitled" *prima facie* means "entitled in possession" (*l*). But in a case where the personalty was reversionary, the exception of a child "entitled on his father's decease" was held to exclude a son who became entitled in possession to the realty before the reversion fell in, although on his father's death he was only entitled in remainder (*m*).

Gifts of residue by reference.

Residuary gifts are sometimes made by way of reference, as

(*f*) The decree is stated in 10 H. L C. 659; this part of the decree was not appealed against.

(*g*) *Re Croker*, Ir. R. 2 Eq. 58.

(*h*) See *post*, p. 1411, *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819; s.c. *sub nom. Law Union* v. *Hill*, [1902] A. C. 263.

(*i*) *Johnson* v. *Foulds*, L. R. 5 Eq. 268.

(*j*) This is discussed *post*, p. 1708.

(*k*) *Sing* v. *Leslie*, 2 H. & M. 68.

(*l*) *Chorley* v. *Loveband*, 33 Bea. 189; *Umbers* v. *Jaggard*, L. R. 9 Eq. 200.

(*m*) *Re Grylls' Trusts*, L. R. 6 Eq. 589.

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in *Re Lindo* (*n*). There a testatrix was entitled to a settled fund subject to the life interest of A; by her will she bequeathed her reversionary interest upon certain trusts for A's issue, and declared that A might, by deed or will, appoint the income of the fund to any future wife for life: by a codicil the testatrix gave her residue upon the like trusts in favour of A and his issue as were contained in her will with reference to the settled fund. A married, and by deed appointed the income to his wife. It was held (1) that A did not take a life interest in the residue; and (2) that the appointment of the income to his wife, being in the nature of a jointure, did not take effect until after his death.

Reference to marriage settlement, ultimate trust in favour of testator.

In *Re Currie's Settlement* (*o*) the testator gave a share of his residuary estate to trustees in trust for a daughter, and directed that it should be paid to the trustees of her marriage settlement to be held upon the same trusts as were thereby declared of the moneys thereby settled by him upon such daughter or such of them as should be then subsisting and capable of taking effect. The daughter survived the testator and her husband and died without issue. The trust in default of issue was for the testator. Joyce, J., held that there was no effective trust declared by the will and that the daughter's share devolved on her personal representative.

Reference to former will.

In *Re White* (*p*) the gift was by reference to a former will; and in *Bagge* v. *Bagge* (*q*) the reference was to a will which was afterwards revoked.

Re Slade.

In *Re Slade* (*r*) the testator devised his residuary estate upon trust to transfer the same to the trustees for the time being of the S. settled estates to be held upon the trusts of monies accruing from sales made in exercise of the powers of sale contained in the settlement of the said estates. The S. estates had been disentailed prior to the will, at the date of which there was no effective subsisting instrument nor were there any settled estates. It was held that there was an intestacy.

Re Courtauld's Estate.

In *Re Courtauld's Estate* (*s*), a testator gave various legacies, and then gave his residuary personal estate in trust for the legatees in proportion to the amounts of their legacies. By a codicil he revoked two of the legacies, and in substitution for them gave increased sums upon the same trusts as those

(*n*) 59 L. T. 462. See also *Re Donald*, 53 Sol. J. 673; *Re Currie's Settlement*, [1910] 1 Ch. 329, *supra*.
(*o*) [1910] 1 Ch. 329; followed in *Re Powell*, [1918] 1 Ch. 407.
(*p*) [1925] Ch. 179.
(*q*) [1921] 1 Ir. R. 213.
(*r*) 122 L. T. 321.
(*s*) [1882] W. N. 185.

declared concerning the revoked legacies : it was held that the residue was divisible among the legatees in the same way as if the substituted legacies had been given by the will.

Beneficial gift to executor.

In *Hillersdon* v. *Grove* (*t*), a testatrix appointed A and B her executors, and gave all the residue of her property " to my executors A and B " : by a codicil she appointed C an additional executor and trustee, and directed that her will should take effect in the same manner as if his name had originally been inserted therein as a third trustee and executor; she bequeathed to him a legacy for his trouble : it was held that he took no interest in the residue.

Construction of gift by reference.

As a general rule, it seems that the Court must follow strictly the terms of a gift by reference, if they are explicit, although the result may be contrary to the testator's probable intention; but if the gift is by way of executory trust, the Court may vary the limitations (*u*).

Gift by reference does not have the effect of duplicating charges—

Testators frequently devise real property to the uses upon the trusts and subject to the powers and limitations of an existing settlement. Such a devise, when carefully drawn, will contain the words " but not so as to increase or multiply charges or powers of charging "; but without these, or similar words, it is reasonably evident that this is the intention of the testator, and it may be laid down as a general rule (applicable not only to devises of realty, but also to gifts of personalty upon the trusts of an existing settlement) that such referential expressions will not in general be construed so as to give them the general effect of multiplying charges upon the trust estate or trusts in the nature of charges. " Of course, such may be the intention or effect of a particular will. But in the absence of anything in the will to show such an intention, the rule is that the Court will not impute it to the testator. In the case of *Hindle* v. *Taylor* (*x*), Lord Cranworth held that in almost all cases it is not a reasonable way of reading a trust created by reference to other trusts to consider everything as there repeated and so to make a duplication, as it were, of trusts in the nature of charges. This opinion has been recognised as sound in subsequent cases " (*y*).

(*t*) 21 Bea. 518. On the question whether under such a gift executors take beneficially or as trustees, see Chap. XXI, *post*, p. 697.

(*u*) See *Lord Kenlis* v. *Earl of Bective*, 34 Bea. 587, referred to *post*, p. 1412; *Miles* v. *Harford*, 12 Ch. D. 691, referred to *ante*, p. 281, and *post*, p. 673.

(*x*) 5 D. M. & G. 577.

(*y*) *Per* Lord Hobhouse in *Trew* v. *Perpetual Trustee Co.*, [1895] A. C. 264; *Boyd* v. *Boyd*, 9 L. T. (N.S.) 166; 2 N. R. 486; *Basket* v. *Lodge*, 23 B. 138; *Sambourne* v. *Barry*, Ir. R. 11 Eq. 140. But see *Re Marquis of Bristol*, [1897] 1 Ch. 946 (settlement, hotchpot clause).

—unless charge is proportional to value.

But it is clear that this rule does not apply where the charge or power of charging is not limited to a fixed amount, but is limited to a certain proportion of the value of the capital or income of the property. Thus, in *Cooper* v. *Macdonald* (*z*), where the original power was to appoint an annuity not exceeding one third part of the yearly income, Lord Selborne, L.C., said: "If the annuity which a tenant for life was empowered to charge upon the specifically devised estates had been one of (or not exceeding) a fixed annual amount, I should have been of opinion that the general rule stated by Lord Cranworth in *Hindle* v. *Taylor* (*a*), against multiplication of charges under a trust created by reference to other trusts, would have applied, and that it would not have been competent for any child of the testator to charge one annuity of that amount on the property specifically devised, and a further annuity on the share of the residuary estate, though both the residuary estate and the property specifically devised might have been made a security for a single annuity. I think, however, that the case is different when the power is to appoint an annuity not exceeding a certain proportion of the income of the property charged therewith. In such a case, by the addition of other property to be held on the same trusts, 'and subject to the same or like powers,' &c., so as to 'correspond with' those before expressed as to the property specifically devised as nearly as the difference in the nature of the property will admit, the testator has (in effect) increased the total amount of income, of which the maximum annual charge is not to exceed a certain aliquot part. The rule of proportion still holds, but the intention is that the power limited by that rule shall be applicable to the added as much as to the original property" (*b*).

"Capable of taking effect."

Where a testator devises or appoints property upon the uses of an existing settlement, or such of them as are "capable of taking effect," and some of the uses or trusts of the existing settlement have failed by reason of their infringing the rule against perpetuities, or for some other reason founded in law and not in the actual facts which have happened, it is seen that the phrase "capable of taking effect" is *prima facie* open to two constructions: (1) as meaning what the law allows to take effect, or (2) as referring to the trust which by reason of the deaths of parties and other intervening circumstances are still, in fact, existing, or capable of coming into existence. Until 1903, in spite of the fact that the phrase had been in use for generations, the only authority on the point was an interlocu-

(*z*) L. R. 16 Eq. 258.
(*b*) L. R. 16 Eq., at p. 266.
(*a*) 5 D. M. & G. 577, 594.

tory observation of Sir G. Jessel (*c*), but the question came before Kekewich, J., in the case of *Re Finch and Chew's Contract* (*d*), where the learned Judge held that on a literal and grammatical construction the phrase was used not merely to comprehend what is existing or possible in fact, but also what is allowable in law, so that the question may now be treated as settled.

Where personalty is bequeathed to trustees upon trust to purchase lands to be settled to such of the uses, etc., of an existing settlement as "at the time of my decease shall be subsisting or capable of taking effect, but not so as to increase or multiply charges or powers of charging," the purchased lands are not subject to charges created before the testator's death (*e*).

Power of appointment.

Where personalty is given upon such trusts as will best correspond with the trusts declared of certain real estate, and there is a power of appointment over the real estate exercisable by A, this does not operate to give A two powers of appointment, one over the personalty and one over the realty, but upon A making an appointment of the real estate the personalty goes to the person who gets the real estate (*f*).

In *Re Arnell* (*g*) it was held that a gift of residue upon the same trusts as a settled legacy extended to the residue a power to appoint a life interest to a husband (which applied to the settled legacy).

If realty is settled upon the same uses as some other real property, the words "the same uses" will include powers to appoint uses (*h*).

If personal property is given by reference to a gift of real estate which fails, the gift of personal estate is valid (*i*).

Failure of a gift by reference by ademption of primary gift.

In *Whiteway* v. *Fisher* (*k*) the testatrix bequeathed £200 to trustees on trust to accumulate for twenty-one years, and then to lay out the accumulated fund in repairing certain property, and to pay the surplus to the same persons to whom the property was devised; and then devised the property in strict settlement. She afterwards sold it, and by a codicil bequeathed

(*c*) In *Line* v. *Hall*, 43 L. J. Ch. 107.
(*d*) [1903] 2 Ch. 486. See *Re Gooch*, [1929] 1 Ch. 740.
(*e*) *Re Berners*, 67 L. T. 849. The question sometimes arises whether there is an accretion to the funds originally settled or a new settlement with similar trusts. See *Re Walpole's Settlement*, [1903] 1 Ch. 928; *Re North*, 76 L. T. 186; *Re Fraser*, [1913] 2 Ch. 224; *Re Paul's Settlement Trusts*, [1920] 1 Ch. 99, and *post*, p. 1144; *Eustace* v. *Robinson*, 7 L. R. Ir. 83.
(*f*) *Liddell* v. *Liddell*, 74 L. T. 105.
(*g*) [1924] 1 Ch. 473.
(*h*) *Minton* v. *Kirwood*, L. R. 3 Ch. 614 (settlement by deed).
(*i*) *Per* Wood, V.-C., 10 Jur. (N.S.) 508. See *Holmes* v. *Prescott*, *ante*, p. 657.
(*k*) 9 W. R. 433.

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the purchase money to the original devisee for life absolutely. The codicil did not refer to the £200; it was held that the legacy of £200 failed.

Revocation of gift by reference.

As to revocation of gifts by reference, see Chapter VII, pp. 170 *seq.*; as to hotchpot clauses, see Chapter XXXII.

Gifts "in the same manner," etc.

II.—Meaning of "in the same manner," etc.—Where there is an absolute gift, coupled with referential expressions, such as "in the same manner," such expressions, in general, determine not *who* shall take a legacy, but *how* the legatee shall take. For instance, where a legacy is given to such of a class as are living at the death of the testator equally as tenants in common, and then follows a gift to the children of A "in the same manner," all the children of A take, whether living at that time or born afterwards (*l*); otherwise if the words be "at the same time and in the same manner" (*m*).

In *Bessant* v. *Noble* (*n*), the testator bequeathed leaseholds after the failure of previous limitations in favour of A and his issue in trust for such persons as at the time of such failure of issue should be his (the testator's) next-of-kin according to the statute, and as if the testator had survived A, and in the like shares as they would be entitled to the same under the same statute. He afterwards bequeathed a legacy in trust for M for life, and after her decease without issue in trust for his own "next-of-kin in manner aforesaid." It was held that the persons entitled to the legacy would be the persons who would be the next-of-kin of the testator living at the death of M, and not the next-of-kin at his own death.

"In manner aforesaid."

On the other hand, where the principal gift is to A for life, with remainder, another gift to A or to B or to the remainderman, "in the same manner" (or the like), will generally import the same (or corresponding) limitations and remainders (*o*).

In *Doughty* v. *Saltwell* (*p*), the testator bequeathed certain

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(*l*) *Yardley* v. *Yardley*, 26 B. 38; *Pigott* v. *Wilder*, 26 Bea. 90; *Re Wilder's Trusts*, 27 Bea. 418; *Archer* v. *Legg*, 31 Bea. 187 ("agreeably to the instructions contained in my will"); *Milsom* v. *Awdry*, 5 Ves. 465 ("in manner aforesaid").

(*m*) *Swift* v. *Swift*, 32 L. J. Ch. 479; 11 W. R. 334.

(*n*) 26 L. J. Ch. 236.

(*o*) *Ross* v. *Ross*, 2 Coll. 269 ("under the same conditions and restrictions"); *Davies* v. *Hopkins*, 2 Bea. 276 (implication); *Re Colshead's Will*, 2 De G. & J. 690; *Re Palmer*, 3 H. & N. 26; *Sweeting* v. *Prideaux*, 2 Ch. D. 413 (implication); *Heasman* v. *Pearse*, L. R. 11 Eq. 522; *Giles* v. *Melsom*, L. R. 6 C. P. 532; 6 H. L. 24 ("so specifically devised"); *Longdon* v. *Simpson*, 12 V. 295 (where "on the same conditions" was held to mean "in the same manner"); *Milsom* v. *Awdry*, 5 V. 465 ("in manner aforesaid"); *Smith* v. *Greenhill*, 14 W. R. 912; *Re Smith*, 45 L. T. 246; and see *Re Shirley's Trusts*, 32 Bea. 394 (settlement, "child, children, or otherwise").

(*p*) 15 Sim. 640.

houses in trust for M for her life, and on her decease for her children, and in case M should die without issue, "to divide the produce [of sale] among such of the testator's grandchildren, thereinafter named, as should be living at her decease"; and the testator bequeathed certain other houses in trust for his granddaughters C., S., and H., for their separate use for their lives, and "after her decease in trust for the issue of her body in the same manner and subject to the same conditions and limitations as hereinbefore expressed in the bequest to my granddaughter M.": Sir L. Shadwell, V.-C., held that "issue" meant "children," and "limitations" meant "limitations over."

"In like manner."

In *Eames* v. *Anstee* (*q*), a testatrix directed trustees to make an investment, and out of the dividends to pay annuities of £100 each to her two nieces and her nephew for life, and the capital to their children respectively, and to apply £100 a year in the maintenance of the children of Daniel, a deceased nephew, until twenty-one, when she gave them the capital fund producing this annuity, and then bequeathed her residue in trust for her two nieces and nephew and the children of Daniel "in equal shares in like manner as thereinbefore mentioned with respect to the annual sums of £100 bequeathed to them respectively," and after the decease of the two nieces and nephew the testatrix gave the capital fund out of which their respective shares of dividends were derived equally amongst their children respectively. Romilly, M.R., held that words "in equal shares" applied only to the children of Daniel, and that the expression "in like manner as is hereinbefore mentioned" merely referred to and repeated what the testatrix had previously said, so that on the death of one of the nieces without issue, the children of Daniel took one-fourth (and not four-sevenths) of her fund between them.

A gift of residue in trust for A and B, "to be divided between them share and share alike, and to be paid and applied in like manner for their use and benefit as I have directed, the rents and profits of my leasehold premises hereinbefore settled upon them," was held not to settle the residue, but only to give the residue for the separate use of A and B (*r*).

"In manner aforesaid."

And in *Lumley* v. *Robbins* (*s*), the words "in manner aforesaid" were referred to the mode of enjoyment of the interest, and to be satisfied by making them refer to a tenancy in common and a separate use.

(*q*) 33 B. 264. See also *Tyndale* v. *Wilkinson*, 23 B. 74 ("to be settled in like manner").
(*r*) *Shanley* v. *Baker*, 4 Ves. 732.
(*s*) 10 H. 621.

In *Surtees* v. *Hopkinson* (*t*), the testator gave his real and personal estate to trustees as to one-fourth to A for life, and after her decease in trust for her children, and in default of children in trust for B, C, and D and their issue in the same manner as thereinafter directed respecting their original shares; as to one other fourth to B for life, and after his decease in trust for A, C, and D and their issue in the same manner as directed respecting their original shares; as to one other fourth part upon trust for C and her children "upon and for the trusts and purposes and with and subject to the powers and authorities and with the like remainder over in default of issue similar to and in all respects corresponding with the trusts, purposes, powers and authorities expressed and declared concerning the one-fourth share hereby bequeathed in trust for A and her children as effectually as if the same trusts were here repeated," and as to the remaining fourth share in trust for D and his children with the same referential expressions as are quoted above in the case of C's share. D died unmarried. Sir R. Malins, V.-C., pointed out that the words were not "to go over with the same limitations," but "with the like remainder," and that the words "like" and "corresponding," but not the word "identical," were used, and consequently held that D's share went in equal thirds to A, B, and C for life.

"Like." "Corresponding."

A devise to persons "upon the same conditions" as they hold property has been held to mean upon the trusts of their marriage settlement (*u*).

"Same conditions."

Where a testator directed a transfer of 3 per cent. Consols three months after his decease, and gave other legacies of stock "as aforesaid," it was held by Lord Eldon, L.C., that "as aforesaid" merely meant 3 per cent. Consols, and did not refer to the time of transfer (*x*).

"As aforesaid."

In *Meredith* v. *Meredith* (*y*), there was a devise for the benefit of S. and A. and their children in a certain event, followed by a proviso that on the happening of a certain event the testator gave the said estates to S. and A. and to the issue of their bodies lawfully begotten or to be begotten, and their heirs as tenants in common "as aforesaid." It was held that the words "as aforesaid" implied that the limitations in the first case were to take effect in the second case.

(*t*) L. R. 4 Eq. 98.

(*u*) *Ord* v. *Ord*, L. R. 2 Eq. 393.

(*x*) *Sibly* v. *Perry*, 7 Ves. 522.

(*y*) 10 East, 503. See also *Davis* v. *Norton*, 2 P. W. 390 ("die without issue as aforesaid," *i.e.*, in lifetime of testator's widow); *Walsh* v. *Peterson*, 3 Atk. 193 ("die before the age of twenty-one or without issue as aforesaid"); and *Weddell* v. *Mundy*, 6 Ves. 341 ("under age as aforesaid," *i.e.*, without leaving a husband).

"As stated above."

Where a testator used the words, "I declare again that I leave everything I die possessed of to my dearest mother, for her entire and sole use and benefit as stated above," the words "as stated above" were held not to limit the subject of the bequest, but to mean that the gift was for the sole use, so that the words were superfluous (*z*).

"So."

In *Dillon* v. *Harris* (*a*), the meaning of the word "so" in a provision to take effect "in case both my said sons should 'so' die unmarried and without leaving lawful issue," was held upon the context to refer to "marrying with the consent of the trustees or executors, or the majority of them."

"Such."

The word "such" is sometimes used as a referential expression meaning "as aforesaid," sometimes to refer to what follows after (*b*).

It frequently happens that the word "such" is inaccurately used, and must be either rejected or modified, in order to carry out the intention of the testator. Thus, in *Howgrave* v. *Cartier* (*c*), there was a limitation to children who attained twenty-one, with a gift over if there should be no "such" children or they should die before any of them attained twenty-one; the word "such" was rejected as senseless. So in *Dowglass* v. *Waddell* (*d*), the testator used the expression "such issue male or female," although no female issue had previously been mentioned. The word "such" was rejected on the authority of *Howgrave* v. *Cartier* (*c*). In *Re Hutchinson* (*e*), the testatrix, after giving life interests to her children, directed that in case of the death of any of her children, the issue of such child should take their parent's share in such shares and proportions as their parent should by will appoint, "in default of such appointment such issue to take equally as tenants in common": Kay, J., held that the expression "such issue" could not be limited to the grandchildren who could take under an appointment.

In *Parker* v. *Tootal* (*f*) R., the testator's eldest son, was dead at the date of the will, leaving a son T.; the testator had a younger son J.; he devised land to T. for life with remainder to the first son of the body of the said T. in tail male, and for

(*z*) *Re Kendall's Trusts*, 14 Bea. 608.

(*a*) *Dillon* v. *Harris*, 4 Bli. (N.S.) 321. See also *Bell* v. *Phyn*, 7 Ves., at p. 458.

(*b*) See the observations of Kindersley, V.-C., in *Stolworthy* v. *Sancroft*, 12 W. R. 635. As to the effect of the word "such" in a gift over in showing the meaning of the primary gift, see *Idle* v. *Cook*, 1 P. W. 70, cited *post*, p. 1801.

(*c*) 3 V. & B. 79.

(*d*) 17 L. R. Ir. 384.

(*e*) 55 L. J. Ch. 574.

(*f*) 11 H. L. C. 143.

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want of such issue "either by my said grandson T. or my said son J.," then over; there was no devise to the issue of J.; it was held that "such issue" meant "issue male." This construction, which is contrary to the referential principle of construction usually applied to gifts over in default of "such issue," is explained elsewhere (*g*).

"At that time."

In one case (in 1810) (*h*) a testator devised his estate at S. to various limitations in succession, concluding with one to the first and other sons of B. in tail male, and in default of such issue [of B.] "to such person and persons and for such estate and estates as should at that time and from time to time afterwards be entitled to the rest of his real estate by virtue of and under his said will." The devise of the other real estate included an ultimate remainder to the testator's own right heirs: it was held that the ultimate remainder in fee of the estate at S. vested by descent in the person who was the testator's heir at the time of his death, the ground being that the ultimate reversion was undisposed of by the will. But since statute 3 & 4 Will. 4, c. 106, s. 3, the heir would take by purchase and not by descent, so that should a similar case arise on a modern will, it will be possible to argue that the words "at that time" operate to give a contingent remainder to the person who is heir-at-law at the time of the failure of issue.

Ultimate limitation.

Where a testator devises specific realty to the uses of an existing settlement which contains an ultimate limitation to the testator and his heirs, the specific devise does not include this ultimate limitation; if the uses of the settlement fail, the real estate specifically devised by the testator reverts to him and passes under his residuary devise (*i*).

Powers.

If lands be devised to the same uses and trusts and with the same powers, etc., as other lands already settled, the powers will be exercisable by the trustees of the settlement, not by the trustees of the will (*k*).

Conversion, investment, etc.

In *Auldjo* v. *Wallace* (*l*), a bequest of "£200 a year to be invested in the same manner as" a sum of Consols previously given, was held to mean a fund producing that income. In *Murton* v. *Markbey* (*m*), a bequest of leaseholds upon the same trusts, etc., as those declared of the moneys to arise by sale of property previously given upon trust for sale, was held to subject the leaseholds to the trust for sale.

(*g*) *Post*, p. 1924. The case is also referred to in Chap. XVIII on another point: *ante*, p. 563.
(*h*) *Doe* d. *Cholmondeley* v. *Maxey*, 12 East, 589.
(*i*) *Jacob* v. *Jacob*, 78 L. T. 451; 82 L. T. 270.
(*k*) *Taylor* v. *Miles*, 28 Bea. 411.
(*l*) 31 Bea. 193.
(*m*) 18 Bea. 196.

Other cases in which the effect of referential expressions is considered are collected in the footnote (*n*).

Various cases.

A bequest to persons "hereinbefore named" does not necessarily refer to persons who have been described by their Christian name or surname (*o*).

A gift of residue to "all the beforementioned pecuniary legatees" is not a gift to them as a class (*p*).

As to annexing personal to real estate, devised in strict settlement before 1926.

III.—Effect of Limitations in strict Settlement upon Personal Property, etc.—Mr. Jarman thus states the practice which was usual in his time (*q*): "When it is intended that leasehold estates, or personal chattels in the nature of heir-looms, shall go with lands devised in strict settlement, they should not be simply subjected to the same limitations; the effect of that being to vest the personal property absolutely in the first tenant in tail though he should happen to die within an hour after his birth (*r*); and as the freehold lands in that event pass over to the next remainder-man, a separation between them and the chattels takes place; but the personal property should be limited over, in case any such tenants in tail (being the sons *in esse*) should die under twenty-one and without inheritable issue, to the person upon whom the freehold lands will devolve in that event; or, which is the more usual mode, the personalty should be subjected to the same limitations as the freeholds, with a

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(*n*) "As before," *Macnamara* v. *Lord Whitworth*, Cooper, 241. "In like manner," *Roe* d. *Aistrop* v. *Aistrop*, 2 Bl. 1228; *Lewis* v. *Puxley*, 16 M. & W. 733. "In manner aforesaid," *Doe* d. *Woodall* v. *Woodall*, 3 C. B. 349; *Mountain* v. *Young*, 18 Jur. 769; Co. Litt. 20 b. "Under the trusts aforesaid," *Re Bowles*, [1905] 1 Ch. 371. "On the same terms," *Goodtitle* d. *Cross* v. *Woodhull*, Willes, 592. "Subject to the same restrictions," *Barber* v. *Barber*, 1 Jur. 915. "Upon the like trusts and with the like powers," *Re Lindo*, 59 L. T. 462. "Conditions therein mentioned," *Stretton* v. *Fitzgerald*, 23 L. R. Ir. 310, 466 (will with subsequent codicil). "In as ample a manner," *Younge* v. *Coombe*, 4 Ves. 101; and see *Hare* v. *Hare*, 24 W. R. 575 (settlement). "As also," *Macnamara* v. *Dillon*, 11 L. R. Ir. 29. "Her part aforesaid," *Doe* d. *Gibson* v. *Gell*, 2 B. & Cr. 680; *Doe* v. *Stopford*, 5 East, 501, and other cases cited *post*, p. 974, n. (*v*). How much of what precedes shall be held affected by referential expressions is a frequently recurring question. See, *e.g.*, *Baker* v. *Baker*, 6 Hare, 269; *Fisher* v. *Brierley*, 30 Bea. 265; *Makings* v. *Makings*, 1 D. F. & J. 355 (question whether charge affected life estate as well as remainder). See also *Re Cameron*, 26 Ch. D. 19, 26; *Leader* v. *Duffey*, 13 A. C. 294; *Adshead* v. *Willetts*, 29 Bea. 358.

(*o*) *Seale Hayne* v. *Jodrell*, [1891] A. C. 304; *Re Holmes*, 1 Dr. 321 ("specially named"); *Bromley* v. *Wright*, 7 Ha. 334.

(*p*) *Re Gibson's Trusts*, 2 J. & H. 656; *Nicholson* v. *Patrickson*, 3 Giff. 209.

(*q*) First ed., vol. ii, p. 507. Since 1925 personalty can be entailed.

(*r*) *Foley* v. *Burnell*, 1 Br. C. C. 274; 4 Br. P. C. 319; *Pelham* v. *Gregory*, 3 Br. P. C. 204; *Scarsdale* v. *Curzon*, 1 J. & H. 40. But where a junior branch, *quoad* the estate, has issue before the senior, the chattels do not vest indefeasibly in such issue; they will not so vest until the senior branches are extinct: *Pelham* v. *Gregory*, 3 Br. P. C. 204; *Re Cresswell*, 24 Ch. D. 102, where *Hogg* v. *Jones*, 32 Bea. 45, is distinguished.

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declaration that it shall not vest absolutely in the tenant in tail until twenty-one, or death under that age, leaving issue inheritable under the entail."

Modern form of trust for annexing chattels to settled realty before 1926.

Notwithstanding these provisions, a separation of the chattels from the lands will nevertheless occur (whichever form is used), if the tenant in tail should die under twenty-one leaving inheritable issue; for in that case he would take the chattels absolutely, while the lands would descend to the issue. To prevent this separation, the declaration should be that the chattels shall not vest absolutely in any tenant in tail by purchase who may die under twenty-one, but shall at his death devolve as nearly as possible in the same manner as the lands (*s*). Under this declaration, the issue will take the whole of the chattels by purchase, instead of such share or interest only as he may be entitled to as of kin to the ancestor.

When not void for remoteness.

That the words "by purchase" are necessary in this form of declaration, in order to avoid a breach of the Rule against Perpetuities, has already been noticed (*t*). But the trust may be so expressed as to be by implication confined to tenants in tail by purchase, as in *Christie* v. *Gosling* (*u*), where freeholds were devised in strict settlement, and chattels were then given on the same trusts and for the same estates as the freeholds, or as near thereto as the rules of law and equity would permit, with a proviso that the chattels should not vest absolutely in any tenant in tail unless he attained twenty-one (without more). These trusts were impugned as constituting in effect a gift to the first tenant in tail who should attain twenty-one, and as therefore being too remote, as upon that construction they clearly were (*x*); and Sir J. Romilly, M.R., adopting that construction, held the gift void. But Lord Westbury differed on the point of construction and reversed the decision. Applying the limitations of the freeholds to the personal estate (as far as the difference of tenure would admit), the effect was (he said) to give the absolute interest to the first tenant in tail by purchase; then came the proviso, in which the words "tenant

Christie v. *Gosling*.

(*s*) Davidson's Prec., vol. iii, pt. ii, p. 1180; vol. i (5th edition), p. 379; Byth. & Jarm. Conv. (4th edition, by Robbins), vol. vii, p. 966; Key and Elphinstone (8th edition), vol. ii, p. 666 (in later editions a more elaborate form is recommended); Wolstenholme (5th edition), p. 148. The older forms are referred to in *Scarsdale* v. *Curzon*, *supra*, and *Harrington* v. *Harrington*, L. R. 5 H. L., at p. 93. The modern form will be found in *Re Beresford Hope*, [1917] 1 Ch. 287, 298.

(*t*) *Ante*, p. 321; *Re Atkinson*, [1916] 1 Ch. 91.

(*u*) L. R. 1 H. L. 279; 32 Bea. 58; 1 D. J. & S. 1 (*Gosling* v. *Gosling*). See also *Martelli* v. *Holloway*, L. R. 5 H. L. 532; *Wells* v. *Wells*, [1890] W. N. 29.

(*x*) See *ante*, p. 317.

in tail" must mean tenant in tail by purchase, for it referred to one in whom the personalty would, but for the proviso, have vested absolutely instead of defeasibly. The L.C. therefore held that the gift vested in the infant tenant in tail liable to be divested on his death under twenty-one. And this decision was affirmed in the House of Lords (*y*).

Lord Westbury observed, "If the will had provided for the event of a tenant in tail by purchase dying under twenty-one leaving a son, by declaring an express trust for such son of the personal estate, the case would have existed of a tenant in tail of the real estates by descent taking the personal estate by purchase; and if in that case the proviso were held to apply to and include such tenant in tail, the whole disposition of the principal of the personal estate would be void for remoteness." In the case before him, he thought, no such trust was either expressed or implied (*z*). But this is, in effect, what the ordinary declaration does express. Hence the necessity for the words "by purchase." The trust in *Christie* v. *Gosling* was saved from remoteness only because it led to the very separation which the ordinary declaration is designed to prevent; it being considered by Lord Westbury (*a*) that if the infant tenant in tail should die under twenty-one leaving issue, the chattels would devolve under the prior trust to the next purchaser in the series of limitations, not to the issue.

Harrington v. *Harrington*.

In *Harrington* v. *Harrington* (*b*), personal chattels were bequeathed in trust for the person for the time being in the actual possession of settled lands, to the intent that they should be deemed heir-looms, to be enjoyed with the estates, so far as the rules of law or equity would permit, but so that they should not vest absolutely in any person who by virtue of any settlement should become entitled to the estates for an estate of inheritance, unless he attained twenty-one, or, dying under that age, should leave issue inheritable under the settlement. The first tenant in tail by purchase died under twenty-one and without issue, and his successor (who was born within a life in being and twenty-one years after the death of the testator) was residuary legatee under the testator's will; consequently he became entitled to the chattels, whether the trust was void, or whether it was valid to the point of vesting them in the first

(*y*) See the explanation of the decision given by Lord Cairns in *Harrington* v. *Harrington*, L. R. 3 Ch. p. 571; 5 H. L. 103.

(*z*) 1 D. J. & S. 16.

(*a*) *Ib.* This point was not noticed in D. P.

(*b*) L. R. 5 H. L. 87. Lord Westbury's statement of the law is inaccurate. The head-note is also inaccurate in stating that the first tenant in tail was in by descent.

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tenant in tail and divesting them without carrying them over to his successor, or whether it was valid to the point of so carrying them over. The claim by the administratrix of the first tenant in tail therefore failed. Lord Cairns seems to have been of opinion that the chattels vested in the first tenant in tail, and were divested on his death under age, but were not carried over to his successor, so that they fell into the testator's residue.

"So long as the rules of law will permit."

As Mr. Jarman points out (*c*), the construction of a direction that chattels shall go with settled lands "so long as may be, or so long as the rules of law will permit, has been *vexata quæstio*." Lord Hardwicke, in *Gower* v. *Grosvenor* (*d*), expressed an opinion that such a direction made the trust executory, and that the Court might make a proper settlement of the chattels; but in *Foley* v. *Burnell* (*e*) and *Vaughan* v. *Burslem* (*f*), Lord Thurlow held that the property vested absolutely in the tenant in tail on his birth; in other words, that the direction did not make the trust executory; and this, though often regretted, is now the settled doctrine (*g*). It was much canvassed in the House of Lords in *Duke of Newcastle* v. *Countess of Lincoln* (*h*), which arose on marriage articles containing a covenant to assign leaseholds upon the same trusts as freeholds so far as the law would allow, and the trusts being executory, it was decided that the Court had power to modify the limitations so far as to suspend the absolute vesting until twenty-one. Lord Eldon did not concur in this decision, considering that the question was concluded by *Vaughan* v. *Burslem*. But in *Shelley* v. *Shelley* (*i*), where a testatrix without reference to any real estate, bequeathed jewels to her nephew to be held as heirlooms by him and his eldest son on his decease, and so on from eldest son to eldest son, as far as the rules of law would permit, and requested her nephew by his will or otherwise to give effect to her wishes, Sir W. P. Wood, V.-C., held this to be a good executory trust, and directed a

Shelley v. *Shelley*.

(*c*) First ed., vol. ii, p. 507.
(*d*) Barnard. 54. See also *Trafford* v. *Trafford*, 3 Atk. 347.
(*e*) 1 B. C. C. 274.
(*f*) 3 B. C. C. 101.
(*g*) *Fordyce* v. *Ford*, 2 Ves. jun. 536; *Carr* v. *Lord Errol*, 14 *ib.* 478; *Stratford* v. *Powell*, 1 Ba. & Be. 1; *Rowland* v. *Morgan*, 6 Hare, 463; 2 Phil. 764; *Doncaster* v. *Doncaster*, 3 K. & J. 26. See the cases reviewed by Wood, V.-C., *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40; *per* Lords Westbury and Cairns, L. R. 5 H. L. 101, 107. See also *Re Cresswell*, 24 Ch. D. 102; *Re Johnston*, 26 Ch. D. 538 ("to be enjoyed and go with the title"); *Miller* v. *Stanley*, 12 W. R. 780.
(*h*) 3 Ves. 387 (*Lincoln* v. *Newcastle*), 12 Ves. 218.
(*i*) L. R. 6 Eq. 540. The point does not appear to have been previously decided. See opinion of Sir L. Shadwell, *Boydell* v. *Golightly*, 14 Sim. 346. In *Re Beresford Hope*, [1917] 1 Ch. 287, the trust was also executory.

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settlement to be made of the jewels to the nephew for life, remainder to his eldest son E. (who was born in the testatrix's lifetime) for life, remainder to E.'s eldest son if living at E.'s death (*k*), to vest at twenty-one, with a gift over on death under twenty-one or in E.'s lifetime.

Re Dayrell.

In *Re Dayrell* (*l*), chattels were bequeathed to trustees upon trust to permit the same from time to time to go and be held and enjoyed with the mansion house (which was devised in strict settlement), so far as the rules of law and equity would permit, by the person or persons who for the time being should be entitled to the possession of the said mansion house by virtue of his will, "yet so that the said chattels shall not vest absolutely in a son or any person hereby made tenant for life of the said mansion house unless such son or other person shall attain the age of twenty-one years." The Court held that "or" must be read "of," so that the declaration was to the effect that "the said chattels shall not vest absolutely in a son of any person hereby made tenant for life of the said mansion house unless such son shall attain the age of twenty-one years"; the operation of the will therefore was to carry on the chattels to the next person entitled to the real estate under the limitations until a tenant in tail by purchase was reached who attained twenty-one.

How far remoteness obviated by words "so long as the law permits."

The words "so long as the rules of law will permit," though ineffectual to make the trust executory, or to correct a gift which in terms infringes the Rule against Perpetuities (*m*), may, it seems, fairly be referred to where the terms are ambiguous, in aid of a construction which will not be obnoxious to that rule (*n*). And even without these words, if the trust is on other grounds executory, it may be moulded to avoid remoteness. Thus, in *Miles* v. *Harford* (*o*), where freeholds were devised to A for life, remainder to his first and other sons in tail male, with a shifting clause which provided that if A or his issue male should become entitled to a certain other estate, the devised estate should go over; and leaseholds were given upon such trusts, etc., as, regard being had to the difference of tenure, would most nearly correspond with the uses, etc., of the freeholds. It was held by Sir G. Jessel, M.R., that this was an executory trust; for the testator "knew that something would

Miles v. *Harford.*

(*k*) "Living at E's death" seems to be due to the words of the will "on his decease, and so on."

(*l*) [1904] 2 Ch. 496. In *Re Fowler*, [1917] 2 Ch. 307, the chattels were to devolve with an entailed estate in Scotland, *post*, p. 676.

(*m*) See *Tollemache* v. *Earl of Coventry*, 2 Cl. & Fin. 611; 8 Bli. (N.S.) 547, *ante*, p. 317. See *Ker* v. *Dungannon*, 1 Dr. & W., at p. 536.

(*n*) See *Harrington* v. *Harrington*, L. R. 3 Ch. 574; 5 H. L. 102, 107.

(*o*) 12 Ch. D. 691.

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not work, and has said you are to make them correspond having regard to the effect of the tenure on the limitations." If the shifting clause were repeated literally for the leaseholds, it would fail to a great extent for remoteness. It must therefore be modified so as to shift the leaseholds in every case (covered by the clause) in which it could lawfully be made to shift (*p*).

Re Caledon.

In *Re Caledon* (*q*) the testator bequeathed chattels, after a life interest to his wife, to the person who under his will should become entitled to the possession of a mansion which he devised to his wife for life with remainder to his first and other sons in tail. The wife and the eldest son disentailed and resettled to such uses as they should appoint and in default to the original uses. Joyce, J., held that the bequest after the death of the wife was a contingent gift to the person who should then under the will have become entitled to the possession of the mansion and that during the life of the wife it was impossible to say who that would be.

Meaning of "possession."

If chattels are bequeathed to or in trust for the persons for the time being entitled to the possession of settled real estate, they do not vest absolutely in the tenant for life, but in the first tenant in tail on his birth, although he may be only tenant in tail in remainder. And a direction that they shall be treated as heirlooms and annexed to the real estate, makes no difference (*r*).

The same principle applies where the testator adds a proviso that the chattels shall not vest absolutely in a tenant in tail by purchase unless he attains twenty-one (*s*).

Re Chesham's Settlement.

The Court of Appeal declined to apply this principle in *Re Lord Chesham's Settlement* (*t*). In that case a mansion house and lands were settled to the use of the third Baron Chesham during his life with remainder to his sons successively in tail

(*p*) As it happened, A himself had become entitled to the other estate, and the M.R. also held that, as this event was separately expressed from that of his issue becoming so entitled, the shifting clause was good in event, as to the leaseholds, without modification. *Miles* v. *Harford* was followed in *Re Beresford Hope*, [1917] 1 Ch. 287.

(*q*) [1915] 1 Ch. 150.

(*r*) *Foley* v. *Burnell*, 1 Br. C. C. 274; 4 Br. P. C. 319; *Re Fothergill's Estate*, [1903] 1 Ch. 149. By "first tenant in tail" is meant the first tenant in tail whose estate is indefeasible, see *ante*, p. 669, n. (*r*). As to the effect of a direction that chattels shall devolve as heirlooms, see Vaizey on Settlements, 1333.

(*s*) *Martelli* v. *Holloway*, L. R. 5 H. L. 532 (where the proviso was implied under the doctrine of *Christie* v. *Gosling*, *ante*, p. 670; *Re Angerstein*, [1895] 2 Ch. 883; note (*x*), *infra*.

(*t*) [1909] 2 Ch. 329; distinguished in *Re Parker*, [1910] 1 Ch. 581; *Re Lewin*, [1918] 2 Ch. 308, and *Portman* v. *Viscount Portman*, [1922] 2 A. C. 473, but it has been followed in Ireland: *Re Duckett*, [1918] 1 Ir. R. 110.

male, and certain chattels were vested in trustees upon trust, so far as the rules of law and equity would allow, to permit the same to be used, held, and enjoyed by the person who for the time being should be entitled to the mansion house under the limitations of the settlement, "yet so that for the effect of transmission the same shall not vest absolutely in any person hereby made tenant in tail male or in tail by purchase who shall not attain the age of twenty-one years, but who nevertheless shall be entitled to the use and benefit thereof during minority." The second Baron Chesham died in 1882; the third Baron had two sons, the elder of whom died, intestate and unmarried, in 1900, shortly after attaining his majority. The younger son was born in 1894, and on the death of his father, the third Baron, in 1907, became the fourth Baron Chesham and tenant in tail male in possession of the mansion house and estates. Eve, J., held that the chattels vested in the elder son of the third Baron. The Court of Appeal, following the construction placed upon the settlement by Chitty, J. (on a question of election) in *Re Lord Chesham* (*u*), held that the testator had shown an intention that the chattels should be annexed to the house and should not vest in a tenant in tail unless he became tenant in possession; the Court accordingly decided that the heirlooms belonged to the infant tenant in tail, subject to being divested in the event of his dying under age (*x*).

(*u*) 31 Ch. D. 466; *ante*, p. 513.

(*x*) The decision has caused some surprise, because it runs counter to a doctrine which has hitherto been regarded as clearly established. Where a settlement contains a declaration that chattels are to be held and enjoyed by the persons from time to time entitled to the possession of the settled real estate, they vest in the first tenant in tail on his birth: "otherwise the absurdity must happen of the personal estate being tied up longer than the real" (*per* Lord Comm. Ashhurst in *Foley* v. *Burnell*, 1 Br. C. C., at p. 285). And where a proviso is added, that the chattels are not to vest in any tenant in tail by purchase unless he attains twenty-one, then if the tenant in tail attains twenty-one while his estate is in remainder, he becomes absolutely entitled to the chattels, subject to the interest of the tenant for life. If it is desired to postpone the vesting until the tenant in tail comes into possession, clear words to that effect must be used (*Potts* v. *Potts*, 3 J. & Lat. 353; 1 H. L. C. 671; *Cox* v. *Sutton*, 25 L. J. Ch. 845; *Scarsdale* v. *Curzon*, 1 J. & H. 40; *Re Fothergill's Estate*, [1903] 1 Ch. 149). Both rules are illustrated by *Re Angerstein*, [1895] 2 Ch. 883: in that case testator A bequeathed chattels as heirlooms to be used and enjoyed by the person for the time being entitled to "the actual possession" of the settled estates: testator B bequeathed chattels as heirlooms to be held and enjoyed by the person for the time being "entitled in possession" to a certain mansion house: it was held by Kekewich, J., that a tenant in tail in remainder, who attained twenty-one and died in the lifetime of the tenant for life, became absolutely entitled to the chattels under the will of testator B, but that he did not become entitled to the chattels under the will of testator A. The question under the will of testator B (not referred to in the headnote) was considered so clear that it was not seriously argued. The view of the Court of Appeal in *Re Lord Chesham's Settlement* was that the chattels were "in effect" annexed to the house, but there was no such declaration in the settlement, while in *Foley* v. *Burnell* the chattels were

Fund and chattels settled by reference to a Scotch settlement.

In *Re Fowler* (*y*) a fund was bequeathed to allow the income of the fund to be received by the person from time to time in "to be held and enjoyed by the several persons who from time to time should respectively and successively be entitled to the use and possession of the same houses respectively, as and in the nature of heirlooms, to be annexed and go along with such houses respectively for ever"; yet it was held by the House of Lords that they vested absolutely in a tenant in tail in remainder who died fourteen days after his birth. And in *Martelli* v. *Holloway* (L. R. 5 H. L. 532), where no person was to be entitled to the personal estate unless he became entitled to an estate tail in possession in the real estate, all the learned lords thought (though the point had become immaterial, owing to the death of the tenant for life) that the case fell within the doctrine of *Foley* v. *Burnell*, and that the personal estate had vested absolutely in the tenant in tail in remainder. In the face of these authorities it is difficult to support the decision in *Re Lord Chesham's Settlement*. In that case, it is true, the settlement was by deed, but this clearly makes no difference (see *Scarsdale* v. *Curzon*, *supra*).

The decision will, it is feared, cause considerable practical inconvenience. The object of the forms in ordinary use for settling chattels as heirlooms is to provide for the case of most frequent occurrence, namely that of the first tenant in tail attaining majority during his father's lifetime, and joining with him in a resettlement of the estate and the chattels. This would be impossible if the chattels were not to vest in the tenant in tail until he came into possession. One of the forms frequently used was approved by the late Mr. Key: it requires the trustees to permit the chattels "to devolve and be enjoyed as heirlooms with the freehold hereditaments hereby settled," and provides in the usual way for the case of a tenant in tail by purchase dying under twenty-one (Key and Elphins. Conv. (4th ed.), vol. ii, p. 696). In *Re Lord Chesham's Settlement* the trust was to permit the chattels "to be used held and enjoyed with the mansion house called L. by the person or persons who for the time being shall be entitled to the said mansion house under the limitations thereof herein contained." Now the chattels which are the subject of a trust of this kind are almost invariably articles of furniture, plate, works of art, etc., which can only be "enjoyed" with a dwelling house, and it is therefore practically impossible to draw any distinction between the form used by Mr. Key, and the form used by the draftsman of Lord Chesham's settlement. If the reasoning of the Court of Appeal is correct, it follows that under a trust in Mr. Key's form the chattels do not vest in a tenant in tail in remainder on his attaining twenty-one. Yet Mr. Key's form was deliberately framed, in reliance on the doctrine of *Foley* v. *Burnell*, in order that the chattels might so vest (see Davidson's Prec. vol. iii, pt. i, pp. 600, 626; Mr. Key was one of the editors of this volume), and the form has been largely used. A short paragraph appeared in the Law Magazine and Review for November, 1909, stating that during the argument of the appeal Farwell, L.J., drew attention to the fact that "the very same point on the very same settlement had been decided in the very same way by Chitty, J., some twenty years ago (*Re Lord Chesham*)." This is not quite accurate: the settlement was the same, but the circumstances and the point were different. When the settlement came before Chitty, J., in 1886, the third Baron Chesham was living, and he was tenant for life of the chattels; he was also residuary legatee under the will of the second Baron, and the question was whether he could, under the doctrine of election, be required to compensate the persons to whom the testator had purported to bequeath the chattels; Chitty, J., held that they could not be removed from the mansion house without a breach of trust, and that the tenant for life, therefore, had no assignable interest in them. It is difficult to see how the learned Judge could have decided otherwise. When the matter came before the Court of Appeal, the third Baron and his eldest son were both dead, and there was no tenant for life of the chattels; the question was whether the chattels had vested absolutely in the eldest son of the third Baron on his attaining twenty-one in his father's lifetime. The decision of Chitty, J., had no bearing on this point, and even if it had, it would not have enabled the Court of Appeal to disregard the artificial rule of construction laid down by the House of Lords in *Foley* v. *Burnell*. See *Re Parker*, [1910] 1 Ch. 581. (Note by C. Sweet.)

(*y*) [1917] 2 Ch. 307.

possession of the testator's entailed estates in Scotland, but so that the capital should not vest absolutely in any person in the line of entail living at the testator's death, but on the death of any such person should devolve with the estates in like manner as if the said sum had been land in Scotland and part of the said estates. The third heir of entail who was living at the testator's death disentailed; it was held that he became entitled to the fund. Chattels were similarly settled, except that on such death as aforesaid they should devolve as heirlooms with the estates to the persons next entitled in the line of entail. It was held that the third heir of entail was not absolutely entitled to the chattels, but that on his death they would pass to his successor in the line of entail.

In *Pole* v. *Pole* (*z*) a fund had been paid into Court to an account "the fund which under the arrangement of 1867, is to follow the limitations contained in the will of the testator with respect to his real estate." It was held that these words were not executory and that the fund vested absolutely in the first tenant in tail by purchase.

Reference to actual possession.

Where chattels are bequeathed to trustees upon trust to permit the same to be enjoyed by the person for the time being in the "actual" possession of real estates settled by the will, a tenant in tail who predeceases the tenant for life does not become entitled to the chattels (*a*); but unless the intention is plain that no person shall take the chattels absolutely who does not live to become entitled to the possession of the real estate, "the Court will not introduce in such cases the restrictions which conveyancers know how to introduce with apt words" (*b*). Even the words "entitled to an estate tail in possession" are insufficient to displace the rule in *Foley* v. *Burnell* (*c*). Where the entail has been barred by a tenant for life and remainderman in tail, the words "who shall be in the actual possession"

(*z*) [1924] 1 Ch. 156.

(*a*) *Re Fothergill's Estate*, [1903] 1 Ch. 149; *Re Angerstein*, [1895] 2 Ch. 883; 44 W. R. 152; *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40. As to the meaning of the expression "actual possession" see *Re Peake's Settlement Trusts*, [1910] 1 Ch. 290 (assignment of life estate).

(*b*) *Per* Sugden, L.C., in *Potts* v. *Potts*, 3 J. & Lat., at p. 368; *Re Fothergill's Estate*, *supra*.

(*c*) *Ante*, p. 674; *Martelli* v. *Holloway*, L. R. 5 H. L. 532; *Potts* v. *Potts*, 3 J. & Lat. 353; 1 H. L. C. 671 ("become seised"); *Re Johnson's Trusts*, L. R. 2 Eq. 716. See also *Cox* v. *Sutton*, 25 L. J. Ch. 845; 2 Jur. (N.S.) 733 (repairing fund to be applied at request of person in possession). As to the meaning of "entitled to the possession" in a shifting clause, see *Leslie* v. *Earl of Rothes*, [1894] 2 Ch. 499; and *Re Hinckes*, [1921] 1 Ch. 475. As to the meaning of "entitled in possession" in a clause of forfeiture (name and arms) see *Re Edwards*, [1910] 1 Ch. 541.

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have been held to mean the person who would have come into possession if the original limitations were subsisting (*d*).

The rules stated by Wood, V.-C.

The general rules of construction which are stated by Wood, V.-C. (afterwards Lord Hatherley) in *Scarsdale* v. *Curzon* (*e*) and were quoted with approval by Lord Birkenhead in *Portman* v. *Viscount Portman* (*f*) are as follows :—" First. That an assignment or bequest of personalty, either immediate or by way of trust executed, to go according to the same limitations as real estate, vests it absolutely in the first tenant in tail of the realty immediately upon his birth, and this whether the limitations of the personalty be expressed *in extenso*, or created by reference to the limitations of the realty; and that such reference may effectually be made either by expressly saying that the chattels are to go on the same uses as the realty or by declaring that they are to be treated as heirlooms, this last expression being sufficient in itself to carry the property in the way I have stated. Secondly. This point was established, that the addition of the words ' so far as the rules of law or equity will permit,' and the circumstance that the legal interest is left in executors, will not prevail to alter the general rule or to make the trusts executory . . .

" The third class of cases is, where the trusts are executory in the sense in which the word is now understood.

" The fourth rule is that which was established by *Foley* v. *Burnell* (*g*) . . . The full extent of that authority is no more than this, that doubtful words tending to restrict the interest in the chattels to those who come into possession of the real estate, will not overrule the operation of the general canons of construction, or have the effect of suspending the interest until the time when possession of the realty is obtained."

In *Re Marquess of Bute* (*h*), the testator bequeathed certain chattels " upon trust to hold the same as heirlooms from time to time so long as the rules of law and equity will allow, and to permit and suffer the same from time to time to be used and enjoyed by the person or persons who for the time being under the limitations and dispositions made by a certain deed of entail bearing date the day of shall be entitled to the possession or to the receipt of the rents and profits of my capital messuage or mansion house called Mount Stuart House." The deed of entail could not be found, and the plaintiff became entitled to

(*d*) *Hogg* v. *Jones*, 32 B. 45; *Re Trevanion*, [1910] 2 Ch. 538 (disentail); see also the Scottish case of *Wesselenyi* v. *Jamieson*, [1907] A. C. 440; and *Re Cornwallis*, 32 Ch. D. 388.
(*e*) 1 J. & H. 40, 50.
(*f*) [1922], 2 A. C. 473, at p. 486.
(*g*) 1 B. C. C. 274; 4 Bro. P. C. 319.
(*h*) 27 Ch. D. 196.

Mount Stuart House as heir-at-law of the testator: it was held that these chattels belonged to the plaintiff.

In *Re Penton's Settlement Trusts* (*i*) jewels were assigned to trustees upon trust to allow the same to devolve and be enjoyed, so far as the law would permit, as heirlooms along with certain settled hereditaments over which A and B had a joint power of appointment. It was held that this power must be imported into the trusts of the jewels and could be exercised over them without exercising it over the realty.

Settlement of chattels to go with a title.

Testators sometimes wish to settle chattels to go with a title, but their intention is frequently frustrated, unless they create an executory trust. The following rules may be deduced from the cases:—

(1) A gift of chattels to the Earl of E. and his successors, and to be enjoyed with and go with the title, is an absolute gift to the Earl of E., since the words "to be enjoyed with, etc.," are not sufficient to create an executory trust, nor any executed trust sufficient to cut down the Earl's interest to a life estate (*j*).

(2) A gift of chattels to trustees for the Earl of E. and his successors, to be held and settled as heirlooms, and to go with the title, creates an executory trust (*k*); in making the settlement, the Court will give the first taker an estate for life only, and will so frame and mould the limitations as not to infringe the law against perpetuities, whether or not the testator has added the words "so far as the rules of law and equity will permit."

(3) A mere gift of a chattel to Lord S. and his heirs, "for an heirloom," is not enough to create an executory trust, so that if the person who was Lord S. at the date of the will dies before the testator, the gift lapses (*l*).

Alteration made by the new law.

IV.—Effect of the New Law.—The new law has made important alterations which now make it easy to settle chattels

(*i*) [1924] 2 Ch. 192.

(*j*) *Re Johnston*, 26 Ch. D. 538, following *Rowland* v. *Morgan*, 6 Ha. 463; 2 Ph. 764 (where the bequest was to the testator's son "and his heirs, Earls of A., to be held as heirlooms"); *Re Viscount Exmouth*, 23 Ch. D. 158 (where the clause intended to postpone the vesting was held void for uncertainty); *Re Hill*, [1902] 1 Ch. 537, 807 (where the words "so far as the rules of law and equity will permit" were added). See also *Re Earl Cathcart*, 56 Sol. J. 271 (gift of property "to his successors in the titles").

(*k*) *Sackville-West* v. *Holmesdale*, L. R. 4 H. L. 543; *Re Johnston*, *supra*; and see *Harrington* v. *Harrington*, L. R. 5 H. L. 87. As to the decision in *Re Gerard*, [1906] W. N. 21, *quære*.

(*l*) *Re Whorwood*, 34 Ch. D. 446. In *Montagu* v. *Lord Inchiquin*, 23 W. R. 592, where chattels were bequeathed to A, who was then the holder of the title to be deemed heirlooms and held and enjoyed by the person for the time bearing the title, it was held that the gift did not lapse by the death of A before the testator.

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or other personal property to devolve with land. In the first place, equitable estates tail (or entailed interests as they are called) may after 1925 be created by formal words in every kind of property (*m*). Secondly, where personal estate is, after 1925, directed to be enjoyed or held with or upon trusts corresponding to trusts affecting land in which either before or after January 1, 1926, an entailed interest has been created and is subsisting, such direction shall be deemed sufficient to create a corresponding entailed interest in such personal estate (*n*). Thirdly, money or securities directed (either before or after January 1, 1926) to be held on trusts declared by reference to capital moneys arising under the Settled Land Act, 1925, will be held on the like trusts as if the same represented money arising from the sale of the settled land (*o*) in spite of any direction that the property is not to vest absolutely in any tenant in tail under the limitations of the settled land who dies under a specified age, or before the happening of a specified event, but this is to operate without prejudice to any person claiming under a disposition of any such money or securities made for valuable consideration before 1926 (*p*).

(*m*) Law of Property Act, 1925, s. 130, sub-s. 1.
(*n*) *Ib.*, s. 130, sub-s. 3.
(*o*) Settled Land Act, 1925, s. 78. For the earlier law see *Re Walker*, [1908] 2 Ch. 705.
(*p*) Law of Property (Amendment) Act, 1926, Schedule.

CHAPTER XXI.

PARTIAL INTESTACY AND RESULTING TRUSTS.

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I.—Partial Intestacy.—Total intestacy is generally the result of a person dying without leaving a valid will, but it may also occur if a person makes a will which is properly executed but becomes wholly inoperative: as where the sole legatee and executor predeceases the testator (*a*). If all the persons to whom beneficial interests are given by the will die in the testator's lifetime, but the executor survives and proves the will, there is no intestacy as to the legal estate, but there is a total intestacy as to the beneficial interest (*b*). Where a will effectually disposes of the beneficial interest in part of the testator's property, but contains no express or implied gift of the residue (*c*), or where the testator excepts certain property from the residuary gift (*d*), or the residuary gift fails to take effect, wholly or partially, by revocation, lapse (*e*), or otherwise (*f*) there is a partial intestacy.

Intestacy how caused.

(*a*) *Re Ford*, [1902] 1 Ch. 218; [1902] 2 Ch. 605; *Re Cuffe*, [1908] 2 Ch. 500.

(*b*) *Ibid.*

(*c*) As in *Re Cameron*, 26 Ch. D. 19; *post*, p. 686, note (*l*). As to implied gifts of residue by the appointment of an heir or executor, see *ante*, p. 76, *post*, p. 696.

(*d*) *Post*, p. 1007.

(*e*) *Cresswell* v. *Cheslyn*, 2 Ed. 123; *Bagwell* v. *Dry*, 1 P. W. 700; *Page* v. *Page*, 2 P. W. 489; *Re Mary Wood's Will*, 29 Bea. 236; *Skrymsher* v. *Northcote*, 1 Sw. 566; *Sykes* v. *Sykes*, L. R. 4 Eq. 200. In *Greated* v. *Greated*, 26 Bea. 621, there was a double lapse or failure, see *post*. As to the effect of a direction that a certain share of residue shall sink or fall into the residue, see *post*, p. 1017 *seq.*

(*f*) As where a trust for accumulation is void under the Thellusson Act: *Talbot* v. *Jevers*, L. R. 20 Eq. 255; *Re Travis*, [1900] 2 Ch. 541.

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Intermediate income.

As will be pointed out later, there was, before 1926, a difference between real and personal estate as regards the operation of a residuary gift, for if a residuary devise is contingent or future, the intermediate rents do not pass by the devise, but go to the heir. But a contingent or future gift of residuary personalty, or of a mixed residue of realty and personalty, carries the intermediate income (*g*).

New law.

In the case of wills coming into operation after 1925, section 175 of the Law of Property Act, 1925, now provides that a contingent residuary devise of freehold land carries the intermediate income except so far as it is otherwise expressly disposed of.

Intestacy resulting from nugatory disposition :

In *Brown* v. *Burdett* (*h*) a testatrix devised a freehold house to trustees upon trust to block up the windows, doors, etc., and keep them blocked up for twenty years, after which she devised the property to B. It was held that these trusts were ineffectual, and that there was an intestacy for twenty years from the testatrix's death.

—from cross bequests.

In *Re Valdez's Trusts* (*i*) a testator gave his residuary estate to M. and J., and in case of their decease bequeathed what he had bequeathed to them to their executors or administrators. M. and J., both predeceased the testator, J. having by her will bequeathed to the testator the residue of her property. It was held that the personal representatives of M. and J. took as tenants in common in equal shares, and that J.'s share came back to the estate of the testator, but was undisposed of by his will and devolved as if he had died intestate.

Effect of declaration without disposition.

The general rule is that a testator cannot by a mere declaration alter the mode of devolution prescribed by law in case of intestacy (*j*) : " You cannot exclude an heir-at-law or next-of-kin but by giving to somebody else " (*k*). As in *Re Holmes* (*l*), where a testator declared that all his relatives except two nieces should be excluded from all advantages and benefit under his will : it was held that the undisposed-of residue went to the statutory next-of-kin. So in *Fitch* v. *Weber* (*m*), a testatrix devised her real estate, upon trust for sale, and declared that the proceeds of sale should be held as personal and not real estate, and that they should not in any event lapse or result

(*g*) *Post*, p. 1007.
(*h*) 21 Ch. D. 667. Compare *Re Cameron*, 26 Ch. D. 19.
(*i*) 40 Ch. D. 159.
(*j*) See the principle stated *ante*, p. 400.
(*k*) *Pickering* v. *Stamford*, 3 Ves. 492; *ante*, p. 525; *Johnson* v. *Johnson*, 4 Bea. 318.
(*l*) 62 L. T. 383.
(*m*) 6 Ha. 145.

for the benefit of her heir-at-law; she made no further disposition of them, or of her residuary personal estate, and it was held that the heir-at-law was entitled to the proceeds of sale by way of resulting trust (*n*). Of course if the testatrix had made a disposition of her residuary personal estate, it might have been held that she intended it to include the proceeds of sale of the real estate, without any express direction to that effect (*o*).

Exclusion of individual.

A declaration by a testator that A shall not take any share of the testator's property, may operate as a gift by implication of the share which A would otherwise have taken, to the other persons entitled to the testator's undisposed-of property, if the intention is clear (*p*).

Statute of Distribution.

The Statute of Distribution, 1670 (*q*), s. 5 (as to hotchpot), did not apply to a partial intestacy arising from a failure of the trusts declared concerning part of a testator's residuary estate (*r*).

Intestates' Estates Act, 1890.

The Intestates' Estates Act, 1890 (*q*), did not apply to cases of partial intestacy (*s*), but it applied to cases where a man leaves a valid will which becomes wholly inoperative owing to the death of the executors and legatees, etc., during the testator's lifetime (*t*). It did not apply where the residue was given by reference to the Statutes of Distribution (*u*).

The Administration of Estates Act, 1925.

These Acts were repealed by the Administration of Estates Act, 1925, which provides a new scheme for the distribution of the property of persons dying intestate after 1925. Certain hotchpot provisions apply in cases of partial intestacy (see section 49).

Dower Act, 1833.

The Dower Act, 1833 (*q*), provided, by section 4, that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will, and by section 9, that where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein,

(*n*) In *Countess of Bristol* v. *Hungerford* (2 Vern. 645) there was a devise of real estate to be sold for payment of debts, the surplus, if any, to be deemed personal estate and to go to the testator's executors, to whom he gave £20 apiece: it seems to have been held that the executors took as trustees for the next-of-kin; see 3 P. W. 194 n.; *Fitch* v. *Weber*, 6 Ha. 145; *Gordon* v. *Atkinson*, 1 De G. & S. p. 482; *post*, p. 747.

(*o*) As in *Court* v. *Buckland*, 1 Ch. D. 605.

(*p*) *Ante*, p. 655.

(*q*) Repealed Jan. 1, 1926.

(*r*) *Re Roby*, [1907] 2 Ch. 84; [1908] 1 Ch. 77.

(*s*) *Re Twigg's Estate*, [1892] 1 Ch. 579.

(*t*) *Re Cuffe*, [1908] 2 Ch. 500.

(*u*) *Re Morgan*, [1920] 1 Ch. 196.

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to or for the benefit of his widow, she shall not be entitled to dower out of any land of her husband unless a contrary intention shall be declared by his will.

Operation of the Dower Act.

As to the effect of testamentary dispositions in barring the widow's right to dower under these sections, the following points have been decided. In *Rowland* v. *Cuthbertson* (*x*), a testator in 1864 devised his real and personal estate, subject to payment of his debts, upon trust as to one-sixth share for his wife for life; it was held by Romilly, M.R., that the land was so devised "for the benefit of" the widow within the meaning of section 9 of the Act, as to deprive her of her right to dower. And in *Lacey* v. *Hill* (*y*), where a testator by his will made in 1861, devised and bequeathed all his real and personal estate upon trust for sale and conversion, and directed his trustees to invest the proceeds, and out of the income of such investments to pay an annuity to his widow, and subject thereto to hold the investments for the benefit of his children: it was held by Jessel, M.R., that the widow's right to dower out of the freehold realty was barred because the devise on trust for sale was a disposition of the land within the meaning of section 4 of the Act, and also amounted to a gift of an estate or interest in the land for the benefit of the widow within the meaning of section 9. So in *Re Thomas* (*z*), Sir E. Kay, J., held that a gift to a widow of the income of part of the proceeds of sale of real estate is a gift to her of an interest in land within section 9 of the Act, so as to bar her claim to dower out of any part of her husband's estate.

Effect when will leaves property partially undisposed of.

II.—Resulting Trust for the Heir before 1926.—Mr. Jarman states the general rule thus (*a*): "If a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed-of interest, whether legal or equitable, devolves to the person or persons on whom the law, in the absence of disposition, casts that species of property (*b*). It is clear, therefore, that where real estate is devised in fee, upon trust for a person incapable of taking, or who is not sufficiently defined, or who dies in the testator's

Where trust resulted to the heir before 1926.

(*x*) L. R. 8 Eq. 466.
(*y*) L. R. 19 Eq. 346.
(*z*) 34 Ch. D. 166.
(*a*) (First ed.) p. 502.
(*b*) As to the apportionment between heir and next-of-kin, see *Re Cameron*, 26 Ch. D. 19, *post*, p. 686, n. (*l*).

lifetime, or who disclaims the estate, the beneficial interest in the estate so devised results to the heir-at-law (*c*).

" So, in a case (*d*) where the Earl of Harborough devised his manors, advowsons, etc., to trustees, in trust, to pay his son £1,000 a year for his life, and the rest of the profits to be laid out in land, to be settled to certain uses; Lord Hardwicke held, that the right of presentation arising from the advowsons during the son's life was a fruit undisposed of, and devolved to the heir; no other profits being given than such as might be accumulated; though, he said, if the testator had devised all the surplus rents and profits, it would have carried the right of presentation " (*e*).

If land is devised to A subject to a charge or a term of years, and the charge or term fails, A takes the benefit of the failure (*f*). But if land is devised to A, subject to an exception out of it of some interest in favour of B, and the gift to B fails, then the excepted interest goes by way of resulting trust to the heir or residuary devisee (*g*). If it is a chattel interest, the heir takes it as personalty (*h*).

(*c*) *Hartop's Case*, 1 Leon. 253; Cro. El. 243; and other cases *post*. In cases where land is devised upon trust, and the devise of the legal estate fails, the lands formerly descended to the heir charged with the trust. In the case of a testator dying since 1897, the effect of the Land Transfer Act, 1897 (now replaced by the Administration of Estates Act, 1925), is that his real estate devised upon trust passes, in the first instance, to his personal representatives as trustees for the persons by law beneficially entitled thereto, but the ultimate result is the same.

(*d*) *Sherrard* v. *Lord Harborough*, Amb. 165; see also *Kellett* v. *Kellett*, 3 Dow. 248. The paragraph to which this note belongs has been transferred from p. 505 of Mr. Jarman's text, where it seems to be out of place.

(*e*) " With this dictum agrees *Earl of Albemarle* v. *Rogers*, 2 Ves. jun. 477; 7 Br. P. C. Toml. 522, where a testator devised all his manors, messuages, lands, and hereditaments to A. for eleven years from his death; and from the end, expiration, or sooner determination of the said term, and in the meantime subject thereto, to B. and his issue in strict settlement. The term was declared to be bequeathed to A., upon trust, to receive the rents, issues, and profits of the premises, and thereout to pay certain charges therein mentioned, *paying the overplus of such monies to the testator's daughter E.* During the eleven years an avoidance occurred in an advowson forming part of the property, and the next presentation was claimed by B., as the devisee of the estates subject to the term, the trusts of which, it was said, did not comprise an interest of this description; and also by E, either as the *cestui que trust* of the residuary rents, issues, and profits, during the term, or as heir-at-law; and it was held to belong to her in the former character, the entire beneficial interest during the term, not absorbed by the charges, being given to her." (Note by Mr. Jarman.) See also *Johnstone* v. *Baber*, 6 D. M. & G. 439; but see *Martin* v. *Martin*, 12 Sim. 579.

(*f*) Where a testator is entitled to a sum of money charged on land and raisable for his benefit in any event, a different rule applies; see *Simmons* v. *Pitt*, L. R. 8 Ch. 978; *ante*, p. 365, n. (*i*).

(*g*) The cases as to charges have been already considered (*ante*, p. 416), with reference to the distinction between an exception and a charge. The cases in which land is devised to one person charged with a legacy, or the like, for the benefit of another, and the legacy fails by lapse or otherwise, are not generally treated as cases of resulting trusts; the legacy is said to sink for the benefit of the devisee. As to devises subject to terms, see *post*, p. 706.

(*h*) *Post*, p. 689.

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Doctrine of *Ackroyd* v. *Smithson*.

The doctrine established by the case of *Ackroyd* v. *Smithson* (*i*)—namely, that where land had been converted into money in accordance with the provisions of a will, and part of the proceeds remained undisposed of, it went to the heir—is an illustration of the general rule stated by Mr. Jarman. This subject is discussed in the next chapter.

Mr. Jarman continues (*k*), "On the same principle, where lands are devised upon trust for particular purposes, as for payment of debts, or with a direction to pay the rents to A. for life, and no further trust is declared, all the unexhausted beneficial interest results to the heir, as real estate undisposed of (*l*).

Question whether devisees take beneficially or not.

"This doctrine is so well settled, that if the character of trustee be plainly and unequivocally affixed to the devisee, no question can at this day be raised respecting its application; but the difficulty in these cases generally is, to determine whether it is intended that the interest in the land, *ultra* the purpose to which it is devoted, shall belong to the devisees in a fiduciary character, or for their own benefit.

Lord Eldon's statement of the principle.

"The distinction between the two classes of cases was, in *King* v. *Denison* (*m*), thus stated by Lord Eldon:—'If I give to A. and his heirs all my real estate, charged with my debts, that is a devise for a particular purpose, but not for that purpose only; if the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more. And the effect of these two modes admits just this difference: the former is a devise of an estate of inheritance, for the purpose of giving the devisee the beneficial interest, *subject* to a particular purpose; the latter is a devise *for* a particular purpose, with no intention

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(*i*) 1 Br. C. C. 503, stated *post*, p. 749.

(*k*) (First ed.), p. 502.

(*l*) *Culpepper* v. *Aston*, 2 Ch. Ca. 115, 223; *Roper* v. *Ratcliffe*, 9 Mod. 171; 2 Eq. Ca. Ab. 508; *Re Sanderson's Trust*, 3 K. & J. 497. In both the above propositions, however, it is assumed that the subject of disposition is the testator's general or residuary real estate, or that the will does not contain a residuary devise, the effect of which to pass the undisposed-of interest in particular lands is considered *post*, p. 926.

It is not, of course, necessary that there should be an express devise: thus in *Re Cameron* (26 Ch. D. 19) a testator gave same legacies and authorised his executors to realise any part of his estate to pay them; he also directed his business to be carried on until his son attained the age of thirty, but did not dispose of the profits or make any other disposition of his property, except by devising a particular house: it was held that the executors might continue to carry on the business with the real and personal estate which the testator had employed in it until the legacies were paid out of the profits, and that any surplus profits must be apportioned between the heir-at-law and next-of-kin.

(*m*) 1 V. & B. 272. This "classical" statement of the rule was cited with approval by the Court of Appeal in *Croome* v. *Croome*, 59 L. T. 582, *post*, p. 693.

to give him any beneficial interest. Where, therefore, the whole legal estate is given for the purpose of satisfying trusts expressed, and those trusts do not, in their execution, exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir. But where the whole legal interest is given for a particular purpose, with an intention to give to the devisee the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given to him.'

" In illustration of this subject, it is proposed to state a few of the leading cases, showing, first, where a trust has been held to result; and, secondly, where not.

Cases of resulting trusts.

" In *Wych* v. *Packington* (*n*), a testator, after appointing his wife S. sole executrix of his will, devised to his said dear wife, his executrix, a rent-charge of £200 per annum, out of certain lands, upon trust that she, her executors, etc., should be supplied with monies out of the rents and profits for the discharging his debts, legacies, and payments; to which end, he gave and bequeathed to her a lease for thirteen years of the said rent-charge, to commence six months after his decease. And the testator devised to his wife certain lands for life, in augmentation of her jointure; and the residue of his lands to his daughter (who was his heir-at-law) in tail. The personal estate being found sufficient to satisfy the debts and legacies, it was not necessary to resort to this fund. The House of Lords, in affirmance of a decree of the Court of Exchequer, held that the rent-charge resulted to the heir.

" So, in a case which arose on the will of Serjeant Maynard (*o*), who devised his lands to three persons, to the use of them and their heirs, upon the trusts after mentioned; and then directed the trustees, upon the death of the countess, his wife, to convey the estate to certain persons for life; but without disposing of the remainder in fee. It was contended that the devise, being to them and their heirs, upon the trusts after mentioned, imported that they should be trustees only for those purposes; and when those estates were spent, the land was to remain to them to their own use. But the L.C. held, that the remainder in fee resulted to the heir, his Lordship adverting to the circumstance that the devise was to three persons, and one of them no relation to the testator.

" It is clear that where lands are devised upon trusts for sale, the resulting trust in favour of the heir is not repelled

(*n*) 3 Br. P. C. Toml. 44. See also *Barrs* v. *Fewkes*, 2 H. & M. 60.

(*o*) *Hobart* v. *Countess of Suffolk*, 2 Vern. 644; 1 Eq. Ca. Ab. 272, pl. 7; see also *Collis* v. *Robins*, 1 De G. & S. 131; *Wills* v. *Wills*, 1 D. & War. 439; *Bird* v. *Harris*, L. R. 9 Eq. 204.

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by a mere bequest to him of a sum of money payable out of the proceeds.

Legacy to the heir does not exclude him.

"Thus (*p*), where a testator devised lands to his executors and their heirs, in trust, to be sold by them, and the survivor of them, for the best price, and with the money to pay his debts, legacies, and funeral, and among the legacies were two to his co-heirs: it was contended, on the authority of *North* v. *Crompton* (*q*), that, there being legacies to the heirs, and none to the executors, the latter must take for their own benefit; but Lord Cowper, C., held, that the trust resulted to the co-heirs, adverting to the direction to the executors to sell for the best price, which need not have been inserted if they were intended to be owners (*r*); and also the devising the estate to the survivor, which, he observed, was a further argument of its being rather a trust than an ownership.

Resulting trust in lands devised to be sold.

"Indeed, where the property is devised in trust to be sold, the point is so clear against the trustees, that a claim by them is seldom advanced (*s*); but the contest in such cases generally lies between the heir-at-law and the residuary legatee, or next-of-kin, whose respective claims are discussed in the next chapter."

Re West.

But the fact that there is a trust for sale is not conclusive. In *Re West* (*t*) a testatrix gave all her real and personal property to four persons upon trust for sale, and upon trust out of the proceeds of sale to pay debts and legacies, etc.; the will contained clauses for the indemnity and reimbursement of the "said trustees," and appointed the same four persons executors, but it contained no residuary gift; Kekewich, J., said: "There is a general devise and bequest to certain persons on trust for sale. Those words alone do not settle the question, as I might still find the trustees were entitled to take beneficially. . . . But I cannot look on that trust as mere machinery. It affords a strong indication that they are to hold the proceeds as trustees generally"; and the learned Judge held that the frame of the whole will showed that the donees were not intended to take the surplus beneficially, and that there was a resulting trust.

(*p*) *Starkey* v. *Brooks*, 1 P. W. 390; see *Randall* v. *Bookey*, 2 Vern. 425.

(*q*) "1 Ch. Ca. 196; see also *Halliday* v. *Hudson*, 3 Ves. 210; and *Countess of Bristol* v. *Hungerford*, 2 Vern. 645; 1 Eq. Ca. Ab. 272, pl. 7, stated *post*." See *ante*, p. 683, n. (*n*).

(*r*) "Why not, as there was a trust for creditors, which might have absorbed all?" (Note by Mr. Jarman.)

(*s*) See, for example, *Watson* v. *Hayes*, 5 My. & Cr. 125.

(*t*) [1900] 1 Ch. 84.

Barrs v. *Fewkes*.

In *Barrs* v. *Fewkes* (*u*) a testator appointed A to be his executor, and after making various bequests gave the rest and residue of all his real and personal estates to A "to enable him to carry into effect the purposes of" the will: it was held that there was a resulting trust for the heir of the real estate.

Estates *pur auter vie*.

In *Northen* v. *Carnegie* (*x*) incorporeal hereditaments were granted to C. his heirs and assigns *pur auter vie*; C. conveyed them to trustees, their executors, administrators and assigns upon trusts which failed as to one third part; it was held that there was a resulting trust of the beneficial interest for the settlor's co-heiresses. This decision is criticised by Mr. Theobald (Wills, 8th ed., p. 591), but it is submitted that it is correct.

As to chattel interest devolving upon the heir.

"And here it may be observed," continues Mr. Jarman (*y*), "that where the portion of real estate left undisposed of is a chattel interest, it devolves upon the heir as personalty, and is transmissible to his personal representative (*z*).

Cases in which devisees held to take beneficially.

"We now proceed to the cases in which a trust has been held not to result, there being an apparent intention to give the devisee as well the beneficial interest as the legal estate.

Effect of direction to sell to certain persons.

"In *Hill* v. *Bishop of London* (*a*) a testator devised his perpetual advowson of B., in the county of H., to his honoured mother-in-law G. S., willing and desiring her to sell and dispose thereof to certain colleges. Upon the refusal of one, the offer was to be made to another, in a prescribed order. Item, he gave to his said mother-in-law his freehold lands in the parish of O., and to her heirs and assigns for ever. It was held, that the beneficial interest in the lands (*b*) included in the first devise did not result to the heir. 'The general rule,' said Lord Hardwicke, 'that, where lands are devised for a particular purpose, what remains after that purpose is satisfied, results, admits of several exceptions. If J. S. devise lands to H., to sell them to B. for the particular advantage of B., that advantage is the only purpose to be served, according to the intent of the testator, and to be satisfied by the mere act of selling, let the money go where it will; yet there is no precedent

(*u*) 2 H. & M. 60.
(*x*) 4 Dr. 587.
(*y*) (First ed.), p. 506.
(*z*) *Levet* v. *Needham*, 2 Vern. 138; see also *Wych* v. *Packington*, 3 Br. P. C. Toml. 44, stated *ante*, p. 687; *Hewitt* v. *Wright*, 1 Br. C. C. 86; *Sewell* v. *Denny*, 10 Bea. 315; *Burley* v. *Evelyn*, 16 Sim. 290; *Whitehead* v. *Bennett*, 18 Jur. 140.
(*a*) 1 Atk. 618.
(*b*) Thus in Mr. Jarman's text; but "lands" is clearly a misprint for "advowson."

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for a resulting trust in such a case. Nor is there any warrant, from the words or intent of the testator, to say that this devise severs the beneficial interest: it is only an injunction on the devisee to enjoy the thing devised in a particular manner. If A. devises lands to J. S., to sell for the best price to B., or to lease for three years at such a fine, there is no resulting trust.' There were in this case, his Lordship observed, two objects of the testator's benevolence, G. S. and the colleges.

Word "trust" not necessary in creating one.

"Lord Hardwicke adverted also to the circumstance that the word *trust* was not made use of; but this, though not immaterial, is by no means conclusive; for a trust may be created without that word, if such an intention can be collected from the whole will (*c*).

Distinction between a devisee *for*, and *subject to*, a particular purpose.

"His Lordship's statement of the general rule may seem to clash with Lord Eldon's, before cited. He appears to have confounded the distinction, so clearly marked by Lord Eldon, between a devise *for* (*d*), and a devise *subject to*, a particular purpose; but, as the case before Lord Hardwicke seems to belong to the latter class, it is in accordance with that distinction. The frame of the devise and the context (for it was immediately followed by a devise, clearly beneficial, to the same person) certainly favoured the construction adopted. The case suggested by his Lordship, of a devise to A to sell, for the best price, to B, perhaps, is more open to doubt. He admitted, however, that, under a devise of lands to be sold for payment of debts, there was a clear resulting trust.

Effect of expressions importing benefit to the devisee.

"The resulting trust for the heir, in lands devised for a particular purpose, is excluded, where the devise contains expressions importing an intention to confer on the devisee a benefit.

"Thus (*e*), where a testator, having given 5*l*. to his brother, (who was his heir,) made and constituted his dearly-beloved wife his sole executrix and *heiress of all his lands* and real and personal estate, to sell and dispose thereof at pleasure, and to pay his debts and legacies, L. C. King held, she was not, after payment of debts, a trustee for the heir. He said that the devise that the wife should be sole heiress of the real estate,

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(*c*) *Halliday* v. *Hudson*, 3 Ves. 210; and see *King* v. *Denison*, 1 Ves. & B. 273; *Saltmarsh* v. *Barrett*, 29 Bea. 474; 3 D. F. & J. 279 (on the word "charged"); *Barrs* v. *Fewkes*, 2 H. & M. 60 ("to enable"); *Bird* v. *Harris*, L. R. 9 Eq. 204 ("in consideration"). And a trust will not be created by the word "trust," if an intention not to do so appears by the whole will: *Hughes* v. *Evans*, *Williams* v. *Roberts*, and *Clarke* v. *Hilton*, all referred to *post*, pp. 691, 697, 699.

(*d*) See *Abrams* v. *Winshup*, 3 Russ. 350, where the word "for" was read as "charged with."

(*e*) *Rogers* v. *Rogers*, 3 P. W. 193; Cas. t. Talb. 268.

Of expressions of kindness.

did, in every respect, place her in the stead of the heir, and not as a trustee for him. His Lordship observed, that it was plainer by reason of the language of tenderness, his 'dearly-beloved wife,' which must have intended something beneficial to her, and not what would be a trouble only; and what made it still stronger was, that the heir had a legacy.

"That these two circumstances alone are not sufficient, is quite clear. The former occurred in *Wych* v. *Packington* (*f*), where the expression was 'my dear wife,' and yet the trust was held to result; and the latter, in *Randall* v. *Bookey* (*g*), where a legacy to the heir was decided not to rebut the inference of a resulting trust.

Of describing devisee by relationship.

"Where the devisee is merely described by the relationship, as 'my cousin,' 'my brother,' unaccompanied by any particular expression of kindness, the argument is still less strong, the designation being merely part of his description; though certainly, in *Coningham* v. *Mellish* (*h*), the fact of the devisee being described as 'my cousin,' and that of his being as nearly related to the testator as the heir, seem to have formed the grounds of the determination. In the cases of that period, however, the doctrine of resulting trusts was not so invariably and steadily maintained as it now is; and many positions to be found in them are inconsistent with the rules at present established. Such a description of the devisee is certainly a circumstance to be attended to, and was so referred to in a case by Lord Eldon, in reference to *Coningham* v. *Mellish* (*i*); but that it would now be allowed the weight which was given it in that case, is not probable."

No trust, though word "trust" used.

Where the gift to the devisee was in the first instance expressly upon trust, and the trust afterwards declared did not absorb the whole property, yet, on the whole, the testator having described the devisee as his most dutiful and respectful nephew, and having expressly declared that the heir should take nothing except a provision made for him by the will, it was held that the devisee took beneficially subject to the trusts declared (*k*).

As to the expressed purpose of the devise being beneficial or not to the devisee.

"In *Rogers* v. *Rogers*," continues Mr. Jarman (*l*), "the purpose expressed, namely, the payment of debts and legacies,

(*f*) Stated *ante*, p. 687.

(*g*) 2 Vern. 425; 1 Eq. Ca. Ab. 272, pl. 4; and see *Hughes* v. *Evans*, 13 Sim. 504.

(*h*) Pre. Ch. 31; 1 Eq. Ca. Ab. 273, pl. 8; 2 Vern. 247 (*Cunningham* v. *Mellish*).

(*i*) See *King* v. *Denison*, 1 V. & B. 274. See also *per* Wood, V.-C., *Barrs* v. *Fewkes*, 2 H. & M. 67.

(*k*) *Hughes* v. *Evans*, 13 Sim. 496.

(*l*) First ed., p. 509.

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was not beneficial to the devisee; and, therefore, unless she had taken the surplus, she would have derived no benefit from the devise. It has been truly said 'that where the purpose expressed is something in favour of the party to whom the bequest is made, the presumption is rather stronger that the benefit specified is the only benefit which he is intended to derive from the bequest' (*m*).

"In *Dawson* v. *Clarke* (*n*), a testator gave to his friends A. and B. all his real and personal estate, to hold to them, their heirs, executors, administrators, and assigns, upon trust in the first place to pay, and charged and chargeable with all his just debts and funeral expenses and the legacies thereinafter bequeathed. The testator, after bequeathing several legacies, appointed A. and B. executors. Lord Eldon, C. :—'The question is, whether, upon the whole will, this is to be taken as a devise and bequest to these executors, with reference to their office, upon a trust to pay; or as giving them the absolute property, subject only to a charge; and I think the latter was the intention.'

Lord Langdale's remark on *Dawson* v. *Clarke*.

"Of this case Lord Langdale, M.R. (*o*), has observed that Lord Eldon gave effect to the words 'charged and chargeable' (which he had placed in opposition to the words 'upon trust'), on some ground which does not appear in the report. It might be that he considered the last words in the will as explanatory of the first.

A devise subject to certain annuities.

"The general doctrine was much discussed in *King* v. *Denison* (*p*), where a testatrix devised her real estate to her cousin Mary A., wife of R. A., and to her cousin Arabella J., and their heirs and assigns for ever; *subject, nevertheless, to and chargeable with*, the payment of the annuities thereinafter mentioned; and she bequeathed her personal estate to three other persons, subject to, and chargeable with, her debts and legacies; and gave such three persons equal legacies. Lord Eldon held, that the devisees of the real estate were not trustees, after paying the annuities, for the heir-at-law; his Lordship considering the intention to be (according to the distinction stated by him, already quoted), that they should not take merely *for the purpose of paying* those annuities, but beneficially, *subject to* them.

(*m*) *Per* Sir W. Grant, in *Walton* v. *Walton*, 14 Ves. 322.

(*n*) 15 Ves. 409; 18 Ves. 247. This case was decided at the Rolls, in reference exclusively to the personal estate.

(*o*) 1 Kee. 324.

(*p*) 1 V. & B. 260.

"The Court of King's Bench had made a similar decision upon the same will (*q*).

Circumstance of devisees being a married woman and an infant

"It happened in this case that one of the devisees was a married woman, and the other an infant of fifteen: persons, therefore, ill adapted to be trustees. But, though Lord Eldon admitted these were circumstances to be attended to (*r*), yet, he observed, that, if they were trustees upon the whole context, he could not say that they were not so on that ground; and upon the singularity that the testatrix had given to these cousins in preference to nearer relations, a sister and aunt, his Lordship observed, that the answer was, she had made the disposition.

—and not testator's nearest relatives.

Of their being trustees of the personal estate.

"Another circumstance in the case was, that the testatrix had used the same expression, 'subject and chargeable,' in the bequest of the personal estate [to her executors], of which it was contended they were trustees, in consequence of having equal legacies given them; but Lord Eldon observed, that, admitting this construction as to the personalty, which he thought doubtful upon the cases, it did not follow that the same words, in different parts of the will, applied to a different subject, were to receive the same construction. It was only the same as if she had said that the executors should not take the personalty beneficially, but had made no such declaration as to the real estate" (*s*).

Croome v. *Croome*.

The rule laid down by Lord Eldon in *King* v. *Denison* was approved and applied by the Court of Appeal in *Croome* v. *Croome* (*t*). There a testator gave to E. all his real estate, "upon trust nevertheless to pay thereout" certain specified sums; the will contained a bequest of the personal estate to E. and other persons, and appointed E. executor: it was held that E. took the real estate beneficially, subject to the payment of the specified sums.

Re Foord.

In *Re Foord* (*u*), where the bequest was as follows: "All my effects including rubber and all other shares I leave absolutely to my sister M. J. in trust to pay my wife per annum three hundred pounds"; it was held that the sister was entitled to the beneficial interest after payment of the annuity.

(*q*) *Smith* d. *Dennison* v. *King*, 16 East, 283. See also the cases as to personalty, discussed in the next Section.

(*r*) See *Blinkhorn* v. *Feast*, 2 Ves. Sen. 27.

(*s*) As to the case of *Countess of Bristol* v. *Hungerford*, 2 Vern. 645; see *ante*, p. 683, n. (*n*).

(*t*) 59 L. T. 582; affirmed in D. P. 61 L. T. 814, as a matter of the construction of the particular will.

(*u*) [1922] 2 Ch. 519.

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As to resulting trust in lands given to charity.

"It should be noticed," says Mr. Jarman (*x*), "that an exception to the doctrine of resulting trusts exists in regard to gifts to charity; the rule being, that where lands, or the rents of lands, are given to charitable purposes, which at the time exhaust, or are represented to exhaust, the whole rents, and those rents increase in amount, the excess arising from such augmentation shall be appropriated to charity, and not go, by way of resulting trust to the heir-at-law (*y*).

"It has been observed by Lord Hardwicke (*z*) and Lord Eldon (*a*), that, at the time this doctrine was established, the right of the heir-at-law under a resulting trust was not sufficiently understood, or it never could have been adopted. Both these great Judges, however, acknowledged it to be a principle not now to be shaken.

"But, if a man give an estate to trustees, and take notice that the payments are less than the amount of the rents, no case has gone so far as to say that the *cestui que trust*, even in the case of a charity, is entitled to the surplus. There would either be a resulting trust, or it would belong to the person who takes the estate" (*b*).

Apportionment.

If the original rents were divisible among several objects, the general principle is that any increase will be apportioned among them, but this is a matter for the discretion of the Court (*c*).

And if a testator gives property to a corporation, as to a specific part of the income upon charitable trusts, and as to the residue of the income (specifying the amount) for the benefit of the corporation, and the income afterwards increases, the

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(*x*) First ed., p. 512.

(*y*) *Thetford School Case*, 8 Co. 130; Duke's Ch. Uses, 71; *Sutton Colefield's Case*, 10 Rep. 31; Duke, 68; *Att.-Gen.* v. *Johnson*, Amb. 190; *Att.-Gen.* v. *Sparks*, Amb. 201; *Att.-Gen.* v. *Haberdashers' Company*, 4 Br. C. C. 103; S. C. *nom. Att.-Gen.* v. *Tonna*, 2 Ves. Jun. 1; *Att.-Gen.* v. *Coventry*, 2 Vern. 397, 713; 3 Madd. 353; 2 J. & W. 305 n.; see also *Re Jortin*, 7 Ves. 340; *Att.-Gen.* v. *Wansay*, 15 *ib.* 231; *Re Ashton's Charity*, 27 Bea. 115; *Att.Gen.* v. *Wax Chandlers' Company*, L. R. 6 H. L. 1; *Merchant Taylors' Co.* v. *Att.-Gen.*, L. R. 6 Ch. 512; *Aberdeen University* v. *Irvine*, L. R. 1 H. L. Sc. 289, and the cases on charitable trusts of personalty, *post*, p. 700.

(*z*) Amb. 190.

(*a*) 2 J. & W. 307.

(*b*) Lord Eldon, in *Att.-Gen.* v. *Mayor of Bristol*, 2 J. & W. 307; and *Att.-Gen.* v. *Skinners' Company*, 2 Russ. 443; *Att.-Gen.* v. *Cordwainers' Co.*, 3 My. & K. 534. See also *Mayor of Beverley* v. *Att.-Gen.*, 6 H. L. C. 310. "But as charitable dispositions of lands by will are prohibited by the statute of 9 Geo. 2, c. 36 (*ante*, p. 237), unless in favour of certain objects, this question rarely occurs, except under wills which are prior to the statute." (Note by Mr. Jarman.) But see now the Mortmain, etc. Act, 1891, *ante*, p. 243.

(*c*) *Att.-Gen.* v. *Jesus College*, 29 Bea. 163; *Att.-Gen.* v. *Marchant*, L. R. 3 Eq. 424; *Re Campden Charities*, 18 Ch. D. 310.

increase will be apportioned (*d*). But the gift may be so expressed that the corporation takes the whole income, subject to the payment thereout of certain definite sums for charity, and in that case any increase in the income goes to the corporation (*e*).

Two sets of trustees.

Where there are two sets of trustees and all the beneficial trusts fail, the question may arise which set of trustees is entitled to the legal estate and the advantages accruing from it. In *Onslow* v. *Wallis* (*f*) land was held under a deed in trust for L. S. in fee. L. S. by her will devised the land to trustees upon trust for sale and out of the proceeds to pay debts and legacies, the legacies being specified in a certain paper marked A. This paper was not forthcoming. The trustee under the deed claimed to be entitled to retain the land for his own benefit, subject to the testatrix's debts, which he offered to pay, but it was held that he was bound to convey the land to the trustees of the will. In *Re Lashmar* (*g*), however, B was entitled, subject to certain life interests, to an equitable reversion in fee, in land vested in the trustees of A's will; B devised his real estate to trustees upon trusts which failed before the reversion fell into possession: it was held that the trustees of B's will were not entitled to call for a conveyance from the trustees of A's will. The Court of Appeal said that the decision in *Onslow* v. *Wallis* turned on the fact that in that case the trustee had duties to perform. In neither case did the Intestates Estates Act, 1884, apply. This Act, which extends the law of escheat to equitable interests in real estate, applies to the proceeds of sale of land devised upon a trust to pay debts, legacies, etc. (*h*). Escheat is now abolished by section 45, sub-section 1 (d) of the Administration of Estates Act, 1925; in default of any person who takes an absolute interest in the residuary estate of an intestate the Crown takes as *bona vacantia* in lieu of any right of escheat (section 46, sub-section 1 (vi)).

Escheat.

Bona vacantia.

(*d*) *Att.-Gen.* v. *Coopers' Co.*, 3 Bea. 29; *Att.-Gen.* v. *Drapers' Co.*, 4 Bea. 67.

(*e*) *Mercers' Company* v. *Att.-Gen.*, 2 Bli. (N.S.) 165; *Att.-Gen.* v. *Smythies*, 2 R. & M. 717; *Att.-Gen.* v. *Bristol Corp.*, 2 J. & W. 294; *Att.-Gen.* v. *Brazenose Coll.*, 2 Cl. & F. 295; *Att.-Gen.* v. *Cordwainers' Co.*, 3 My. & K. 534; *Att.-Gen.* v. *Grocers' Co.*, 6 Bea. 526; *Att.-Gen.* v. *Trinity Coll.*, 24 Bea. 383; *Southmolton Corp.* v. *Att.-Gen.*, 5 H. L. C. 1; *Beverley Corp.* v. *Att.-Gen.*, 6 H. L. C. 310; *Att.-Gen.* v. *Dean, etc., of Windsor*, 8 H. L. C. 369; *Re Rosenblum*, 131 L. T. 21 (no resulting trust to heir-at-law or next-of-kin).

(*f*) 1 Mac. & G. 506.

(*g*) [1891] 1 Ch. 258.

(*h*) *Re Wood*, [1896] 2 Ch. 596.

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III.—Resulting Trust for Next-of-Kin.—The general principle has been already stated by Mr. Jarman, that "if a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed-of interest, whether legal or equitable, devolves to the person or persons on whom the law, in the absence of disposition, casts that species of property" (*i*). Thus where a testator gives his real and personal estate upon trust for conversion, and only partially disposes of the beneficial interest, there is a resulting trust for the next-of-kin of the undisposed of residue, so far as it arises from the personal estate (*k*). The same rule applies where there is a trust for the conversion of money into land, and the objects for which conversion is directed partly fail (*l*).

Charge on real estate.

Where a testator is entitled to a sum of money charged on real estate, and raisable for his benefit in any event, it is personal estate, and if part of it is undisposed of, it goes to his next-of-kin and does not sink for the benefit of the estate (*m*). But if the testator is entitled both to the estate and to the charge, and makes a disposition of the estate, it is a question of intention whether the charge merges in the estate, or is kept alive for the benefit of the testator's personal estate (*n*).

When executor trustee of undisposed of residue for next-of-kin.

Before the passing of the Executors Act, 1830, the presumption was that if a testator appointed an executor, he meant him to take beneficially all personal property not disposed of by the will. Since the Act, an executor is a trustee for the next-of-kin of any residue not expressly disposed of by the will (*o*), unless it appears by the will that he was intended to take the residue beneficially (*p*). If, however, there are no next-of-kin, the presumption in favour of the executor arose (before 1926) as under the old law, but it might be rebutted,

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(*i*) *Ante*, p. 684.

(*k*) *Robinson* v. *Taylor*, 2 Br. C. C. 589. Now the resulting trust of both realty and personalty will be for the persons entitled under the Administration of Estates Act, 1925.

(*l*) *Post*, Chap. XXII, p. 759.

(*m*) *Simmons* v. *Pitt*, L. R. 8 Ch. 978, *ante*, p. 365, n. (*i*).

(*n*) *Johnson* v. *Webster*, 4 D. M. & G. 474 (deed); *Re Duke of Somerset*, 55 L. T. 753; *Price* v. *John*, [1905] 1 Ch. 744. See also *Re Hole*, [1906] 1 Ch. 673; *Re Gibbon*, [1909] 1 Ch. 367. These cases are also referred to *post*, p. 944.

(*o*) The executor does not, under this doctrine, take the whole of what is commonly called "residue," for he does not take lapsed legacies or property ineffectually disposed of; see the cases cited, *ante*, p. 474.

(*p*) Sometimes an apportionment between heir and next-of-kin is necessary, as in *Re Cameron*, 26 Ch. D. 19, *ante*, p. 686, n. (*l*).

in which case the executor was trustee for the Crown (*q*). *Prima facie*, therefore, an executor was not beneficially entitled to any property not expressly disposed of by the will, even if the terms of the will showed that the testator considered that it disposed of all his property (*r*). But an intention that the executor should take beneficially may appear from the general scheme of the will (*s*).

Since 1925 the executor's right is taken away by section 46, sub-section 1 (vi) of the Administration of Estates Act, 1925.

Where residue expressly bequeathed.

If a testator expressly bequeaths the residue of his personal estate, the question whether the residuary legatee is to take beneficially or not is a question of construction, to be decided on the language of the testator. The question generally arises where the residuary legatee is also appointed executor (*t*). In the case of *Dawson* v. *Clarke* (*u*), referred to above by Mr. Jarman, the personal estate was bequeathed to two persons upon certain trusts, which did not exhaust the beneficial interest, and they were afterwards appointed executors : it was held that they took the residue beneficially (*x*). *Wood* v. *Cox* (*y*), *Romans* v. *Mitchell* (*z*), *Re Henshaw* (*a*), and *Williams* v. *Roberts* (*b*), were similarly decided. So in *Williams* v. *Arkle* (*c*), a testator appointed his friend G. A. executor and trustee, and bequeathed to him a legacy of £1,000; he also bequeathed various legacies and annuities to his wife and near relatives and other persons, and gave all his real estate and the residue of his personal estate to G. A. : it was held from the general scheme of the will that an intention appeared that G. A. should take the real and residuary personal

Williams v. *Arkle.*

(*q*) *Middleton* v. *Spicer*, 1 Br. C. C. 201; *Johnstone* v. *Hamilton*, 11 Jur. (N.S.) 777; *Cradock* v. *Owen*, 2 Sm. & G. 241; *Taylor* v. *Haygarth*, 14 Sim. 8; *Re Knowles*, 28 W. R. 975, and other cases cited *ante*, p. 475 *seq.* *Prima facie* the presumption is rebutted if the testator bequeaths a legacy to a sole executor or equal legacies to several executors; and this counter presumption may in its turn be rebutted by parol evidence. The cases are referred to in Chap. XV, *ante*, pp. 474 *seq.*

(*r*) *Juler* v. *Juler*, 29 Bea. 34; *Travers* v. *Travers*, L. R. 14 Eq. 275.

(*s*) *Harrison* v. *Harrison*, 2 H. & M. 237; *Hillersdon* v. *Grove*, 21 Bea. 518; *Fuge* v. *Fuge*, 27 L. R. Ir. 59; *Williams* v. *Arkle*, L. R. 7 H. L. 606.

(*t*) In *Hillersdon* v. *Grove*, 21 Bea. 518, the residue was given "to my executors, A and B"; their right to take beneficially does not appear to have been questioned. In *Parsons* v. *Saffery*, 9 Pr. 578, where a similar construction prevailed, the wording of the will was very special.

(*u*) 18 Ves. 247.

(*x*) See further as to gifts to executors beneficially, *post*, pp. 1585 *seq.*

(*y*) 2 My. & Cr. 684.

(*z*) 15 W. R. 552.

(*a*) 34 L. J. Ch. 98.

(*b*) 27 L. J. Ch. 177; followed in *Morrison* v. *M'Ferran*, [1901] 1 Ir. 360. As to the effect of expressions of kindness, see *ante*, p. 691.

(*c*) L. R. 7 H. L. 606.

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estate beneficially. But in *Mapp* v. *Elcock* (*d*) the House of Lords, while approving the reasoning of Lord Eldon in *Dawson* v. *Clarke*, held, on the construction of the will in the case before them, that the executors were trustees for the next-of-kin. A similar construction prevailed in *Mullen* v. *Bowman* (*e*).

"Use and benefit."

In *Wood* v. *Cox* (*supra*), the construction was aided by the fact that the gift was to the residuary legatees "for their own use and benefit" (*f*). But in the case of a gift to a married woman "for her sole use and benefit, independent of her husband," these words may be held to indicate that she is to take as if she were a *feme sole*, and not necessarily for her own benefit (*g*).

Provisions inconsistent with executors taking beneficially.

Although the fact that a testator has bequeathed legacies to his executors is generally sufficient to prevent them from taking the residue beneficially by virtue of their office, this rule does not, it seems, apply where the residue is expressly bequeathed to them (*h*). In *Saltmarsh* v. *Barrett* (*i*), however, Turner, L.J., in deciding against the executors, laid considerable stress on the bequest of the legacies, and also on a provision contained in the will for the trustees' indemnity (*k*).

If a testator gives the residue to his executors for such purposes as they think fit, they hold it as trustees for the next-of-kin (*l*).

Executors Act, 1830.

After the passing of the Executors Act, 1830, a doubt existed for some time, whether the Act had introduced any new principle of construction in cases where residuary personal estate is bequeathed to executors for purposes which do not exhaust the beneficial interest (*m*); but it has been settled that

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(*d*) 2 Ph. 793 (*Ellcock* v. *Mapp*); 3 H. L. C. 492.

(*e*) 1 Coll. 197. See also *Southouse* v. *Bate*, 2 V. & B. 396; *Andrew* v. *Andrew*, 1 Coll. 686; *Barrs* v. *Fewkes*, 2 H. & M. 60, *ante*, p. 689; *Briggs* v. *Penny*, 3 Mac. & G. 546; *Read* v. *Stedman*, 26 Bea. 495; and *Dacre* v. *Patrickson*, 1 Dr. & Sm. 182 and *Re Jones*, [1925] 1 Ch. 340, where the Crown took in default of next-of-kin. *Re Roby*, [1907] 2 Ch. 84; [1908] 1 Ch. 71, was a clear case.

(*f*) Compare *Irvine* v. *Sullivan*, and *Gray* v. *Gray*, *post*, p. 699.

(*g*) *Stubbs* v. *Sargon*, 3 My. & Cr. 507; *Re Haly's Trust*, 23 L. R. Ir. 130. This construction may be affected by the Married Women's Property Acts in cases falling within them.

(*h*) *Re Henshaw*, 34 L. J. Ch. 98; *Hillersdon* v. *Grove*, 21 Bea. 518. As to *Gibbs* v. *Rumsey*, 2 V. & B. 294, see *ante*, p. 458, n. (*y*).

(*i*) 3 D. F. & J. 279.

(*k*) Compare *Romans* v. *Mitchell*, 15 W. R. 552.

(*l*) *Vezey* v. *Jamson*, 1 S. & St. 69; *Fowler* v. *Garlike*, 1 R. & My. 232; *Buckle* v. *Bristow*, 10 Jur. (N.S.) 1095; *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381; *Fenton* v. *Nevin*, 31 L. R. Ir. 478; *Balfe* v. *Halpenny*, [1904] 1 Ir. R. 486; *Re Chapman*, [1922] 2 Ch. 479, distinguishing *Re Howell*, [1915] 1 Ch. 241 ("at his own disposal"). As to *Gibbs* v. *Rumsey*, 2 V. & B. 294, see *Ellis* v. *Selby*, 1 M. & Cr. 286; *Buckle* v. *Bristow*, *supra*.

(*m*) *Love* v. *Gaze*, 8 Bea. 472; *Saltmarsh* v. *Barrett*, 3 D. F. & J. 279; *Andrew* v. *Andrew*, 1 Coll. 686.

the Act had no application in such cases (*n*). An executor who is a trustees for the next-of-kin by virtue of the Act is not an express trustee (*o*).

Where residuary legatee is not executor, or not sole executor.

Where a testator bequeaths his residuary personal estate to a person who is not an executor, or is only one of two or more executors, for specified purposes, which do not exhaust the beneficial interest, the question may arise whether the legatee is intended to take the surplus for his own benefit, or whether he holds it subject to a resulting trust for the next-of-kin. The principle above stated as applicable to devises of real estate (*p*), seems to apply to bequests of personalty (*q*). In *Clarke* v. *Hilton* (*r*) a testator gave all his personal estate to his grandson, J. C. H., his executors, administrators and assigns, "subject to the payment of debts, legacies, and personal expenses, and to the trusts hereinafter contained," upon trust to convert and "to stand possessed of the said trust moneys," upon trusts which did not exhaust the funds; it was held that the grandson took the residue beneficially (*s*). Again, in *Irvine* v. *Sullivan* (*t*), the residue was given to the executors upon trust to convert and after payment of debts, etc., to pay the net residue to D. "to whom I give and bequeath the same absolutely, trusting that she will carry out my wishes": subject to the payments directed by the testator, it was held that D. took the residue beneficially. Much stress was laid on the word "absolutely." So in *Morrison* v. *M'Ferran* (*u*), where the residuary legatee was one of two executors. On the other hand, in *Re West* (*x*), the residuary legatees were held to be trustees of the surplus personal estate for the testator's next-of-kin. In this case, however, the property was given to them upon trust for sale, and they were also executors.

Clarke v. *Hilton.*

The distinction is between a gift for a particular purpose only, and a gift subject to the performance of a particular purpose.

(*n*) *Williams* v. *Arkle*, L. R. 7 H. L. 606; *Re Roby*, [1907] 2 Ch. 84; [1908] 1 Ch. 71.

(*o*) *Re Lacy*, [1899] 2 Ch. 149; *Re M'Causland's Trusts*, [1908] 1 Ir. R. 327.

(*p*) *Ante*, pp. 686 *seq.*

(*q*) *Fenton* v. *Hawkins*, 9 W. R. 300; *Cary* v. *Cary*, 2 Sch. & L. 173.

(*r*) L. R. 2 Eq. 810.

(*s*) The testator appointed four persons, including the grandson, to be his executors, but this fact does not appear to have affected the construction.

(*t*) L. R. 8 Eq. 673. Compare *Gray* v. *Gray*, 11 Ir. Ch. R. 218.

(*u*) [1901] 1 Ir. R. 360.

(*x*) [1900] 1 Ch. 84, stated *ante*, p. 688. Compare *Stubbs* v. *Sargon*, 3 My. & Cr. 507, *ante*, p. 456.

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Charity.

The general principle stated above with reference to real estate devised for charitable purposes (*y*), applies also to personalty. Accordingly, where a testator bequeathed a sum of money for charitable purposes to be applied in a manner which did not exhaust the whole fund, it was held that the surplus was nevertheless dedicated to the general purposes indicated by the testator (*z*).

Where whole trust is indefinite.

In addition to the cases above mentioned, reference may here be made to that class of cases in which the question arises whether the testator intends to create a trust at all; if he does, a further question may arise whether he has indicated the objects of the trust with sufficient clearness, or whether they are so indefinite that the trust fails to take effect, and there is a resulting trust for the residuary legatee or next-of-kin. These questions are discussed in Chapter XXIV, in connection with the doctrine of precatory trusts.

Destination of particular estates void in their creation.

IV.—Acceleration of Future Interests.—(1) *As to Realty.*—"Another question," continues Mr. Jarman (*a*), "which has been agitated between the heir and devisee is, whether if, in a series of consecutive limitations, a particular estate be void in its creation from being limited to a person incapable by law or refusing to take, the remainders immediately expectant on such estate are accelerated, or the interest in question descends to the testator's heir-at-law as real estate undisposed of.

Ulterior estate held to be accelerated.

"The early authorities are clearly in favour of the acceleration. Thus, it is laid down in Perkins (*b*), that, 'if a man, seised of land devisable in fee, devise it to a monk for life, the remainder to a stranger in fee, and the devisor dies, the monk being alive, in this case the remainder shall take effect presently.'

"So it was held by Gawdy, in *Fuller* v. *Fuller* (*c*), (though the case did not raise the point,) that if the devisee of an estate tail refuse, the devisee in remainder shall take immediately. And the same point, in regard to a devisee for life, was maintained *arguendo* in *Archbishop Cranmer's Case*" (*d*).

(*y*) *Ante*, p. 694.

(*z*) *Att.-Gen.* v. *Drapers' Co.*, 2 Bea. 508; *Bishop of Hereford* v. *Adams*, 7 Ves. 324; *Att.-Gen.* v. *Earl of Winchelsea*, 3 Br. C. C. 374.

(*a*) First ed., p. 513.

(*b*) Section 567. See also sections 568, 569; and Shepp. Touchst. 435, 451.

(*c*) Cro. Eliz. 422. So where the devisee in tail died, though he left issue, *Hutton* v. *Simpson*, 2 Vern. 722; but see now 1 Vict. c. 26, s. 32.

(*d*) Dy. 310 a.

And if land be devised to A for life with remainder over, and the devise to A is void under section 15 of the Wills Act, the remainder takes effect at once (*e*). The same rule applies if a devise of a life estate is revoked by the testator (*f*).

Where devise of life estate is void or revoked.

"The doctrine," as Mr. Jarman points out (*g*), "evidently proceeds upon the supposition that, though the ulterior devise is in terms not to take effect in possession until the decease of the prior devisee, if tenant for life, or his decease without issue, if tenant in tail, yet that, in point of fact, it is to be read as a limitation of a remainder, to take effect in every event which removes the prior estate out of the way. Such a principle is familiar in its application to the case of an estate for life being determined by forfeiture." In *Craven* v. *Brady* (*h*) real estate was devised to A for life, with a proviso that if she made any voluntary or involuntary alienation of the income, her life estate should determine as if she were dead; she forfeited her estate, and it was held that the remainder was accelerated.

Forfeiture.

Where, however, the particular estate which fails is followed by a contingent interest, and that by a vested interest, the ultimate interest will not be accelerated by the failure of the particular estate, but there will be an intestacy until it is ascertained whether the contingent interest will take effect or not (*i*). Thus in *Re Townsend's Estate* (*k*) real estate was devised upon trust to convert and pay the income of the proceeds to A for life and after his death upon trust for his children in equal shares, with a gift over in case A should die without leaving issue; the will had been attested by A's wife, so that the gift of his life interest was void; A had no children; it was held that until A had a child, the interests subsequent to A's life estate could not be accelerated, and during the life of A, so long as he had no children, the income belonged to the heir-at-law of the testatrix (*l*).

Particular estate followed by contingent interest.

(*e*) *Jull* v. *Jacobs*, 3 Ch. D. 703.

(*f*) *Lainson* v. *Lainson*, 18 Bea. 1; 5 D. M. & G. 754; *Re Johnson*, 68 L. T. 20.

(*g*) First ed., p. 513.

(*h*) L. R. 4 Eq. 209; 4 Ch. 296. Part of the property belonged to the testator, and as to the rest he had a power of appointment. As regards the part which belonged to him, it seems that the remainder would have been accelerated irrespectively of the special terms of the proviso. See *post*, p. 707.

(*i*) *Carrick* v. *Errington*, 5 Br. P. C. 391. In this case the settlement was of an equitable fee simple by deed; see *Hopkins* v. *Hopkins*, 1 Atk. 597.

(*k*) 34 Ch. D. 357.

(*l*) See also *Chambers* v. *Brailsford*, 18 Ves. 375; *Andrew* v. *Andrew*, 1 Ch. D. 410. Lord Westbury's decision in *Sidney* v. *Wilmer* (4 D. J. & S. 84), must be considered as overruled by *Hodgson* v. *Earl of Bective* (1 H. & M. 376); see *Wade-Gery* v. *Handley*, 3 Ch. D. 374. Shifting clauses usually provide expressly or by implication for the destination of the rents in the meantime: *Turton* v. *Lambarde*, 1 D. F. & J. 516; *D'Eyncourt* v. *Gregory*, 34 Bea. 36.

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In *Lomas* v. *Wright* (*m*) land was limited to an after-born illegitimate son in fee, and if he should die before he attained twenty-one, then to A an infant, in fee; A died under age and without issue; the after-born illegitimate son attained twenty-one : it was held by Leach, M.R., that the contingent limitation to A failed to take effect, the event on which it was limited not having happened, and that there could consequently be no acceleration by reason of the limitation to the after-born illegitimate son being void; the land therefore resulted to the heir of the grantor.

In *Re Conyngham* (*n*) the testator devised his Kent estates to the use of his trustees in fee simple upon trust out of the income to pay certain annuities and, subject thereto, he devised the same to the uses of his Irish estates—namely, to the use of the plaintiff for life with remainder to the use of the plaintiff's first and other sons in tail male, with remainder to his nephew for life, with remainders over. By a codicil the testator revoked the plaintiff's life interest in the Irish estates, and in lieu thereof devised the Irish estates to the use of trustees during the life of the plaintiff upon trust to pay him an annuity. The plaintiff, who was the testator's heir-at-law, was married, but had no children. It was held that until the plaintiff had a son the nephew's life interest in the rents was accelerated.

Where the remainder is limited to a class, the effect of acceleration may be to alter the period at which the class is to be ascertained (*o*).

Whether same rules apply to personalty.

(2) *As to Personalty.*—It seems to be now settled that the same principles are applicable to quasi-remainders of personalty. In *Eavestaff* v. *Austin* (*p*) Romilly, M.R., expressed an opinion that the rules which relate to real estate do not apply to personalty, though in the case before him he held that there were special circumstances strong enough to create an exception. In *Lainson* v. *Lainson* (*q*), where a remainder in freeholds was

(*m*) 2 Myl. & K. 769. In this case the settlement was by deed, but the rule as laid down by the M.R. applies to devises.

(*n*) [1921] 1 Ch. 491, following *Re Willis*, [1917] 1 Ch. 365, applied in *Re Brooke*, [1923] 2 Ch. 265. Cases such as *Re Scott*, [1911] 2 Ch. 374, where the limitations were legal, will not occur in the future as all life estates and remainders are equitable after 1925.

(*o*) *Re Johnson*, 68 L. T. 20; *Re Crother's Trusts*, [1915] 1 Ir. R. 53 (personalty). Compare *Re Clark*, 31 Ch. D. 72, stated in the text, *post*, p. 703.

(*p*) 19 Bea. 591.

(*q*) 23 L. J. Ch. 170; *Alt* v. *Gregory*, 8 D. M. & G. 221; *Re Love*, 47 L. J. Ch. 783 (referred to *ante*, p. 168; *s. n. Green* v. *Tribe*); *Stephenson* v. *Stephenson*, 52 L. T., 576; *Re Whitehorne*, [1906] 2 Ch. 121. Compare *David* v. *Rees*, 1 R. & My. 687, where stock was bequeathed in trust for A for life, remainder to B for life : by codicil an annuity to A was substituted for his life estate, and B's interest was held not accelerated. See also *Kearney*

held to be accelerated by the revocation of the life estate, the remainder in leaseholds bequeathed on corresponding trusts was held by the same Judge to be also accelerated. And a similar decision was made by Sir R. Malins, V.-C., in *Jull* v. *Jacobs* (*r*). In *Re Clark* (*s*) a testator gave his real and personal estate to his wife for life and after her death to be equally divided between such of his children as should be living at her death, and in case of any of his children dying before his wife leaving children, such children were to take their parent's share. At the death of the testator's widow one of the testator's daughters was living and had several children, but her husband was an attesting witness to the will, and the gift to her was therefore void; it was held by Bacon, V.-C., that the children of the daughter were entitled to her share. This construction was no doubt benignant, but it seems contrary to the principle laid down in *Lomas* v. *Wright* (*t*).

Re Clark.

In *Re Vernon* (*u*), where a legatee elected to give up her life interest in a settled share of residue, it was held by Kekewich, J., that the interests of her husband and children were not accelerated.

There can of course be no acceleration if the persons to take in remainder are not in existence (*x*).

It may, apparently, be laid down as a general rule that where personal property is given to A absolutely with remainder to B absolutely, and A dies in the testator's lifetime, the gift to B is accelerated, and takes effect (*y*).

Successive absolute interests in personalty.

It may here be noted that where a fund is given to A contingently on a certain woman not having children, and the woman has passed the age of child-bearing without having had any children, the Court has jurisdiction to direct the fund to be paid over to A (*z*). But if B is entitled to property contingently on a certain woman having a child, the Court will

Woman past child-bearing.

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v. *Kearney*, [1911] 1 Ir. R. 137 (gift void by reason of legatee's attestation of will). And see *Re Colson's Trusts*, Kay, 133, where the enjoyment of an accumulation fund was accelerated, the devisees in tail of the estate for whose benefit it was created having barred the entail.

(*r*) 3 Ch. D. 703.

(*s*) 31 Ch. D. 72.

(*t*) *Ante*, p. 702.

(*u*) 95 L. T. 48; *Re Cooper*, 116 L. T. 760 (cesser of life interest on bankruptcy).

(*x*) *Re Townsend's Estate*, 34 Ch. D. 357.

(*y*) *Re Lowman*, [1895] 2 Ch. 348; *ante*, p. 427.

(*z*) *Ibid.* In *Re White*, [1901] 1 Ch. 570, the rule was extended to the case of a widow over fifty-six who had had only one child, then thirty-four years of age.

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not enter into the question of her being past child-bearing for the purpose of depriving B of the chance of becoming entitled to the property (*a*).

Surplus income.

In *Re Travis* (*b*), a testator directed the surplus income of his property to be accumulated until the death of A, and subject thereto he gave his property upon trusts which, stated shortly, were for the issue of A who should attain twenty-one or be living at her death, and in default of issue for certain named beneficiaries; when the period of twenty-one years from the testator's death expired, and the trust for accumulation was stopped by the Thellusson Act, A was past the age of child-bearing and had never had any children, but it was held that as to the surplus income from that time to the death of A there was an intestacy.

Tregonwell v. *Sydenham.*

(3) *Devises after Trusts which fail.*—The doctrine of acceleration underwent much discussion in *Tregonwell* v. *Sydenham* (*c*), where a testator devised certain estates at S. and D. in strict settlement, and devised certain estates at E. in like manner as the D. estates, except that there was interposed between the limitations of the E. estates a devise to trustees for a term of sixty years, upon trust to receive the rents until the trustees should have received certain sums which they were from time to time to lay out in the purchase of land, to be settled upon the persons for the time being in the possession of the S. estates. On a bill filed by the persons entitled to the estate for life in possession and the immediate estate in remainder in the S. estates, to have the trusts of the term declared void as tending to a perpetuity, and that the residue should be assigned for their benefit, the Court of Exchequer declared the trusts to be void, and the term to attend the inheritance. But the House of Lords, on appeal, reversed the decree; declaring, first, that the trusts of the term were not void in their creation, but became so in event, the trusts for raising the money being valid; but that of settling the lands to uses being void as too remote, in consequence of its happening that the person then in possession, and to whom, therefore, an estate for life was to be limited with remainder to his issue, was one who was not in existence at the testator's death (*d*).

(*a*) *Re Hocking*, [1898] 2 Ch. 567.

(*b*) [1900] 2 Ch. 541.

(*c*) 3 Dow. 194. Only the short effect of the limitations is stated above: the provisions of the will are given in detail in the previous editions of this work. See the remarks on the case ("a case of extraordinary difficulty") in Gray on Perpetuities, §§ 419, *seq*

(*d*) On this point, *vide ante*, pp. 257 *seq*.

Secondly, (and this is the point material to the present discussion,) that the trusts of the term resulted for the benefit of the heir-at-law of the testator (*e*).

The argument of Lord Redesdale and Lord Eldon, upon which this part of their decision turned, was, that the land, not being given over until "from and after" the raising of the money, the intermediate interest was evidently not included in the devise, and, therefore, went to the heir. The interest given to the devisee was exclusive of, and with a deduction of, that sum. "The testator, then," observed Lord Eldon, "has said that the devisees shall not take it. The policy of the law will not permit the uses for which the testator intended it to take effect; and in such a case, in the absence of any expression of intention on the part of a testator with respect to a purpose which the law will allow, the doctrine of law is, that he shall take the interest who takes independently of all intention, and on whom the law casts it. On these grounds, I agree that the money must be raised and applied for the benefit of the heir, and not of the devisees" (*f*).

Remark on *Tregonwell* v. *Sydenham*.

"It is evident," says Mr. Jarman (*g*), "that the two points adjudicated by the House of Lords had no necessary connection; or, in other words, that the deciding the heir to be entitled was not a consequence of holding the trusts of the term to be void in event only, and not in their creation; for Lord Eldon expressly laid it down, that, if the trusts had been to raise £20,000 for charities, (in which case they would have been clearly void *ab initio*,) and after the sum has been raised, then to the devisees, as the intention would not have been in their favour, the heir would have been let in" (*h*).

Term for years, trust being satisfied, or not arising, attends inheritance for the benefit of devisee.

(4) *Devises subject to Trusts which fail.*—Mr. Jarman continues (*i*): "It is clear, however, that where a term of years is created for particular purposes, and the land *subject thereto* is devised over, the term, after the purposes of its creation are satisfied, or immediately, if those purposes do not arise, attends the inheritance for the benefit of the devisee. And such was

(*e*) Lord St. Leonards in Law of Prop., p. 362, says, "I prefer the decision of the Exchequer."

(*f*) "And with this doctrine the cases on the statute restraining accumulation of income (*ante*, pp. [364, 365]) seem to agree." (Note by Mr. Jarman.)

(*g*) First ed., p. 517.

(*h*) "His Lordship seems to have forgotten that in the case put by him, not only the gift of the £20,000, but also the term would have been void *ab initio*, and the reversioner, and not the heir would then have become entitled in possession. See *Williams* v. *Goodtitle*, 5 My. & Ry. 757, *post*, p. [707]." (Note by Messrs. Wolstenholme and Vincent in the 3rd edition of this work.)

(*i*) First ed., p. 517.

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the decision in one case, where the nature of the trust and the expressions of the testator afforded an argument in favour of a contrary construction.

"The case here alluded to is *Davidson* v. *Foley* (*j*), where a testator devised lands to trustees, their executors, etc., for ninety-nine years, upon the trusts after mentioned, and, after the expiration or other determination thereof, and subject thereto, to A., testator's son, for life, remainder to his first and other sons in tail male. Another term was created, in the same manner, of property similarly given to B., another son, and his sons in tail male. The trusts of the respective terms were for the trustees, in their discretion, to pay testator's two sons an annual allowance, not exceeding a given sum, but so as that *they should have no estate or interest in the rents of the property for their lives*, other than the trustees, in their discretion, should think proper; and then to pay off a certain mortgage; and then to pay certain debts of his sons, but so that the testator's sons' creditors should have no lien upon the land; and, *after the decease of his sons*, and the payment of the mortgage-money and debts before mentioned, and the costs, the terms were to attend the inheritance. Lord Thurlow was of opinion, that, as the purposes for which the terms were created were exhausted, the terms attended the inheritance for the benefit of the tenants for life. It had been ingeniously argued, he said, that these were trusts extending beyond the lives of the sons, and that, if those trusts were sufficient, the sons were to have no interest for their lives. But the nature of a resulting trust was, that it was such as had escaped the attention of the testator, and that here the intention of raising a trust beyond the payment of debts was totally unexpressed. No trust could be raised upon the terms used.

"Lord Thurlow's reasoning evidently assumes that the devises, subject to the term, comprised all the interest not actually absorbed by the trusts of such term; and this may serve to reconcile some expressions in his judgment, which might otherwise seem to warrant a conclusion more favourable to the heir than to the devisees.

Case in which term was created, but no trusts were declared.

"The same principle has been applied to a case in which a term for years was devised, upon trusts to be thereinafter declared, (but which were not declared,) with devises over on the 'expiration or sooner determination' of the term, the words

(*j*) 2 Br. C. C. 203. See Lord Eldon's judgment in *Sidney* v. *Shelley*, 19 Ves. 364.

'subject thereto,' though not actually occurring in the will, being by force of the intention appearing upon the general context, supplied.

Sidney v. *Shelley*.

"As in the case of *Sidney* v. *Shelley* (*k*), where A. devised lands to trustees and their heirs, to the use of them, their executors, etc., for ninety-nine years, 'upon the trusts hereinafter expressed and declared concerning the same, and from and after the expiration or other sooner determination of the said term of ninety-nine years,' he gave the said lands to several persons for life and in tail; and the will contained no declaration of the trusts of the term. It was strongly contended that the trusts resulted to the heir, chiefly on the authority of a *dictum* of Lord Hardwicke (*l*), in a case wherein a term of ninety-nine years having been created by settlement, without any declaration of trust, his Lordship is made to say, upon the question whether there was a resulting trust for the settlor, 'It has been determined so in the case of voluntary settlements and wills'; his Lordship distinguishing a settlement for valuable consideration. But Lord Eldon, in the principal case, decided that the testator, having created a term for ninety-nine years, upon trusts to be afterwards declared, and, at the expiration or sooner determination of that term, having devised those estates in such a manner as that the actual enjoyment of them was clearly intended; the termors having nothing for their own use, and he not having declared any trust, the result was exactly the same as if some trust had been declared, which it became unnecessary to satisfy, or which was satisfied after his death. His Lordship considered that the will was to be read as if the words 'subject to the trusts thereof' were in it.

As to terms not upon trusts.

"Lord Eldon observed, that, if the limitation had been simply to the trustees, without reference to any trusts, however monstrous the supposition with reference to the intention, the subsequent devisees must have taken subject to the term."

Reversion accelerated where term is void.

If the limitation of the term itself is void, as where (under the old law) trusts are declared in favour of a charity, the devisee of the freehold is, of course, immediately entitled in possession (*m*).

(5) *As to Appointments under Powers.*—The doctrine of acceleration does not extend to estates limited under powers of

(*k*) 19 Ves. 352.

(*l*) In *Brown* v. *Jones*, 1 Atk. 191. A note of this *dictum*, found among Lord Northington's papers, coincided.

(*m*) *Williams* v. *Goodtitle*, 5 M. & Ry. 757.

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appointment; where, if the particular estate fails, the remainder continues such, and the estate, during the life of the intended taker, goes as in default of appointment (*n*).

The foregoing paragraph, with the note, is taken from the 3rd edition of this work, by Messrs. Wolstenholme and Vincent. It is to be observed that the case in which Sugden, C., laid down this doctrine was the case of a special power, and in his work on Powers he states the rule as if it applied only to special powers (*o*). If, however, the reason of the rule is that where the donor of a power has designated persons to take in default of appointment, he means them to take whatever is not validly appointed, then there seems no reason why it should not apply to general powers.

In any case it is clear that whether the appointment is general or special, the testator may show an intention that if the particular interest fails, or is determined, the interests in remainder shall be accelerated (*p*).

Whether, under devise to A during minority of B, A's estate determines on B's decease during minority.

(6) *Devises during Minority where the Minor dies.*—Mr. Jarman continues (*q*): "Sometimes an estate is made to determine at the majority of a minor; and it happens that he dies under age: whence arises the question, whether the devisee is entitled to hold the estate until the minor would, if living, have attained the prescribed age; or whether the devise over (for it has generally, though not necessarily, happened that there is such a devise) is accelerated. The authorities upon this point are not to be reconciled (if at all) without resorting to some very fine-spun distinctions, as will be seen by the following brief statement.

"In *Carter* v. *Church* (*r*), A. devised lands to his daughter in fee, and declared that his executors should receive the profits until she attained twenty-one, towards payment of his debts and legacies. The daughter died when five years old. The Lord Keeper was of opinion that the charging the profits until the daughter attained twenty-one, amounted to a term until she would, if living, have attained that age.

(*n*) *Per* Sugden, C., *Crozier* v. *Crozier*, 3 D. & War. 365, 366; 2 Sugd. Pow. 67 (7th ed.). And distinguish the cases there cited, and *Reid* v. *Reid*, 25 Bea. 469, in which the remainder as well as the particular estate fails.

(*o*) Eighth ed., p. 515.

(*p*) *Craven* v. *Brady*, L. R. 4 Eq. 209; 4 Ch. 296; *Line* v. *Hall*, 43 L. J. Ch. 107; *Re Finch and Chew's Contract*, [1903] 2 Ch. 486. In *Craven* v. *Brady*, Romilly, M.R., cites as applicable to the general question of accelerating an appointed remainder some observations of Sir E. Sugden in *Crozier* v. *Crozier*, which appear to refer only to the question whether under an appointment the failure of the particular estate involved also the failure of the remainder; and stops just short of the passage cited above in the text.

(*q*) First ed., p. 520.

(*r*) 1 Ch. Ca. 113.

"So, in [*Coates*] v. *Needham* (*s*), where A. devised lands to C. and D. and their heirs, upon trust, to receive the rents until his son W. should attain the age of twenty-one years; and pay one-third to the testator's wife in lieu of dower; and out of the other two-thirds to raise portions for his daughters; and devised all to W., when twenty-one, in tail; and, in default of such issue, then over. W. died under the age of twenty-one, without issue; the widow afterwards died before W. would, if living, have attained that age; and it was held, [according to the first report of the case (*t*), which is probably the correct one (*u*), that the wife's administrator was entitled during the term for which the minority would have lasted; but in a subsequent case on the same will, it was held] that the wife's third for such period was an interest undisposed of, and went to the testator's heir, on the ground that nothing was given to the devisees until W. attained (or, rather, would have attained) his majority, and died without issue.

"On the other hand, in the case of *Manfield* v. *Dugard* (*v*), where A. devised lands to his wife until B., his eldest son, should attain twenty-one; and, when he should attain that age, to him in fee. B. died at the age of thirteen; whereupon his heir-at-law claimed the rents from his death. The L.C. held, that the heir was entitled, for that the wife's estate determined at the death of the son, whose estate in fee, which was vested at the testator's death, took effect in possession on that event."

One of the reasons assigned for this adjudication was, that the land was not devised to the wife for the payment of debts; and this agrees with *Boraston's Case* (*w*), where a testator devised lands to his executors until such time as his grandson, Hugh, should accomplish his full age of twenty-one years, and the mean profits to be employed by his executors towards the performance of his will. Hugh died at the age of nine years; and it was argued by Coke, that the term of the executors did not thereby cease, because it was to be intended that the testator had computed that the profits to be taken of his lands

Boraston's Case.

(*s*) 2 Vern. 65, *Levet* v. *Needham*, *ib.* 138, which states the decision in *Coates* v. *Needham* wrongly.

(*t*) 2 Vern. 65.

(*u*) The decree is given in Mr. Raithby's edition from Reg. Lib., but he states that he could not find any decree in *Levet* v. *Needham*. Mr. Jarman adds: "The most singular feature in this case is, the holding the interest of the wife to have ceased at her death. If, as the Court assumed, a term was absolutely carved out of the inheritance, clearly words of limitation were not necessary to vest it in the wife with the transmissible quality of personal estate."

(*v*) 1 Eq. Ca. Ab. 195, pl. 4.

(*w*) 3 Co. 19 a. See further as to this case, *post*, p. 1345.

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by his executors, during the minority of his grandson, would suffice to pay his debts and perform his will, and that he did not intend that it should determine by the death of his grandson, for then his debts would remain unsatisfied and his will unperformed, which was granted by the whole Court (*x*).

This argument was adopted by Sir J. Jekyll, M.R., in *Lomax* v. *Holmedon* (*y*), in which he distinguished the cases where such an interest was created for a particular purpose, as for a fund for payment of debts (which he said was *Boraston's Case*), from the cases where no such intention appeared; in these latter he said the interest would absolutely determine by the death of the party under the age specified in the will. It is plain that here the existence of the minority supplies the sole occasion and motive for the creation of the estate in question (*z*). The principle of these authorities is clearly unaffected by the circumstance of the specified purpose being insufficient to exhaust the whole proceeds of the term. The construction is that the testator has made his own computation, so that the estate must endure until the regular expiration of the term, and if any part of the beneficial interest is undisposed of, it must result to the heir-at-law.

Postponement during minority, not extended to devisees over.

"Sometimes it happens," as Mr. Jarman points out (*a*), "that real estate is devised to a minor contingently on his attaining twenty-one, with a devise over in the event of his dying under that age; in which case, though, under the original devise, if construed to be contingent, the property would, during the minority, have devolved to the heir-at-law of the testator as real estate undisposed of; yet, on the minor dying under age, the devise over, not being subject to the postponement affecting the original devise, takes effect in possession immediately" (*b*).

(*x*) 3 Co. 21 a.

(*y*) 3 P. W. 176. See also *Sweet* v. *Beal*, Lane, 56, where the term was held to endure beyond the death of the minor under age, for the termor's own benefit, which was therefore the "particular purpose" in that case. In *Goodright* d. *Revell* v. *Parker*, 1 M. & S. 692, the property was leasehold.

(*z*) See *Castle* v. *Eate*, 7 Bea. 296. If the person to whom the intermediate interest is given should die during the minority, the same reasons (*i.e.*, "the existence of the minority") will give the interest to his representatives during the remainder of the term: see *Laxton* v. *Eedle*, 19 Bea. 321. Where it is a class during whose minority the income of property is given, the estate will continue while there is a chance of any persons becoming members of the class, though none may for the time being be actually in existence, *e.g.*, during the life of a parent whose children's minority is contemplated, *semb.* *Conduitt* v. *Soane*, 4 Jur. (N.S.) 502. (Note by Messrs. Wolstenholme and Vincent in the 3rd edition of this work.)

(*a*) First ed., p. 522.

(*b*) *Chambers* v. *Brailsford*, 18 Ves. 368.

CHAPTER XXII.

CONVERSION (*a*).

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I.—Effect of Conversion dehors the Will.—A. *As to Conversion of Land into Money.*—It has been already pointed out, that if a testator devises land to A, and afterwards sells it, or contracts to sell it (*b*), to B, this operates as a revocation or ademption of the devise and a conversion of the land into money. Consequently A has no claim to the purchase-money, which forms part of the testator's personal estate (*c*). In order that a con-

Revocation or ademption by conversion.

(*a*) The alteration in the law, by which after 1925 land and personal property devolve or are distributable in the same way on an intestacy, will in course of time render the subject of this chapter almost obsolete. But for the present it is still necessary to understand the subject, and the chapter has been retained in the form in which it was in the last edition, with the slight alterations required by the cases decided since then.

(*b*) *Watts* v. *Watts*, L. R. 17 Eq. 217. Compare *Townley* v. *Bedwell*, 14 Ves. 591, *post*, p. 713. See also *Jones* v. *Bailey*, [1910] 1 Ir. R. 110 (where conversion was effected by an originating application for sale under the Irish Land Purchase Acts), and *Guiry* v. *Condon*, [1918] 1 Ir. R. 23 (where land agreed to be sold was held not to form part of a specific devise).

(*c*) *Ante*, pp. 149 *seq.* But A is entitled to the rents between the testator's death and the completion of the purchase: *Watts* v. *Watts*, L. R. 17 Eq. 217. In *Re Bagot's Settlement*, 31 L. J. Ch. 772, the proceeds of sale were subject to re-investment in land, but the only effect of this was that they passed as realty not specifically devised. See also *Manton* v. *Tabois*, 30 Ch. D. 92. A contract by a railway company, in the event of its requiring part of A's land, to pay a certain price per acre for it, does not operate as a conversion: *Ex p. Walker*, 1 Dr. 508, *post*, p. 716.

As to ademption in the case of powers of appointment, see *post*, p. 814.

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tract of sale may have this effect, it seems that the contract must be enforceable by the testator: if it is not enforceable against the purchaser by reason of its not complying with the Statute of Frauds, or because the title shown is not in accordance with the contract, and has not been accepted by the purchaser, the contract does not operate as a conversion (*d*).

Rescission of contract.

If, however, there is a binding contract at the testator's death, and it is afterwards rescinded for non-payment of the purchase-money, or for any cause other than a defect in the title, the land is still treated as having been converted (*e*).

Adoption of verbal contract by devisee.

If a testator enters into a verbal contract of sale, which is not enforceable against him, and after his death the devisee sells the land to the same purchaser for the same price, this does not operate as a retrospective conversion, unless the devisee expressly adopts the testator's contract (*f*).

Mortgage foreclosed.

In *Re Bogg* (*g*) proceeds of sale of settled land were invested on mortgage; the mortgage was foreclosed. It was held that the foreclosure operated as a reconversion of the property into realty.

Option of purchase.

Lawes v. *Bennett.*

An anomalous rule (known as the rule in *Lawes* v. *Bennett* (*h*)) applies to cases where the testator has entered into a contract under which a person has an option of purchasing land belonging to the testator, and exercises the option after the testator's death (*i*). In such a case, although constructive con-

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(*d*) *Lacon* v. *Mertins*, 3 Atk. 1; *Re Thomas*, 34 Ch. D. 166. There are *dicta* to the effect that a contract of sale does not operate as a conversion unless, at the death of the testator, it is enforceable by both parties: *per* Jessel, M.R., in *Lysaght* v. *Edwards*, 2 Ch. D. 506 *seq.*; *per* Fry, J., in *Edwards* v. *West*, 7 Ch. D. 862. The subject is discussed in *Crowe* v. *Menton*, 28 L. R. Ir. 519.

(*e*) *Bennett* v. *Earl of Tankerville*, 19 Ves. 170; *Curre* v. *Bowyer*, 5 Bea. 6, n.; *Lysaght* v. *Edwards*, *supra*; *Crowe* v. *Menton*, *supra*; *Re Thomas*, 34 Ch. D. 166. In *Ryder* v. *Ryder*, Ir. R. 8 Eq. 86, the sale was set aside in proceedings by the heir on the terms of the purchase-money being repaid; it was held that the heir must repay the money himself: see *Stump* v. *Gaby*, 2 D. M. & G. 623.

(*f*) *Re Harrison*, 34 Ch. D. 214. If an heir voluntarily adopts a contract of sale which is not enforceable, this operates as a retrospective conversion: *Frayne* v. *Taylor*, 33 L. J. Ch. 228.

(*g*) [1917] 2 Ch. 239.

(*h*) 1 Cox, 167. See *Townley* v. *Bedwell*, 14 Ves. 591; *Collingwood* v. *Row*, 26 L. J. Ch. 649. It applies to cases of intestacy: *Re Isaacs*, [1894] 3 Ch. 506. The rule applies only as between the real and personal representatives of the testator and will not be extended: *Edwards* v. *West*, 7 Ch. D. 858, and see *Re Adams and Kensington Vestry*, 27 Ch. D. 394, as to the devolution of an option contained in a lease on the death of the lessee.

(*i*) As to the effect of an option of purchase given by will, see *ante*, p. 73.

version only takes place as from the exercise of the option (*j*), yet the proceeds of sale devolve as part of the testator's personalty. The rule applies although the purchase-money is payable to the testator "his heirs or assigns" (*k*). It also applies where the option does not arise until after the testator's death (*l*).

Purchase not completed.

A notice exercising an option to purchase operates as a conversion, although the exercise of the option is not followed by the completion of the purchase (*m*).

If the devise is general, it is immaterial whether the will is executed before or after the contract giving the option (*n*); and if the devise is specific, the rule applies in all cases where the contract giving the option is entered into after the date of the will (*o*), unless of course the testator has contemplated the possibility of his entering into such a contract and has provided for it by his will.

How contrary intention may appear.

But a testator who has entered into a contract of sale, or given an option of purchase, in respect of land, and afterwards or simultaneously makes a will specifically devising it, may show that he wishes the devisee of the land to have the benefit of the sale. In *Knollys* v. *Shepherd* (*p*) (a case of contract), a specific devise to the testator's "dear wife" of the estate "which he had lately contracted to sell," was held not to show such an intention, but to give the wife only the legal estate, the purchase-money passing by the residuary bequest. But in the case of an option, a will made or re-published after the date of or simultaneously with the creation of the option, and specifically devising the property in strict settlement, has been held to take the case out of the rule in *Lawes* v. *Bennett*, and, upon the option being exercised after the testator's death, to carry the purchase-money to the devisees (*q*).

Knollys v. *Shepherd.*

(*j*) So that the heir or devisee is entitled to the intermediate rents, but the interest on the purchase-money is part of the testator's personal estate: *Townley* v. *Bedwell*, 14 Ves. 591; *Re Marlay*, [1915] 2 Ch. 264 (Irish Land Acts). In *Miley* v. *Carty* (*Re Lawless*), [1927] Ir. R. 54, in which *Lawes* v. *Bennett* was applied, there are some observations in *Re Marlay* and *Re Huddlestone's Estate*, [1921] 1 Ir. R. 1.

(*k*) *Townley* v. *Bedwell*, *supra*; *Weeding* v. *Weeding*, 1 J. & H. 424.

(*l*) *Re Isaacs*, [1894] 3 Ch. 506.

(*m*) *Re Blake*, [1917] 1 Ch. 18.

(*n*) *Lawes* v. *Bennett*, *supra*; *Goold* v. *Teague*, 5 Jur. (N.S.) 116 (leaseholds).

(*o*) *Weeding* v. *Weeding*, *supra*.

(*p*) 1 J. & W. 499, cit., affirmed in D. P., Sug. Law of Prop. 223. As to whether a devise includes land which the testator has contracted to sell, see *post*, pp. 1240, 1256.

(*q*) *Drant* v. *Vause*, 1 Y. & C. C. C. 580; *Emuss* v. *Smith*, 2 De G. & S. 722; *Re Pyle*, [1895] 1 Ch. 724; *Duffield* v. *M'Master*, [1896] 1 Ir. R. 370. See *Re Isaacs*, [1894] 3 Ch. 506 (intestacy).

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In *Re Calow* (*qq*), at the date of his will the testator possessed an undivided moiety in 37 acres of land at D., 10½ of which he had contracted to sell. Completion did not take place until after the testator's death. It was held that a devise of all his freehold property at D. upon trust for sale passed the proceeds of sale because of a reference to proceeds of sale which would be redundant if limited to the proceeds of sale arising under the trust for conversion in the will.

Where a testator specifically bequeaths leaseholds, and after his death the term is put an end to under a condition contained in the lease, the legatee is entitled to the compensation payable under the condition (*r*).

Sale by mortgagee.

If mortgaged land is sold by the mortgagee under his power of sale, the destination of the surplus proceeds of sale is, as a general rule, governed by the condition of the property at the mortgagor's death. Consequently if the sale takes place after the mortgagor's death, the surplus proceeds devolve as realty, while if it takes place during his lifetime, they devolve as personalty : and the fact that the mortgage deed provides that they are to be paid to the mortgagor "his heirs or assigns" makes no difference, these words not being sufficient to effect a constructive re-conversion (*s*).

Trustee in bankruptcy.

A similar rule seems to prevail in the case of a sale by a trustee in bankruptcy (*t*).

Sale by Court.

Where land is sold under an absolute order, made within the jurisdiction of the Court, the proceeds are personalty; in fact the order itself operates as a conversion from its date, and before any sale has taken place (*u*). But where a conditional order is first made, and is afterwards made absolute, it only takes effect from the latter date (*x*).

Whether order effects conversion out and out.

If the order for sale is made in an administration action, for payment of debts and legacies, it would seem, on principle, that it operates as a conversion for all purposes, so that any surplus is personal estate. The contrary was indeed decided by

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(*qq*) [1928] Ch. 710.

(*r*) *Coyne* v. *Coyne*, Ir. R. 10 Eq. 496; *post*, p. 721.

(*s*) *Wheldale* v. *Partridge*, 8 Ves. 227; *Bourne* v. *Bourne*, 2 Ha. 35; *Wright* v. *Rose*, 2 S. & S. 323; *Re Smith*, 7 Jur. (N.S.) 903; *Re Grange*, [1907] 1 Ch. 313, referred to in *Burgess* v. *Booth*, [1908] 2 Ch. 648.

(*t*) *Banks* v. *Scott*, 5 Madd. 493.

(*u*) *Arnold* v. *Dixon*, L. R. 19 Eq. 113; *Hyett* v. *Mekin*, 25 Ch. D. 735; *Re Dodson*, [1908] 2 Ch. 638; *Fauntleroy* v. *Beebe*, [1911] 2 Ch. 257; *Re Stinson's Estate*, [1910] 1 Ir. R. 13.

(*x*) *Re Beamish's Estate*, 27 L. R. Ir. 326; *Re Henry's Estate*, 31 L. R. Ir. 158.

Romilly, M.R. (*y*), but the decision has been disapproved (*z*). And it is clear that if the order is made by consent, for the convenience or benefit of the parties, it operates as a conversion out and out, whatever the nature of the action may be (*a*).

Excessive sale; so-called "equity of reconversion."

It was formerly supposed that the general principle did not apply if the order directed a sale to be made for raising a specific sum; and that in such a case, if more land was sold than was required, the surplus proceeds of sale retained the character of realty (*b*). Accordingly, where a sale was directed in a mortgagee's suit, and the surplus was invested by the Court at his request, it was held to devolve as realty on his death (*c*). And in a case (*d*), where land belonging to an infant was sold for the purpose of paying costs, and the infant died intestate after attaining twenty-one, it was held by Eve, J., that the surplus proceeds of sale (which had been invested in consols) devolved as realty. But this decision was reversed by the Court of Appeal (*e*), and the general principle laid down in *Steed* v. *Preece* now applies in all cases.

Burgess v. *Booth.*

Sale in partition action.

If land is sold in a partition action under the Partition Act, 1868, s. 8, the proceeds of sale are to be treated as realty (*f*), unless the person entitled is *sui juris* and elects to take them as personalty (*g*), or unless they are paid out to trustees who had a power of sale (*h*). If the person entitled is a married woman, she may elect by examination in Court to take the fund as personal estate (*i*). In *Wallace* v. *Greenwood* (*k*), Jessel, M.R., seems to have thought that an order for sale, made with the consent or at the request of a married woman under section 6 of the Partition Act, 1876, operates as a conversion of her share, but the accuracy of this view was doubted by Byrne, J., who

(*y*) *Cooke* v. *Dealey*, 22 Bea. 196.

(*z*) By Jessel, M.R., in *Steed* v. *Preece*, L. R. 18 Eq. 197. See also *Hartley* v. *Pendarves*, [1901] 2 Ch. 498; *Ferguson* v. *Benyon*, 17 L. R. Ir. 212. In *Fellow* v. *Jermyn*, [1877] W. N. 95, Jessel, M.R., held that the Court has jurisdiction to direct that if there is a surplus it shall be re-invested in land, so as to preserve its character as realty.

(*a*) *Steed* v. *Preece*, *supra*; *Ferguson* v. *Benyon*, 17 L. R. Ir. 212.

(*b*) *Jermy* v. *Preston*, 13 Sim. 356. But see the criticisms of Jessel, M.R., in *Steed* v. *Preece*, L. R. 18 Eq. 197.

(*c*) *Scott* v. *Scott*, 9 L. R. Ir. 367.

(*d*) *Burgess* v. *Booth*, [1908] 1 Ch. 880.

(*e*) [1908] 2 Ch. 648.

(*f*) The order itself operates a conversion: *Re Dodson*, [1908] 2 Ch. 638, *ante*, p. 714; *Herbert* v. *Herbert*, [1912] 2 Ch. 268.

(*g*) *Foster* v. *Foster*, 1 Ch. D. 588; *Mildmay* v. *Quicke*, 6 Ch. D. 553; *Re Barker*, 17 Ch. D. 241. See *Mordaunt* v. *Benwell*, 19 Ch. D. 302, where the beneficiaries died intestate before the fund was paid out, so that it descended to their heir-at-law; it was held that on his death it formed part of his personal estate.

(*h*) *Re Morgan*, [1900] 2 Ch. 474.

(*i*) *Standering* v. *Hall*, 11 Ch. D. 652. The examination may be dispensed with if the fund is under £200; 16 Ch. D. 362.

(*k*) 16 Ch. D. 362.

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held in *Re Norton* (*l*) that a consent or request on behalf of an infant does not operate as a conversion of his share. *Hopkinson* v. *Richardson* (*m*) is to the same effect. The Partition Acts are repealed by the Law of Property Act, 1925.

Lands Clauses Act.

Where purchase-money is paid into Court by a railway company under section 69 of the Lands Clauses Consolidation Act, 1845 (*n*), the general rule is that it remains impressed with the character of real estate (*o*). In a case before Lord Cranworth, V.-C. (*p*), an owner of land had made a will containing a residuary devise and afterwards became a lunatic not so found; part of the land was taken by a railway company, and the purchase-money was paid into Court under section 76 of the Lands Clauses Act: it was held that this operated as a conversion. But this decision is generally considered erroneous (*q*).

Where trustees can sell.

In any case, however, where land is vested in trustees subject to a trust for sale, or a power of sale, and it is sold by order of the Court or under the Lands Clauses Act, this operates as a conversion (*r*).

Notice to treat.

A notice to treat under the Lands Clauses Act does not effect a conversion (*s*), even if it is followed by an offer by the landowner to accept a certain price for the land (*t*); but if the price is agreed upon, this constitutes a valid contract, and operates as a conversion (*u*). An agreement as to the price per acre, without defining the land, does not effect a conversion (*x*).

Compulsory sale after testator's death.

In *Ex parte Hardy* (*y*), a testator gave to his children in succession the option of purchasing his real estate. Before the option had been exercised, and while some of the children were still infants, part of the property was purchased under compulsory powers: it was held that this did not effect a conversion.

(*l*) [1900] 1 Ch. 101, approving *Howard* v. *Jalland*, [1891] W. N. 210.
(*m*) [1913] 1 Ch. 284.
(*n*) Or under the Union and Parish Property Act, 1835: *Re Horner*, 5 De G. & S. 483.
(*o*) *Ex p. Walker*, 1 Drew. 508; *Kelland* v. *Fulford*, 6 Ch. D. 491. Compare *Re Harrop*, 3 Drew. 726; *Midland Ry.* v. *Oswin*, 1 Coll. 74; *Re Taylor's Settlement*, 9 Ha. 596; *Re Stewart*, 1 Sm. & G. 32.
(*p*) *Re East Lincolnshire Ry.; Ex p. Flamank*, 1 Sim. (N.S.) 260.
(*q*) *Re Tugwell*, 27 Ch. D. 309. Compare *Re Bagot's Settlement*, 31 L. J. Ch. 772, *ante*, p. 711.
(*r*) *Re Hobson's Trusts*, 7 Ch. D. 708; *Re Smith*, 40 Ch. D. 386; *Re Morgan*, [1900] 2 Ch. 474; *Re Sheffield Corporation*, [1903] 1 Ch. 208.
(*s*) *Haynes* v. *Haynes*, 1 Dr. & Sm. 426.
(*t*) *Re Battersea Park Acts*; *Re Arnold*, 32 Bea. 591.
(*u*) *Ex p. Hawkins*, 13 Sim. 569; *Re Manchester and Southport Ry.*, 19 Bea. 365; *Harding* v. *Metropolitan Ry.*, L. R. 7 Ch. 154; *Watts* v. *Watts*, L. R. 17 Eq. 217.
(*x*) *Ex p. Walker*, 1 Dr. 508.
(*y*) 30 Bea. 206.

Sale in lunacy.

It has been already mentioned that a sale, by proper authority, of land belonging to a lunatic does not, as a general rule, affect the rights of his devisees, etc., in the proceeds of sale (*z*).

Conversion directly by statute.

Conversion may also be produced by Act of Parliament: as where a statute abolishes a particular kind of real property, and substitutes for it a right to compensation, or other personal property (*a*).

Contract of purchase by testator.

B. *As to Conversion of Money into Land.*—In the case of a person entering into a contract for the purchase of land, the rule formerly was, that if the contract was binding on the purchaser at the time of his death, his heir or devisee was entitled to the benefit of it: in other words, was entitled to consider the contract as having converted the personal estate, *quoad* the purchase-money, into real estate (*b*). But as regards the estates of persons dying after 1877, the Real Estates Charges Act, 1877 (*c*), enacts that where a testator or intestate dies entitled to land of whatever tenure, which is at his death charged by way of lien for unpaid purchase-money, the devisee or legatee or heir shall not be entitled to have the money discharged out of any other estate of the testator or intestate, unless, in the case of a testator, a contrary intention appears from the will (*d*). In such a case, therefore, all that the devisee or heir is entitled to is the land charged with the purchase-money (*e*).

Contract enforceable at death, subsequently rendered incapable of completion.

Old rule.

In cases not within the Act, the old rule above stated applied even if the contract was rescinded, by or at the suit of the vendor, after the testator's death (*f*), for as Mr. Jarman points out (*g*): "The true principle is, that where the contract is such as could have been enforced against the purchaser at the time of his decease, the estate which is the subject-matter of the contract, or, failing that, the purchase-money, belongs to his heir or devisee; but if, from a defect of title or any other cause, the contract was not obligatory on the purchaser at his death, his

(*z*) *Ante*, p. 150. As to a purchase of land in lunacy, see *post*, p. 720.

(*a*) *Frewen* v. *Frewen*, L. R. 10 Ch. 610; *Richards* v. *Att.-Gen. for Jamaica*, 6 Moo. P. C. C. 381; *Cadman* v. *Cadman*, L. R. 13 Eq. 470.

(*b*) *Garnett* v. *Acton*, 28 Bea. 333. As to the effect of a voidable contract of purchase entered into by a trustee for his own benefit, see *Ingle* v. *Richards*, 28 Bea. 361.

(*c*) Replaced by section 35 of the Administration of Estates Act, 1925. See Chap. LIV.

(*d*) See further on this subject, *post*, Chap. LIV.

(*e*) *Re Cockroft*, 24 Ch. D. 94; *Re Kidd*, [1894] 3 Ch. 558. In *Re Cockroft* there had been a compromise which would in any case have defeated the plaintiff's claim.

(*f*) *Whittaker* v. *Whittaker*, 4 Br. C. C. 31; *Hudson* v. *Cook*, L. R. 13 Eq. 417.

(*g*) First ed., p. 46.

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heir or devisee is not entitled to say he will take the estate with its defects, or have the purchase-money laid out in the purchase of another. Such is the doctrine of the case of *Broome* v. *Monck*" (*h*). In that case Lord Eldon observed of *Whittaker* v. *Whittaker* (*i*) that it was very difficult to maintain the doctrine in it, which went beyond what was necessary for the decision. His Lordship said: "As between the heir and the personal representatives, *Lacon* v. *Mertins* (*k*), *Buckmaster* v. *Harrop* (*l*) and other cases, establish the general principle, that whatever is the state of liability of the party himself to take at his death, must be the state of liability to be considered upon questions between those representing him after his death (*m*); and if at his death he could not be compelled to take, clearly the heir could not say to the executor, 'I will have the estate; and you shall pay for it.' . . . . . I have not met with any case that has induced me to suppose, that if this were between the heir and the personal representative, it would be possible for the heir to say, though the title was doubtful, yet being the real representative, he is entitled to take it, as it is; though the ancestor never meant so to take it; or intimated any purpose of retiring from that situation, in which he had a right either to insist upon a good title, or to refuse the estate; and though there is no proof that the ancestor would have paid for the estate with a bad title, yet the heir can insist that the personal estate shall pay for it out of the assets. None of the cases give any colour for that; *Green v. Smith* (*n*), indeed, seems to state a doctrine quite inconsistent with that." He therefore held that, as no title could be made, the devisees were not entitled to take this estate, or to have another estate bought for them.

State of liability of the party himself at his death, governs the question between those claiming under him.

"It will be observed," says Mr. Jarman (*o*), "that Lord Eldon adverted to the circumstance of the purchasing devisor not having himself shown an intention to take the estate with a bad title. It is conceived his Lordship here alluded to such evidence of intention as would have amounted to an acceptance of the title. Nothing short of this, it is presumed, could have any effect; for, to admit parol evidence of intention *as such* would be liable to the objection attaching to the reception of extrinsic

What evidence of intention by devisor to accept title necessary.

(*h*) 10 Ves. sen. 597. See also 1 Ves. sen. 218.
(*i*) *Ante*, p. 72.
(*k*) 3 Atk. 1.
(*l*) 7 Ves. 341.
(*m*) See acc. *Curre* v. *Bowyer*, 5 Bea. 6, n.; *Ingle* v. *Richards*, 28 Bea. 365; *Haynes* v. *Haynes*, 1 Dr. & Sm. 451, 452; *Hudson* v. *Cook*, L. R. 13 Eq. 417; *Lysaght* v. *Edwards*, 2 Ch. D. 516.
(*n*) 1 Atk. 572.
(*o*) First ed., p. 48.

evidence in aid of, or in opposition to, a written will (*p*). It is true that, under the doctrine in question, the devise is incidentally affected by this evidence, since, as already observed, the inquiry whether the contract was obligatory on the testator at his decease, lets in any evidence which would be admissible, in a suit between the vendor and vendee, of circumstances discharging the vendee, as a difference in the estate from that contracted for, not capable of being the subject of compensation, or the like. Of course the vendor could not take advantage of the waiver by the heir or devisee of objections to the title which his ancestor or devisor might have advanced, he (*i.e.*, the heir or devisee) having in that event no interest in the estate.

Question where the deceased purchaser was bound, but the vendor was not.

"In the cases of *Whittaker* v. *Whittaker*, and *Broome* v. *Monck*, the contract seems to have been binding on the vendor, and therefore, those cases do not decide what would be the effect, where the deceased purchaser was bound at his decease, but the vendor was not, a case which clearly may and often does arise; as where a written contract has been entered into, which is duly signed by one party and not by the other, and the signing party dies before there has been any act of part performance, which would render the contract obligatory on the other. It is clear, that in such a case, the surviving (*q*) party may choose or not to enforce the performance of the contract against the representatives of the deceased: should he decline, of course the contract is at an end, and the property remains unconverted as between the real and personal representatives of the deceased party. If, on the other hand, the surviving party choose to compel performance, the question arises between the respective representatives of the deceased, whether such conversion has taken place. For instance, suppose the deceased party to be the vendor; if the surviving party, *i.e.*, the purchaser, should (as he may) call upon the heir or devisee of the deceased vendor, to convey to him the property in pursuance of his ancestor's or testator's contract—upon the doctrine in question would depend the destination of the purchase-money, which, if the contract is to be considered as effecting an absolute conversion of the property would belong to the personal representatives (*r*); if not, to the heir or devisee of the deceased vendor. The writer is not aware of any direct authority on the point; but, perhaps it would be considered as governed by the cases (which seem to be analogous in principle), in which, there being

Cases where there is an option to purchase.

(*p*) See *Rose* v. *Cunynghame*, 11 Ves. 550.

(*q*) "The fact of survivorship is introduced merely for the convenience of distinction; it would, of course, be immaterial whether the party represented as the survivor were living or not." (Note by Mr. Jarman.)

(*r*) See *ante*, p. 149.

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in a lease of a freehold estate a clause entitling the lessee pending the term to purchase the demised property, and the lessor having died before the option of the lessee has been declared, the latter has *subsequently* elected to purchase the property. Under such circumstances, it was held by Lord Eldon, in the case of *Townley* v. *Bedwell* (*s*), on the authority of a previous decision of Sir William Grant (*t*), (but without, it should seem, approving the principle), that the rents, until an election to purchase be made, belong to the heir or devisee; but that when it is made, the purchase-money goes to the personal representative of the vendor."

Voidable purchase by lunatic.

If a person of unsound mind enters into a contract to purchase real estate, and the purchase is afterwards completed by direction of the lunacy authorities, this operates as a conversion of the purchase-moneys into realty (*u*).

Investment of lunatic's money in real estate.

In *Att.-Gen.* v. *Marquis of Ailesbury* (*x*), the money of a lunatic was invested by his committees in the purchase of lands which, pursuant to orders made in the lunacy proceedings, were conveyed upon trust for the lunatic "his executors administrators and assigns," and directed to be considered as part of his personal estate: it was held that on his death the value of the lands was part of his personal estate. But if money is expended by leave of the Judge in lunacy for the permanent improvement of the lunatic's real estate, in the course of the ordinary management of the property, it will not, as a general rule, be ordered to be charged upon the real estate in favour of the personalty (*y*). But when allowances were made out of the surplus income of a lunatic's estate with provision that they should be treated as advancements and brought into hotchpot, it was held that the Court in administering the lunatic's estate after her death had a discretion not to enforce these provisions to hotchpot (*z*).

When money is a "hereditament."

Where land has been sold, and the proceeds are subject to a trust for re-investment in land, they will generally come within the description of "hereditaments" (*a*).

Contract for building.

Conversion may also be effected by a testator entering into a contract with a builder for the erection of buildings on the

(*s*) 14 Ves. 591; *Re Marlay*, [1915] 2 Ch. 264. See also *Collingwood* v. *Row*, 26 L. J. Ch. 649.

(*t*) *Lawes* v. *Bennett*, 1 Cox, 167. The case was decided by Lord Kenyon. Compare *Wright* v. *Rose*, 2 S. & St. 323, and the observations of Wood, V.-C., 1 J. & H. 429.

(*u*) *Baldwyn* v. *Smith*, [1900] 1 Ch. 588. (*x*) 12 A. C. 672.

(*y*) *Re Gist*, [1904] 1 Ch. 398. See *Re Searle*, [1912] 2 Ch. 265 (purchase of freehold reversion); *Re Silva*, [1929] 2 Ch. 198.

(*z*) *Re Merrall*, [1924] 1 Ch. 45.

(*a*) *Re Gosselin*, [1906] 1 Ch. 120.

testator's land, and dying before they are completed or paid for: in such a case the devisee is entitled to have the contract performed out of the personal estate (*b*).

But this rule does not apply where the contract relates to land not belonging to the testator (*c*).

Operation of law.

Conversion may be produced by operation of law. In *Re Loveridge* (*d*) a mortgagee, who since 1861 had been in possession of the mortgaged land, died in 1864, having by his will given his residuary real and personal estate to his wife during widowhood, but made no other disposition of his property, so that subject to the widow's interest during widowhood, his widow and brother were entitled to his personal estate under the Statutes of Distribution; after his death his widow entered into possession of the mortgaged land and remained in possession until 1879, when the equity of redemption was barred under the Statute of Limitations; the brother died intestate in 1880, and it was held that his moiety of the mortgage debt was converted into real estate in 1879; consequently on his death one moiety of the land descended to his co-heiresses.

Redemption of rent-charge and conversion of renewable leases.

Several cases have been decided in Ireland on the question how money paid for the redemption of a rent-charge ought to devolve (*e*), and how the rights of parties are affected by Irish statutes relating to renewable leases (*f*), but they do not seem to lay down any principle of general application.

Conversion of one kind of personal property into another.

In the case of personal property, the operation of a will may be affected by the nature of the property being changed by some act *dehors* the will. Where the testator himself sells property which he has specifically bequeathed, this operates as an ademption of the bequest (*g*). And the principle of *Lawes* v. *Bennett* (*h*) applies to leaseholds (*i*).

Coyne v. *Coyne.*

In *Coyne* v. *Coyne* (*k*) the testator was entitled to a lease which was determinable by the lessors on giving notice and on payment of compensation; notice was given during the testator's lifetime, but the compensation was not ascertained until after

(*b*) *Holt* v. *Holt*, 2 Vern. 322; *Cooper* v. *Jarman*, L. R. 3 Eq. 98; *Re Day*, [1898] 2 Ch. 510.
(*c*) *Re Day*, *supra*.
(*d*) 73 L. J. Ch. 15. See also *Re Bogg*, [1917] 2 Ch. 239 (mortgage foreclosed), stated *ante*, p. 712.
(*e*) *Re Graves*, 15 Ir. Ch. 357; *Re Crofton*, 1 Ir. Eq. 204.
(*f*) *Morris* v. *Morris*, Ir. R. 6 C. L. 73; 7 C. L. 295; *Re Dane's Estate*, Ir. R. 10 Eq. 207; *Batteste* v. *Maunsell*, *ib.* 314.
(*g*) The cases are referred to *post*, p. 1053.
(*h*) 1 Cox, 167, *ante*, p. 712.
(*i*) *Goold* v. *Teague*, 5 Jur. (N.S.) 116.
(*k*) Ir. R. 10 Eq. 496.

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his death; he had specifically bequeathed the lease : it was held that the legatee was entitled to the compensation. The question seems to have been whether the lease was still subsisting at the testator's death; if it had been determined by the notice, the legatee would not have been entitled to the compensation.

Unauthorised conversion.

In *Browne* v. *Groombridge* (*l*), a testator gave his wife all his ready money which he should have about his person or at his residence at his death, and he bequeathed to others his exchequer bills, stock, etc. : he became insane two years before his death, and during that time large sums of ready money belonging to the testator were invested on his behalf in stock and exchequer bills : it was held that this was a due conversion of the money, and that the specific legatees of the stock and exchequer bills were entitled to the investments. But some doubt is thrown on the correctness of this conclusion by the decision of Wood, V.-C., in *Taylor* v. *Taylor* (*m*). In that case a testator made a specific bequest of leaseholds and chattels, and afterwards became insane; no commission in lunacy was taken out, but the persons who managed the testator's affairs entered into an agreement for the sale of the leaseholds and chattels, and after his death the agreement was approved by the Court : nevertheless it was held that this did not alter the rights of the specific legatees (*n*).

Conversion of stock, etc., by Act of Parliament.

The question whether a bequest of stock or shares is adeemed by the property being converted by Act of Parliament, or under the powers of a company, is discussed elsewhere (*o*).

Conversion in lunacy.

In *Jones* v. *Green* (*p*), a testator specifically bequeathed certain shares, and was afterwards found a lunatic : the shares were sold by order of the Court and the proceeds invested in consols : it was held that the bequest was adeemed. But this result would probably not follow if the sale took place under the Lunacy Act, 1890 (*q*).

II.—Rights of Beneficiaries affected by Trustees' Option to Convert.—Where trustees have a discretionary power to convert, they ought not to exercise it in such a way as unnecessarily to alter the rights of the parties. Thus, if wasting securities are

(*l*) 4 Madd. 495.

(*m*) 10 Hare, 475.

(*n*) Compare *Domvile* v. *Taylor*, 32 Bea. 604; *Re Larking*, 37 Ch. D. 310; *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296. The decisions in *Drinkwater* v. *Falconer*, 2 Ves. sen. 623, and *Basan* v. *Brandon*, 8 Sim. 171, also seem inconsistent with *Browne* v. *Groombridge*. The difficulty is that ademption is not a question of intention but of fact : *Ashburner* v. *Macguire*, cited *post*, p. 1053.

(*o*) *Post*, p. 1056.

(*p*) L. R. 5 Eq. 555; *Re Freer*, 22 Ch. D. 622.

(*q*) Section 123. See *post*, p. 1056.

bequeathed by a testator upon trust for A for life, with a discretionary power of conversion, the trustees ought not to convert unless the investment become hazardous (*r*).

Result of actual conversion under will.

Where property is given to trustees with power to convert it into realty or personalty at their option (*s*), the general rule is that it devolves according to the state of investment in which it happens to be. Thus in *Rich* v. *Whitfield* (*t*) a testator directed his trustees to sell land and to invest the proceeds in the purchase of other lands or in government securities; they invested them in government securities, and it was held that these devolved as personal estate.

An investment in personalty under a power of interim investment does not affect the devolution of the property (*u*).

Conversion under power of sale.

The general principle is that conversion of land under a power of sale has no retrospective effect, and does not divest the interest of the person entitled beneficially to the land at the time of conversion, but merely changes his interest from an interest in real estate to an interest in personal estate, so that his personal and not his real representatives would upon his death become entitled (*x*).

Trustees' option to sell may affect destination of property.

Where trustees have a power or discretion to convert land into money, or *vice versa*, it may happen, as Mr. Jarman points out (*y*), that "the exercise of [the] trustees' option to convert, regulates not merely the devolution of property as between the real and personal representatives respectively of the beneficial objects, but also determines its destination under the will itself; *i.e.*, until conversion, it belongs to one, and when actually converted, to another. Large and inconvenient as such a discretion is, yet, if the intention to confer it be clearly manifested, the construction must prevail, in spite of any suspicion that the testator misapprehended the effect of the terms he has employed.

(*r*) *Lord* v. *Godfrey*, 4 Madd. 455. The case of *Baud* v. *Fardell*, 7 D. M. & G. 628, in which it was seriously argued that a trustee with power to invest in government securities ought to sell out a government security bearing interest at 5 per cent., and invest in 3 per cent. securities, savours of Lord Eldon's days.

(*s*) As to the cases in which an option is given in form but not in substance: *Grieveson* v. *Kirsopp*, 2 Kee. 653; *Minors* v. *Battison*, 1 A. C. 428, and other cases cited *post*, p. 738.

(*t*) L. R. 2 Eq. 583; *Polley* v. *Seymour*, 2 Y. & C. 708, *post*, p. 738. Compare *Re Bird*, [1892] 1 Ch. 279; *Walker* v. *Denne*, 2 Ves. jun. 170; *Van* v. *Barnett*, 19 Ves. 102.

(*u*) *Re Bird*, *supra*.

(*x*) *Per* Neville, J., in *Re Dyson*, [1910] 1 Ch. 750.

(*y*) First ed., p. 538. The effect of the exercise of an option of purchase given to a stranger has been already considered, *ante*, p. 712.

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Brown v. *Bigg.*

" As in *Brown* v. *Bigg* (*z*), where a testator ordered and empowered his wife (in case she chose so to do) with the advice of W. G., to sell all his G. estates, stating that she would probably not choose to live there, with the crop, stock, and effects, with all convenient speed; and the money arising from such sale, to be placed out on security, the yearly interest of which, as well as the interest due to the testator on notes, bonds, mortgages or otherwise (except what was in the public funds), he gave to his wife for life, determinable as to one moiety on marriage again. And the testator gave the whole of his personal estate, principal and interest, of every kind, both on public and private security, before undisposed of, to several persons. The wife sold part of the G. estate, and died; and Sir W. Grant, M.R., held, that the proceeds of such part belonged to the residuary legatees, and that the unsold part of the estate remained the property of the testator's heir.

Vesting of fund postponed until actual sale.

" So, if the fund arising from the sale be disposed of in such terms as unequivocally and explicitly to make the vesting depend on the period of actual sale, the vesting will be postponed accordingly.

" Thus, where (*a*) a testator devised certain real estates to his wife for life, and directed that A. should, as soon after her decease, or her refusing to release her dower, as conveniently might be, sell the estate; and as to the monies arising from the sale, together with the rents till sold, he gave the same to be equally divided between his five nephews (naming them), at such time as the sale should be completed, *in case they should be then living*; but, in case any of them should die in his lifetime, or before the sale of his said estate should be completed, leaving issue, his part should be paid to his children; but in case any of them should die in his lifetime, or before the sale should be completed, without leaving issue, to the survivors. Sir W. Grant held, that the share of a nephew surviving the testator, but dying before the sale, did not vest; observing, that to adopt the contrary construction would deny to the testator the power, by any express form of words, or clear manifestation of intention, to make the vesting depend on the actual sale.

" In all such cases, however, the Courts, ever anxious to avoid imputing to a testator a mode of disposition at variance with what is usual and convenient, will diligently seek in the context of the will for means of escape; and in one class of cases, of very frequent occurrence, the literal force of the language of the

(*z*) 7 Ves. 279; and see *Walter* v. *Maunde*, 19 Ves. 424; *Harding* v. *Trotter*, 21 L. T. (o.s.) 279; and *Re Perkins* (1909), 53 Sol. J. 698.

(*a*) *Elwin* v. *Elwin*, 8 Ves. 547. See also *Faulkener* v. *Hollingsworth*, cit. 8 Ves. 558.

Doctrine as to enjoyment of property which is subject to a trust for conversion.

will has, even without any such aid from the context, been moulded into conformity with probable intention. The cases here alluded to are those in which a will, creating a trust for conversion, is so framed as that the enjoyment of the *cestui que trust* is apparently made to wait until actual conversion. The inconvenience of such a postponement is obvious; it seems hardly supposable that the testator could mean that the actual enjoyment by the object of his bounty should be liable to be deferred for an indefinite period, by difficulties attending the execution of the trust, or the want of activity in the trustees in effecting a conversion. To prevent such consequence, a liberal construction has obtained in these cases, and the legatee, until the execution of the trust, takes an interest in the unconverted property, corresponding to that which he would have been entitled to in the proceeds, if the conversion had taken place (*b*).

Thus, where (*c*) lands were devised (*d*) to be sold, and out of the money arising from the sale other lands were to be purchased, to be settled to certain uses, and a person, who would have been tenant in tail under those uses with reversion in fee to himself, levied a fine of the estate devised to be sold; Sir W. Grant held, that though no estate was in terms limited to him in that property, yet he was tenant in tail in equity; and, by the fine, acquired an equitable fee." It follows from this principle, that where land is devised in trust for sale, and the proceeds of sale are to be held in trust for a person for life, with remainder over, the tenant for life is, as a general rule, entitled to the rents of the land until it is sold (*e*). And the same rule applies where the real and personal estates are devised and bequeathed together (*f*).

So, where by will trustees were directed to sell an advowson when full, and invest the proceeds for the benefit of A during her life, and afterwards for other persons, a sale of the advowson not having been effected while the advowson was full, it was held that the right to nominate a clerk was in A (*g*).

(*b*) This statement of the law by Mr. Jarman was cited with approval in *Re Searle*, [1900] 2 Ch. 829. As to the rights of the tenant for life in such a case, see Chap. XXXIV, *post*, pp. 1193 *seq.*

(*c*) *Pearson* v. *Lane*, 17 Ves. 101; *Waddington* v. *Yates*, 15 L. J. Ch. 223, seems to have been decided on the same principle. In that case the power of sale was exercisable with the consent of the tenant for life.

(*d*) It was really a conveyance by deed upon trust for sale.

(*e*) *Casamajor* v. *Strode*, 19 Ves. 390 n.; *Re Laing's Trusts*, L. R. 1 Eq. 416; *Re Carter*, 41 W. R. 140; *Hope* v. *D'Hédouville*, [1893] 2 Ch. 361.

(*f*) *Re Searle*, [1900] 2 Ch. 829; *Re Earl of Darnley*, [1907] 1 Ch. 159; *Re Oliver*, [1908] 2 Ch. 74, referred to *post*, p. 1026. In *Yates* v. *Yates*, 28 Bea. 637, there was no trust for sale.

(*g*) *Briggs* v. *Sharp*, L. R. 20 Eq. 317. And see *Hawkins* v. *Chappel*, 1 Atk. 621; *Johnstone* v. *Baber*, 6 D. M. & G. 439; *O'Shea* v. *Howley*, 1 J. & Lat. 391.

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And in *Prendergast* v. *Prendergast* (*h*), where trustees were empowered in their uncontrolled discretion to set aside sufficient investments to produce £1,500 a year, and to pay that sum to A, the Court refused to exercise their discretion, but directed an adequate sum in consols to be purchased to meet the annuity.

Residuary personalty.

The doctrine above stated must not, of course, be confused with the rules governing the rights of tenant for life and remainder-man in respect of a residuary personal estate, whether there is a trust for conversion or not; these are discussed in Chapter XXXIV.

Money to be laid out in land considered as land and *vice versa*.

III.—Doctrine of Constructive Conversion.—The general rule is thus stated by Mr. Jarman (*k*) : "On the principle that equity considers that as done which ought to have been done, it is well established that 'money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given : whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land' (*l*). It follows, therefore, that every person claiming property under a will or settlement directing its conversion, must take it in the character which such instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to property of this character. This doctrine is founded in justice and good sense : since it would be obviously unreasonable that the condition of the property, as between the representatives of the parties beneficially interested, should depend on the acts of persons through whom, instrumentally, the conversion is to be effected, and in whom no such discretion is expressed to be reposed. The principle is, besides, too well supported by numerous authorities (*m*) to be called in question at this day."

(*h*) 3 H. L. C. 195. See *Re Hollins*, [1918] 1 Ch. 503 (abatement).

(*k*) First ed., p. 523. As to trusts for conversion, see *post*, p. 841.

(*l*) "*Vide* Sir Thomas Sewell's judgment in *Fletcher* v. *Ashburner*, 1 Br. C. C. 499, whose statement of the doctrine in these terms was commended for its accuracy by Lord Alvanley, in *Wheldale* v. *Partridge*, 5 Ves. 396." (Note by Mr. Jarman. His citation of the judgment is not quite accurate : for "the owner of the fund," he substitutes "the owner of the land [qu. property?]." No doubt "fund" is a misprint for "land.")

(*m*) 2 Keb. 841; 2 Vern. 55; Pre. Ch. 543, cited 2 Vern. 58; 1 Vern. 345; 2 Vern. 20; 1 Eq. Ab. 273, pl. 5; 1 Eq. Ab. 274, pl. 6; 2 Vern. 101; *ib.* 295; *ib.* 506; 1 P. W. 172; Pre. Ch. 400; 1 Eq. Ab. 175, pl. 5; 3 P. W. 212; Ca. t. Talb. 80; 1 P. W. 204; *ib.* 483; 1 B. P. C. Toml. 207; 3 *ib.* 1; *ib.* 148; 2 Atk. 452; 3 Atk. 111; 3 *ib.* 254; 1 B. C. C. 224; 7 B. P. C. Toml. 530; 1 B. C. C. 497; *ib.* 505; 2 Kee. 653.

Cases illustrative of the doctrine before 1926.

Thus, money directed to be laid out in land, and settled on A in fee, is, though not actually laid out, descendible as real estate to the heir : was subject to tenancy by the curtesy (*n*) : was not liable (otherwise than real estate is liable) to simple contract debts (*o*) : and will not pass under a general bequest purporting to include personal estate only (*p*), unless the testator had power to change its character, and showed an intention to do so (*r*).

As a general rule, money so constructively converted into land passes under a devise of lands, tenements, and hereditaments (*s*). But if a testator devises all his lands in Staffordshire to A, this will not pass moneys arising from the sale of lands in Staffordshire, and subject to a trust for re-investment in lands in any part of England; being, however, in the nature of realty, they would pass under a residuary devise of real estate (*t*).

So, in the case of real estate, whether freehold or copyhold, being directed to be sold, and the proceeds bequeathed to A, who, after surviving the testator, happens to die before the sale, the property devolves to his personal representative, with all the incidental qualities of personal estate, or passes by a residuary bequest contained in his will (*u*). The question whether it is subject to the *lex loci* is discussed in the next chapter.

Double conversion.

The doctrine, of course, applies where the ultimate destination of the property is to be reached by several gradations. Thus, land directed to be sold, and the proceeds to be invested in land, will, though neither conversion has been actually effected, be

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(*n*) *Sweetapple* v. *Bindon*, 2 Vern. 536; *Cunningham* v. *Moody*, 1 Ves. sen. 174; *Dodson* v. *Hay*, 3 B. C. C. 404.

(*o*) *Lawrence* v. *Beverly*, 2 Keb. 841; see *post*, p. 1940.

(*p*) *Gillies* v. *Longlands*, 4 De G. & S. 372; and see *Richards* v. *Att.-Gen. for Jamaica*, 13 Jur. 197; *Re Pedder's Settlement*, 5 D. M. & G. 890; *Re Skeggs*, 2 D. J. & S. 533; *Re Greaves*, 23 Ch. D. 313.

(*r*) *Chandler* v. *Pocock*, 16 Ch. D. 648; *Re Harman*, [1894] 3 Ch. 607. Compare *Re Greaves*, *supra*.

(*s*) *Lingen* v. *Sowray*, 1 P. W. 172; *Shorer* v. *Shorer*, 10 Mod. 39; *Harvey* v. *Aston*, 1 Atk. 364; *Guidot* v. *Guidot*, 3 *ib.* 254; *Rashleigh* v. *Master*, 1 Ves. jun. 201; 3 B. C. C. 99; *Hickman* v. *Bacon*, 4 B. C. C. 333; *Green* v. *Stephens*, 12 Ves. 419; 17 *ib.* 64.

(*t*) *Re Duke of Cleveland*, [1893] 3 Ch. 244; *Re Upton-Cottrell-Dormer*, 112 L. T. 974 (residuary personalty liable to be invested in land); *Basset* v. *St. Levan*, 43 W. R. 165.

(*u*) *Elliott* v. *Fisher*, 12 Sim. 505. See, as to a devise under the old law of lands contracted to be purchased but not conveyed at the date of the will, Lord Cowper's judgment in *Lingen* v. *Sowray*, as reported 1 Eq. Ca. Ab. 175, pl. 5; *Wheldale* v. *Partridge*, 5 Ves. 388; 8 Ves. 227; *Thornton* v. *Hawley*, 10 Ves. 129; *Biddulph* v. *Biddulph*, 12 Ves. 161; *Green* v. *Stephens*, *ib.* 419; 17 Ves. 64; *Kirkman* v. *Miles*, 13 Ves. 338; *Triquet* v. *Thornton*, *ib.* 345; *Van* v. *Barnett*, 19 Ves. 102; *Ashby* v. *Palmer*, 1 Mer. 296, and stated *post*; *Stead* v. *Newdigate*, 2 Mer. 521. The *dictum contra* of Lord Loughborough, *Walker* v. *Denne*, 2 Ves. jun. 170, is completely overruled.

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regarded as real estate (*y*). But where the first conversion is out and out, and the second qualified only, the property will be impressed with the character which the first conversion stamps upon it, namely, that of personalty (*z*).

Where trust for sale is invalid.

It is hardly necessary to add that in order to effect a constructive conversion, the trust for sale must be valid; if it is void (*e.g.*, by reason of its transgressing the Rule against Perpetuities) no conversion is effected (*a*).

No conversion unless a sale directed.

IV.—What Words will work a Constructive Conversion.—In order to work a constructive conversion, "the new character must be decisively and absolutely fixed upon the property" (*b*). In other words, an actual sale or purchase, either immediately or in future, must be directed positively and absolutely, and not conditionally or contingently (*c*). The direction may be express or implied. It has been already mentioned that the direction must be free from objection on the score of remoteness (*d*).

Effect of direction that money shall devolve as land, or *vice versa*.

A direction that real estate shall be considered as personal, or *vice versa*, is insufficient to effect a conversion, since the law does not allow property to be retained in one shape, and yet to devolve as if it were in another. But where a testator gives a power of investing money in the purchase of land and directs that until so invested it shall devolve as land, or, conversely, gives a power of selling land and directs that until sold it shall devolve as personalty, this is effective for the purposes of the trusts contained in the will; so that in the one case the money follows the trusts declared concerning land which is subject to the will, and in the other case the land follows the trusts declared concerning personalty which is subject to the will. In other words, the trusts are declared by reference. But the direction cannot affect the devolution of the property by the rules of law, so that if the trusts fail, the direction is inoperative, for there is no true conversion (*e*).

(*y*) *Sperling* v. *Toll*, 1 Ves. sen. 70; *Pearson* v. *Lane*, 17 Ves. 101. In such a case, where part of the land has been sold and the money not yet re-invested, the money will not pass under a devise of all the testator's interest in the land, if there is any part unsold to answer the description: *Re Pedder's Settlement*, 5 D. M. & G. 890.

(*z*) *Van* v. *Barnett*, 19 Ves. 102, stated *post*, p. 731.

(*a*) *Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Re Wood*, [1894] 3 Ch. 381; *Re Appleby*, [1903] 1 Ch. 565.

(*b*) Mr. Jarman, first ed., p. 526.

(*c*) *Tily* v. *Smith*, 1 Coll. 434; *Wall* v. *Colshead*, 2 De G. & J. 683. As to the effect of giving the trustees a discretion in respect of the time of sale, or of making the sale conditional on the consent or request of a certain person, see *post*, pp. 734 *seq.*

(*d*) *Supra.*

(*e*) *Att.-Gen.* v. *Mangles*, 5 M. & Wels. 120; *De Beauvoir* v. *De Beauvoir*, 3 H. L. C. 524; *Edwards* v. *Tuck*, 23 Bea. 268. As to *De Beauvoir* v. *De Beauvoir*, see *post*, p. 1546.

Cases where money has been held converted.

Earlom v. *Saunders.*

And first as to the cases where money has been held to be converted. In *Earlom* v. *Saunders* (*f*), lands were devised to trustees to the use of the testator's wife for life, with remainder to his first and other sons in tail male, with remainder to his daughters in tail, with remainder to two persons as tenants in common in fee; and money was bequeathed to trustees to be laid out in the purchase of lands or any other security or securities as they should think proper and convenient; and the testator directed that the lands and securities should be made to and settled on the trustees, their heirs and assigns, in trust and to the use of his wife for life, and after her decease to such uses and under such provisions, conditions, and limitations, as his lands before devised were limited; Lord Hardwicke, on the ground that if the money was laid out on securities which were personal, all the limitations might not take place, considered the money to be constructively converted.

Cowley v. *Hartstonge.*

In *Cowley* v. *Hartstonge* (*g*), the point was much considered. The trust was to lay out money "either in the purchase of lands of inheritance, or at interest, as my trustees shall think most fit and proper, and then upon this further trust, to pay the rents of the said lands of inheritance, or the interest of the money, etc., to H. for his life," and then followed a series of limitations of estates for life and in tail to the sons and daughters of H., and to other persons in strict settlement. It was held in D. P. that taking the whole will together, the testator contemplated an investment in land at some time or other, and there was therefore a constructive conversion. There was an ultimate limitation to the testator's right heirs, executors and administrators; but Lord Redesdale said the meaning of that was merely that if all the previous limitations failed before the death of H., there was no further cause for investing in land, and the personal estate might be left to go to the testator's next-of-kin, and the real estate to the heir.

Hereford v. *Ravenhill.*

In *Hereford* v. *Ravenhill* (*h*), fee-simple estates were devised in strict settlement, and money was bequeathed upon trust with

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In *Re Walker*, [1908] 2 Ch. 705, the testator devised his real estate by way of settlement, and directed that his trustees should hold and apply the proceeds of his personal estate as if they had arisen from a sale of the real estate under the settled Land Act, 1882: it was held by Parker, J., that this was not an imperative trust for conversion into realty, because under the Settled Land Act, capital moneys may be invested in the purchase of leaseholds. *Re Twopenny's Settlement*, [1924] 1 Ch. 522; *Re Aspinall's Settled Estates*, [1916] 1 Ch. 15. The law is now altered by section 78 of the Settled Land Act, 1925 (as amended by the Law of Property (Amendment) Act, 1926).

(*f*) Amb. 241; see also *Johnson* v. *Arnold*, 1 Ves. sen. 169; *Meure* v. *Meure*, 2 Atk. 265.

(*g*) 1 Dow, 361.

(*h*) 5 Bea. 51.

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consent to be invested in the purchase of freehold, leasehold, or copyhold messuages, lands or hereditaments, which were to be conveyed, settled, or assured to the like uses, etc., as the hereditaments thereinbefore devised stood limited. There was, also, a power to invest at interest till a purchase could be made. Lord Langdale, M.R., decided that this was a trust for conversion, and observed that the case before him differed from *Walker* v. *Denne* (presently noticed), in that the leaseholds to be purchased in that case were to be for very long terms of years. This difference is not very apparent; but the limitations in the several cases were such as easily to lead to different conclusions.

Cookson v. *Reay.*

In *Cookson* v. *Reay* (*k*), the testator directed a sum of money to be invested in land or other securities for his son John, the interest of such money or produce of such lands to be paid to him for his life, and if he married with consent, and made a proper settlement on his wife, that the remainder should go to such child or children as he might have lawfully begotten, and on failure of these to the testator's son Isaac and his heirs for ever. Lord Langdale, without deciding the point, said that, upon the authorities of *Earlom* v. *Saunders* and *Cowley* v. *Hartstonge*, he was inclined to consider the money as directed to be laid out in the purchase of land, and that the direction to invest on some other securities had reference only to the time which might elapse before a purchase of land could be procured. On appeal to the House of Lords (*l*), Lord Brougham inclined to the same opinion by reason of the words "remainder" and "heirs" in the limitations to the children and Isaac. It would seem that "heirs" alone would not have supported this conclusion (*m*). However, assuming that the will had converted the money, the decision was that the beneficiaries had reconverted it.

(*k*) 5 Bea. 22.

(*l*) *Cookson* v. *Cookson*, 12 Cl. & Fin. 121.

(*m*) *Atwell* v. *Atwell*, L. R. 13 Eq. 23; *Walker* v. *Denne*, 2 Ves. jun. 170. In *Atwell* v. *Atwell* (also reported 41 L. J. Ch. 23), land was settled by deed to trustees to the use of the children of J. A., equally and their heirs and assigns, and the settlement contained a power of sale and also of re-investment of the proceeds in land; the land was sold but the proceeds were invested on mortgage. Some of the beneficiaries had died before the sale took place, and others died afterwards. The order of Lord Romilly, M.R., as to the devolution of the respective interests in the settled property was as follows:—"that the shares therein of C. A. and Joseph A., two of the children of the settlor J. A., who died in early infancy before such conversion descended to their brother, and heir-at-law J. B. A., and that the said J. B. A., John A., and F. W. A., three of such children, having died subsequently to such conversion as in the chief clerk's certificate mentioned, the interests of the said J. B. A. as well original as accrued, and interests of John A. and F. W. A. were at the times of their respective deaths personal estate, and that the plaintiff, as legal personal representative of the said J. B. A. the settlor, the father and sole next-of-kin of such children, is entitled accordingly to five shares." See Reg. Lib. A. 3112, November 16, 1871.

Simpson v. *Ashworth.*

In *Simpson* v. *Ashworth* (*n*), the testator gave to his daughter C. £4,000 out of his personal estate, and directed his executors to pay her the interest of £2,000 till she attained the age of twenty-one years. He also directed his executors or the survivor of them, as soon as convenient after his decease, to purchase an estate, not to exceed £2,000, for her use and her lawful heirs, the daughter to come into possession, with the accumulations, at her age of twenty-one years. If the land was not bought before she attained that age, she was to receive the £4,000, and to give security for £2,000, to be returned, if she died without lawful heirs, to the testator's son and daughters that should have heirs, share and share alike, and provided the land be purchased to be returned in the same manner. Lord Langdale held that the £2,000 was intended to be converted at all events, and that the daughter took an estate tail. Applied to personal estate the gift over on the death of the daughter without heirs (*i.e.*, heirs of her body) would have been void for remoteness; which of itself, according to *Earlom* v. *Saunders*, was strong reason for deciding in favour of the conversion.

Cases where money has been held not converted.

Next, with respect to the cases in which it was held that there was no conversion.

Curling v. *May.*

In *Curling* v. *May* (*o*), the trust was to lay out money in the purchase of lands, or put the same out on good securities, upon trust for the separate use of H., her heirs, executors and administrators. The money never having been laid out, Lord Talbot decreed the administrator of H. to be entitled.

Van v. *Barnett.*

In *Van* v. *Barnett* (*p*), lands were covenanted to be conveyed to trustees to be sold, and the produce, with the consent of certain persons, was directed to be laid out in the purchase of lands or in government securities, and the latter trust was held not to operate as a reconversion, the trusts declared of the fund in its ultimate state not being such as to show that a re-investment in land at some time or other was intended (*q*).

Walker v. *Denne.*

In *Walker* v. *Denne* (*r*), where money was directed to be laid out in freehold lands, or long terms of years, in trust for A for life, and afterwards for her children and their heirs, but if there should be no child or heirs of her body living at her death, then for the testator's right heirs, Lord Loughborough held that it was not converted into realty so as to escheat to the Crown on failure of heirs, there being an option in the trustees to have it laid out

(*n*) 6 Bea. 412.
(*o*) Cited 3 Atk. 255.
(*p*) 19 Ves. 102.
(*q*) See also *Biggs* v. *Andrews*, 5 Sim. 424; *Rich* v. *Whitfield*, L. R. 2 Eq. 583, where, however, the point was rather assumed than decided.
(*r*) 2 Ves. jun. 170; see also *Van* v. *Barnett*, 19 Ves. 102.

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Doctrine of conversion in regard to escheat.

in either species of property. Indeed, he doubted whether, even if there had been no such option, the Crown could have claimed. But his doubt appears to have referred as well to the general doctrine, as to its effect in regard to escheat. There would seem to be considerable difficulty in supporting the claim of the Crown to have the money laid out in such a case, as escheat was a consequence of tenure, and, therefore (it should seem) inapplicable to equitable interests of every description (*s*).

Pole v. *Pole.*

In *Pole* v. *Pole* (*t*), a fund was paid into Court to the account "The fund which under the arrangement of November, 1867, is to follow the limitations contained in the will of P. with respect to his real estate." It was held that this did not imply a direction to invest the fund in real estate.

Implied trust for conversion.

Sometimes there is no express trust for conversion, but the accompanying directions are such as lead to an implication that conversion was intended; as, where real and personal estate was devised to trustees in trust to "invest" the same in the funds (*u*), and again, where leaseholds were given upon the same trusts and subject to the same powers as those declared of the moneys to arise by sale of property previously given in trust for sale (*w*). But the same inference is not necessarily to be drawn from a trust to divide into several shares, if the trustees have an express power of sale (*x*); or though they are directed to "invest" some of the shares (*y*). In *Burrell* v. *Baskerfield* (*z*), however, a power to trustees to collect all the testator's property together, and to sell and convert into money, and to pay certain legacies, followed by a direction to divide the whole of the remainder of his property among certain persons, was held to create a trust for conversion. And in *Mower* v. *Orr* (*a*), where a testator after stating that his property consisted of copyholds,

Mower v. *Orr.*

(*s*) See *Henchman* v. *Att.-Gen.*, 3 My. & K. 485, at p. 494. The law of escheat was extended to equitable estates and interests by the Intestates Estates Act, 1884, s. 4: *Re Wood*, [1896] 2 Ch. 596. Escheat is now abolished.

(*t*) [1924] 1 Ch. 156.

(*u*) *Affleck* v. *James*, 17 Sim. 121; *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595 (settlement).

(*w*) *Murton* v. *Markby*, 18 Bea. 196. The question arose upon a claim by tenant for life to enjoy leaseholds in specie. See also *Tait* v. *Lathbury*, L. R. 1 Eq. 174, and *per* Lord Campbell, 2 D. F. & J. 138.

(*x*) *Greenway* v. *Greenway*, 29 L. J. Ch. 601, 605; 2 D. F. & J. 128; *Lucas* v. *Brandreth*, 28 Bea. 273; *Re Wintle*, 65 L. J. Ch. 863. See *Grieveson* v. *Kirsopp*, *post*, p. 738.

(*y*) *Cornick* v. *Pearce*, 7 Hare, 477. See *Re Hailes and Hutchinson's Contract*, [1920] 1 Ch. 233.

(*z*) 11 Bea. 525. In *Re Cookes' Contract*, 4 Ch. D. 454, the question was whether the trustees could sell after the death of the tenant for life; no question of conversion seems to have arisen.

(*a*) 7 Hare, 473. See *Re Wintle*, [1896] 2 Ch. 711; *Owen* v. *Owen*, [1897] 1 Ir. R. 580 (settlement). After 1925 land held in undivided shares is subject to a trust for sale.

leasehold houses, merchandise in Australia, cash at his bankers and in the public funds, and that as it was so scattered about and not realised he could not state what he should die worth, divided it into twenty shares, sixteen of which he disposed of by giving a certain number to each of his three sons absolutely, and, as to the remaining four, he gave two to his daughter absolutely and two to be invested in the funds for the use of her children; and he appointed two of his sons executors, requesting them to get his property together and divide it according to his intention; it was held that the testator must be understood as directing a conversion of his copyhold estate into personalty. Wigram, V.-C., said that the division of the entire property into a number of shares, and the directions as to the investment and disposition of some such shares, precluded the supposition that he intended the copyholds to remain unsold.

Option for trustees to invest in realty.

Where a will disposes of personalty only, the fact that the gift is framed with limitations appropriate to realty, some of which must fail of effect when applied to personalty, will not raise an implied trust to convert into realty. A testator gave the residue of his personal estate to trustees, upon trust in their option to invest part thereof either in the purchase of real estate or in personal securities, and directed that the real estate so purchased or the investments should be held subject to certain limitations declared by the will which were applicable only to real estate; it was held by the House of Lords (*b*), affirming the decision of the Court of Appeal, that there was no implication of a trust for conversion, so as to control the option of the trustees.

Direction for temporary investment does not prevent conversion.

A provision that, until land be purchased, the money shall be placed out on security at interest, does not prevent its receiving the impression of the real estate instanter (*c*), this being a mere temporary arrangement; unless it appears, as of course it may, from other parts of the instrument, that the arrangement is not, in fact, intended to be merely temporary; for instance, if by a final disposition of the capital fund, in certain events, as money, it is shown that the conversion is to take place only in the alternative events (*d*).

Trust to sell at a stated time.

A trust to sell within a specified period converts the property though no sale be made within the period; the specification of

(*b*) *Evans* v. *Ball*, 47 L. T. 165.
(*c*) See *Edwards* v. *Countess of Warwick*, 2 P. W. 171; *Re Bird*, [1892] 1 Ch. 279.
(*d*) *Wheldale* v. *Partridge*, 5 Ves. 388; 8 *ib.* 227.

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time being directory only (*e*). In *Tily* v. *Smith* (*f*), the testator directed that his wife should hold one of his houses for her use to bring up his children E. and M., and at their arriving to the age of twenty-one years, then all his estates, real and personal, to be sold and converted into money, and the proceeds to be divided between his wife and as many children as she had at his decease. The wife and M. survived the testator, but E. died in his lifetime under twenty-one, and M. afterwards died under twenty-one, so that, strictly construed, the time for conversion never arrived. However, the V.-C. thought that the words "at their arriving," etc., meant only "subject thereto," or "when there shall be no child alive under twenty-one," and that in the event, which happened, of the wife or one or both of the daughters surviving the testator, he intended that there should positively and absolutely at some time and not conditionally or contingently, be a sale of the real estate. That time, he thought, arrived at or before the widow's death.

Tily v. *Smith.*

Effect of sale or purchase being only when trustees think fit.

Again, if the trust is imperative, it is not generally material that the sale or purchase is to be made only when the trustees think fit. Thus, in *Doughty* v. *Bull* (*g*), the trust was to sell as soon as the trustees should see necessary for the benefit of the testator's children, and to apply the money for their benefit; and it was held that only the time of the sale, and not the question whether there should be any sale, was left to the discretion of the trustees. But a discretionary trust for sale does not effect a conversion (*h*).

Doughty v. *Bull.*

Effect where sale or purchase to be made upon request.

If the purchase is to be made with consent or approbation (*i*), or on or after request or direction, the question whether or not a conversion is intended must be answered from a consideration of the whole instrument, and especially of the trusts to which the property is subjected, and the persons by whom the request is to be made (*j*).

Lechmere v. *Carlisle.*

Thus in *Lechmere* v. *Earl of Carlisle* (*k*), L. covenanted within one year to lay out a sum of money in the purchase of lands, with the consent of trustees, and to settle them; and it

(*e*) *Pearce* v. *Gardner*, 10 Hare, 287; and see *Cuff* v. *Hall*, 1 Jur. (N.S.) 972.

(*f*) 1 Coll. 434.

(*g*) 2 P. W. 320. See also *Robinson* v. *Robinson*, 19 Bea. 494; *Biggs* v. *Peacock*, 22 Ch. D. 284; *Re Raw*, 26 Ch. D. 601; *Re Heathcote*, 58 L. T. 43; *Minors* v. *Battison*, 1 A. C. 428.

(*h*) *Post*, p. 738.

(*i*) The person whose approbation is required will not be allowed to delay the sale for his own advantage and to another's prejudice: *Lord* v. *Wightwick*, 4 D. M. & G. 803; 6 H. L. C. 217.

(*j*) See *Waddington* v. *Yates*, 15 L. J. Ch. 223; *Batteste* v. *Maunsell*, Ir. R. 10 Eq. 314 (settlement); *MccGwire* v. *MccGwire*, [1900] 1 Ir. R. 200 (settlement).

(*k*) 3 P. W. 211. And see *Wrightson* v. *Macaulay*, 4 Hare, 497.

was held that the money thus agreed to be laid out should be taken as land. To the objection that the trustees must previously give their consent, Sir J. Jekyll, M.R., replied, that in his opinion they were not to do the first act : L. ought to have proposed his purchase and settlement, upon which the trustees were to signify their agreement or disagreement.

Thornton v. *Hawley*.

Again, in *Thornton* v. *Hawley* (*l*), Sir W. Grant was of opinion that the circumstance that a sum of stock was to be sold by the trustees after request to them made by the husband and wife, or the survivor, or the executors or administrators of the survivor, and the produce laid out in the purchase of land with the consent of the same persons, did not prevent the fund being immediately impressed with the quality of real estate, because to such property alone were the limitations applicable, and also because it was hardly possible to suppose an intention to give an option to any person who should be an executor or administrator, whether it should be money or land, though it might be intended to give that option to the husband and wife. From these considerations he inferred that this requisition did not exclude the authority of the trustees to convert the property at their own discretion, without request; but only rendered it imperative on them to act on the request, if made. Mr. Jarman remarks (*m*) :—" *If* the M.R. was right in his construction of the will, the conclusion at which he arrived respecting the nature of the property, was inevitable."

Re Taylor's Settlement.

On the other hand, in *Re Taylor's Settlement* (*n*), houses held in fee simple had been vested by marriage settlement in trustees in trust, upon request of the husband and wife, or the survivor, to sell and invest the produce of the sale, and to pay the income of the money, or of the houses till a sale, to W. for life, and after his decease, to his wife for life, and after the decease of the survivor, to convey the houses unless sold or to assign the money, to the issue of W. and his wife. The houses had been sold, not under the trust, but under compulsory powers in an Act of Parliament, which also provided that the purchase-money should be re-invested in land, to be settled to the same uses; so that the money retained the character which the houses

(*l*) 10 Ves. 129; applied in *Att.-Gen.* v. *Dodd*, [1894] 2 Q. B. 150, and *Re O'Grady's Settlement*, [1915] 1 Ch. 39. The cases are considered in *Re Goswell's Trusts*, [1915] 2 Ch. 106 (deed); *Re Ffennell's Settlement*, [1918] 1 Ch. 91; see also *Triquet* v. *Thornton*, 13 Ves. 345; *Johnson* v. *Arnold*, 1 Ves. Sen. 169. But see Lord Eldon's judgment, in *Van* v. *Barnett*, 19 Ves. 102; where, however, the direction was alternative to invest in personal security or land.

(*m*) First ed., p. 527. Mr. Jarman treats the case as if the settlement had been made by will : it was made by deed.

(*n*) 9 Hare, 596; and see *Davies* v. *Goodhew*, 6 Sim. 585; *Huskisson* v. *Lefevre*, 26 Bea. 157.

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possessed under the settlement (*o*). Upon the question what that character was, Turner, V.-C., held that the settlement had not worked a conversion of the houses. He remarked that, in *Thornton* v. *Hawley*, the sale was, after the death of the husband and wife, to be made at the request of the executors or administrators of the survivor; but, in the case before him, the sale was to be made only on the request of the husband and wife or the survivor; so that no sale could be made after their deaths, and that words of request in cases of such nature must be construed as inserted for the purpose either of enforcing obligation or of giving discretion, as the context of the instrument might require. In this case, the general intent that the houses should be sold at some time or other was evidently wanting, the last proviso in the settlement directing that the property, if sold, was to be personal, if not sold, real.

Effect of property directed to be sold being devised in a certain contingency as land.

"It seems," says Mr. Jarman (*p*), "that the converting effect of a trust for sale, in regard to a legatee to whom the proceeds are bequeathed, is not prevented by the fact, that in an alternative event, the testator has devised the property in terms adapted to its original state; as he may have contemplated the possibility of the contingency happening before a sale could be effected; besides which, it seems to have been considered that the property might be real estate as to one legatee, and personalty as to another, to whom it was given in an alternative event.

Lands devised to be sold, and proceeds given to A;

"Thus, in the case of *Ashby* v. *Palmer* (*q*), where a testatrix devised and bequeathed her real and personal estates to trustees, upon trust, as soon as convenient after her decease, to sell, and with the money thereby raised, and the rents until the sale, to pay her and her late husband's debts, and with the surplus to educate and bring up her daughter; and when she should attain twenty-one, or marry, 'to pay the monies which should be in the hands of the trustees, by virtue of the will, undisposed of for the uses aforesaid,' to the daughter. And the testatrix went on to direct, that if the daughter died under twenty-one

(*o*) As to this, *vide ante*, pp. 715 *seq.*

(*p*) First ed., p. 527.

(*q*) "MS.; *S. C.* 1 Mer. 296. The statement of this case is extracted from a note with which the author has been favoured. It supplies a deficiency in Mr. Merivale's report of it, in which, with less than his usual accuracy he omits, in the statement of the will, the very bequest on which the question arose, and to the particular language of which the M.R. adverted." (Note by Mr. Jarman.) See also *Tily* v. *Smith*, 1 Coll. 434, *supra*; *Ward* v. *Arch*, 15 Sim. 389; and see Lord Redesdale's remarks in *Cowley* v. *Hartstonge*, 1 Dow, 361, cited *ante*, p. 729. But the mere fact that conversion is less necessary for distribution in one alternative than in another will not prevent a trust for sale from being imperative in both: *Wall* v. *Colshead*, 2 De G. & J. 683. And see *Wilson* v. *Coles*, 6 Jur. (N.S.) 1003.

—with a limitation over of the moneys, *or the estate if unsold*, to B.

or unmarried, the monies in the hands of the trustees, *and such part of the real estate* (*if any*) *as should remain unsold at the time of her decease*, and not be applied for the payment of her debts or for the education of her daughter, should go to the testatrix's sister, her heirs, executors and assigns. The daughter attained twenty-one, but was a lunatic, and therefore incompetent to elect to take the estate as land or money. The question was, whether it went, at her death, to her heirs-at-law or next-of-kin. For the heir, it was contended that the estate was not to be sold at all events, but only to answer a particular purpose; that the testatrix did not mean it to go as money; *that she contemplated the possibility of its not being sold.* For the next-of-kin, it was argued that the estate was to be sold out and out; that the testatrix had no objection that her sister should take it as land, if by accident it should remain unsold; and she might have contemplated the premature death of the daughter before a sale could be effected; in which event, and in that only, she directs that the trustees shall not proceed in the accomplishment of her purpose. And it was contended that the words 'pay to' supported this construction; and it was said that, at all events, the daughter was to take it as money. Sir W. Grant, M.R.: 'I think that the construction of this will admits of no reasonable doubt: it is the settled rule of this Court, that land once impressed with the character of money retains that impression till some act is done, by a person competent to do that act, to restore it to its primary character. The testatrix has directed the estate to be sold; but the question is, not whether the estate shall be actually sold or not, but whether it is to be treated as personal estate. There is no gift to the daughter in any other shape than that of money. I see nothing inconsistent in the subsequent clause, by which, in the event of the death of the daughter under twenty-one, such part of the estate as should remain unsold is given to the sister (*r*). She might choose to give it to the daughter as money, and to the sister as land. There is no inconsistency in saying it shall be converted *quoad* the first taker, not *quoad* the second. The cases which have arisen between the heir and next-of-kin of a testator have no application to the present' (*s*).

Held to be personal estate as to A.

"And though a mere *power* of sale or purchase, of course, does not change the nature of the property; yet, the

Mere power does not produce conversion unless by force of the context.

(*r*) As to this, see also *Crabtree* v. *Bramble*, 3 Atk. 680.

(*s*) "What is the effect of a direction to purchase land in a particular parish, in which it turns out that land cannot be obtained, is not settled. Lord Thurlow thought it could not be laid out elsewhere; Lord Loughborough, that it might. Lord Eldon has alluded to these conflicting opinions without stating his own; see *Broome* v. *Monck*, 10 Ves. 610; also Hayes' Introd. (5th ed.), p. 95."

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circumstance of the clause respecting the sale or purchase being framed in the language of a power, will not prevent its producing a constructive conversion, if the context of the will shows that it is meant to be imperative, or in the nature of a trust. Thus, in the recent case of *Grieveson* v. *Kirsopp* (*u*), where a testator gave to his widow, for the benefit and advantage of his children, power of selling his Woodfoot estate; and, by a codicil, expressed himself (in effect) thus: 'I do empower my wife to sell all my estates whatsoever, and the money arising from such sale, together with my personal estate, she, my said wife, *shall* and may divide and proportion among my said children, as she shall think fit and proper, or as she shall direct by will.' The estate was neither sold nor appointed by the widow. It was held that a trust for the children was created by the will, and that they were entitled equally. It was held also, that the direction to sell operated as a conversion of the real estate, and that the shares of those children who were dead devolved on their representatives as personalty.

Grieveson v. *Kirsopp.*

Nature of property made to depend on trustee's option to sell or not.

"But although, in general, the presumption is that a testator does not intend the nature of the property to depend upon the option of the person through whom the conversion is to be effected (*v*); yet, if upon the whole will it appears to have been the intention of the testator to give to such person an absolute discretion to sell or not, the property in the meantime will, as between the real and personal representatives of the persons beneficially entitled, devolve according to its actual state. Thus, in *Polley* v. *Seymour* (*w*), a testatrix devised the residue of her real and personal estate to W., his heirs, executors and administrators, according to the different qualities thereof, upon trust to retain and keep the same in the state it should be in at the time of her decease, as long as he should think proper, or to sell and dispose of the whole, or such part

Polley v. *Seymour.*

(*u*) 2 Kee. 653. The codicil recited the will, and continued thus: "My will and mind is, that my wife S. C., and I do hereby empower her, by and with the assistance and help of the trustees therein named, to sell and dispose of all my estates, etc." In *Johnson* v. *Arnold*, 1 Ves. Sen. 169, there was a power to invest money in the purchase of land, coupled with a direction that until so invested it should be and enure [*sic*] to such purposes as if lands had been purchased: it was held that this operated as a conversion. See also *Nickisson* v. *Cockill*, 3 D. J. & S. 622; and the cases cited *ante*, p. 732.

(*v*) See further as to this, *ante*, p. 736.

(*w*) 2 Y. & C. 708; see also *Re Taylor's Settlement*, 9 Hare, 596, *supra*; *Harding* v. *Trotter*, 21 L. T. 279; *Glover* v. *Heelis*, 32 L. T. 534; *Greenway* v. *Greenway*, 2 D. F. & J. 128; *Lucas* v. *Brandreth*, 28 Bea. 273; *Yates* v. *Yates*, 28 Bea. 637; *Re Ibbitson*, L. R. 7 Eq. 226; *Re Hamlet*, 39 Ch. D. 426, 439. In *Minors* v. *Battison*, 1 A. C. 428, a direction to trustees to sell was held to work conversion, notwithstanding some equivocal expressions as to their "discretion" and "deciding to sell."

thereof, as and when he or they should from time to time think expedient, and then, upon trust to invest the proceeds. The testatrix then directed that W., his heirs, executors or administrators, should stand possessed of all such the general residue of her real and personal estate, and after such sale, of the securities whereon the same should have been invested, in trust, out of the rents and profits, interest, dividends and proceeds, to pay several life annuities; and, after payment thereof, the testatrix directed W., his heirs, executors and administrators, to stand possessed of all the said residue of her said real and personal estate, and of the stocks, funds and securities whereon the same or any part thereof should have been invested, and the rents and profits, interest, dividends and produce thereof, in trust for five persons (including W. himself), in equal shares, and for their respective heirs, executors, administrators and assigns, according to the different qualities thereof. It was held, that upon the terms of this will, it was not the intention of the testatrix that the property should be converted out and out; but that W. had a discretion to sell the whole or any part of it, when and as he might think expedient; and that, until he exercised that discretion, the property must be considered to remain in the state it was in at the time of the death of the testatrix."

In short, a trust to sell which is so expressed as to give the trustees a discretion whether they shall sell or not, is equivalent to a power of sale, and therefore does not effect a conversion (*x*). A devise to trustees either to retain or at such times as the trustees should think fit to sell was held in *Re Johnson* (*y*) to create a trust for sale with a power of postponement.

Death duties.

The question whether real estate is absolutely converted by a direction or authority to sell, was formerly of considerable importance with reference to the claim of the Crown to legacy duty and probate duty in respect of money charged on or arising from the sale of land, but its importance has been much diminished by the Succession Duty Act, 1853, the Customs, etc., Act, 1888, and the Finance Act, 1894. With regard to legacy duty, the question formerly arose on the Stamp Act, 1815, which subjected to the duty "moneys to arise from the

(*x*) *Re Hotchkys*, 32 Ch. D. 408; *Re Wintle*, 65 L. J. Ch. 863; *Re Newbould*, 110 L. T. 6 (as and where the trustees thought proper). The first trust in *Eyre* v. *Marsden*, 2 Keen, 564, seems to have been of this character, the second trust for sale being imperative.

(*y*) [1915] 1 Ch. 435, following *Re Crips*, 95 L. T. 865, and *Re Wagstaff's S. E.*, [1909] 2 Ch. 201, and distinguishing *Re Hotchkys*, 32 Ch. D. 408; *Re Horner's S. E.*, 39 Ch. D. 84; and *Re Goodall's Settlement*, [1909] 1 Ch. 440. See now section 25, sub-section 4 of the Law of Property Act, 1925.

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sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged or otherwise disposed of." On this subject, the following points have been decided :—

Rule as to legacy duty under the Stamp Act, 1815.

1st. Where real estate is directed to be sold out and out, the duty attaches, though by reason of the legatee electing to take it as real estate the property is not actually sold (*z*).

2ndly. Where the trustees have an option to continue the property in its actual state or to sell for the purpose of distributing the proceeds according to the will, and in the exercise of this discretion they sell, the legacy duty attaches (*a*) : but not if they do not sell (*b*). If the power of sale is given only for the purpose of re-investment in land (*c*), or for the variation of securities (*d*), or (it seems) for the purpose of raising debts and legacies or other prior charges (*e*), the duty is not payable, whether the property is sold or not, and although, after a sale, the beneficial owners have elected to take the property as money (*f*).

3rdly. Where a sale is directed by the Court in order to raise a charge, duty will attach on the amount necessary to satisfy the charge, if the will contains a power of sale which the donees of the power are compelled by the Court to exercise, but not (*g*) if the Court acts upon its general jurisdiction in such cases.

Mere power of sale does not let in legacy duty.

And it is to be observed, that where trustees are authorised to sell or not, as they think proper, and in virtue of this option they leave the property unconverted, the legacy duty is not attracted by a mere declaration in the will that the property shall be deemed to be personal estate, as it is not in the power of a testator to alter or regulate the nature of the subject of disposition by any such declaration (*h*).

Person absolutely entitled, may elect to take property in its actual state.

V.—Election to take Property in its actual State.—" But although," continues Mr. Jarman (*i*), " a new character may have been in plain and unequivocal terms impressed upon pro-

(*z*) *Att.-Gen.* v. *Holford*, 1 Pri. 426; *Adv.-Gen.* v. *Ramsay's Trustees*, 2 C. M. & R. 224, n.; *Williamson* v. *Adv.-Gen.*, 10 Cl. & Fin. 1.

(*a*) *Att.-Gen.* v. *Simcox*, 1 Ex. 749.

(*b*) *Att.-Gen.* v. *Mangles*, 5 M. & W. 120; *Att.-Gen.* v. *Simcox*, 1 Ex. 749.

(*c*) *Mules* v. *Jennings*, 8 Ex. 830.

(*d*) *Re Evans*, 2 C. M. & R. 206; *Adv.-Gen.* v. *Smith*, 1 Macq. Sc. Ap. 760.

(*e*) *Per* Lord Cranworth, *Adv.-Gen.* v. *Smith*, *supra*.

(*f*) *Mules* v. *Jennings*, 8 Ex. 830.

(*g*) *Hobson* v. *Neale*, 8 Ex. 368; 17 Bea. 178; *Harding* v. *Harding*, 2 Gif. 597.

(*h*) *Att.-Gen.* v. *Mangles*, 5 M. & Wel. 120. As to estate duty, see *Re Grimthorpe*, [1908] 1 Ch. 666; 2 Ch. 675. As to legacies bequeathed free of duty, see Chap. XLVI.

(*i*) First ed., p. 533.

perty by means of a trust for conversion; yet such constructive quality is liable to be determined by the act of the person or persons beneficially entitled, who may, at any time before its conversion *de facto*, elect to take the property in its actual state. And then comes the inquiry, who are personally competent to make, and what amounts to, such an election. It is clear that an infant (*j*), or lunatic (*k*), is incompetent, and also [under the old law] a feme covert (*l*), unless under a power or trust authorizing her to deal with the property as a feme sole (*m*); [but a feme covert who was married on or after the 1st of January, 1883, is under no such disability, nor a feme covert who was married before that date, so far as regards property, her title to which accrued after that date (*n*)]. It was said by Lord Macclesfield in *Edwards* v. *Countess of Warwick* (*o*), that the election might be made by parol. This was denied by Lord Hardwicke in *Bradish* v. *Gee* (*p*), but the affirmative appears to have been decided at the Rolls (*q*), in the case of *Chaloner* v. *Butcher*.

Who competent to make election.

Parol election whether good.

"The expressions or acts declaratory of such an intention, however, [though it is said they may be slight (*r*)] must be unequivocal (*s*). Thus, where (*t*) a person was, under a settlement, tenant in tail of lands, with a reversion in fee to himself, and was entitled under the same settlement to lands to be purchased with a certain sum of money and settled to the same uses; it was held, that his levying a fine of the land limited by the settlement, to bar the issue, did not demonstrate an intention to take as money the fund not laid out" (*u*).

What amounts to an election.

(*j*) *Carr* v. *Ellison*, 2 B. C. C. 56; *Van* v. *Barnett*, 19 Ves. 102. Except under the direction of the Court, *Robinson* v. *Robinson*, 19 Bea. 494.

(*k*) *Ashby* v. *Palmer*, 1 Mer. 296; *Orr* v. *Alexander and Megaw*, [1925] N. Ir. 104 (reconversion). As to what will amount to an election on behalf of a lunatic, see *Re Douglas and Powell*, [1902] 2 Ch. 296.

(*l*) *Oldham* v. *Hughes*, 2 Atk. 452; *Sisson* v. *Giles*, 3 D. J. & S. 614. As to a married woman electing by examination in Court to take the proceeds of sale in a partition action as personal estate, see *Standering* v. *Hall*, 11 Ch. D. 652, *ante*, p. 715.

(*m*) *Re Davidson*, 11 Ch. D. 341.

(*n*) See the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 2, 5.

(*o*) 2 P. W. 173.

(*p*) Amb. 229.

(*q*) March 8, 1736, cited 3 Atk. 685.

(*r*) *Per* Lord Eldon, 8 Ves. 236.

(*s*) *Stead* v. *Newdigate*, 2 Mer. 531; *Re Pedder's Settlement*, 5 D. M. & G. 890.

(*t*) *Edwards* v. *Countess of Warwick*, 2 P. W. 171; 2 Eq. Cas. Ab. 42, pl. 3; 1 Br. P. C. Toml. 207; and see *Biddulph* v. *Biddulph*, 12 Ves. 161; *Dixon* v. *Gayfere*, 17 Bea. 433; *Griesbach* v. *Fremantle*, 17 Bea. 314; *Meredith* v. *Vick*, 23 Bea. 559.

(*u*) As to barring entails in lands to be purchased, see stat. 3 & 4 Will. 4, c. 74, ss. 70, 71; and 1 Hayes's Introd. (5th ed.), p. 204.

Changing the securities.

And where a person, constructively entitled in fee simple to lands to be purchased with trust-money, called in part of the money, and placed it out upon a fresh security, in the name of a trustee for himself, his executors and administrators, it was held that he had by these acts elected to take that part as money (*v*), but that the rest of the money, whether subsisting upon the securities upon which it was originally placed, or on any other securities where no new trusts had been declared, ought to be considered as real estate.

Demising the property.

But where (*w*) the legatee of the proceeds of an estate directed to be sold, entered upon the whole estate and made a lease of part of it, reserving rent to her heirs and assigns, she was held to have elected to take it as land. And letting to a new tenant from year to year has been held to bring the case within the same principle, on the ground that if the tenant were lawfully evicted by a purchaser under the trust for sale, the lessor would be liable to an action by the tenant (*x*).

Taking possession of it: length of possession.

In *Re Gordon* (*y*) Jessel, M.R., thought that taking, and for nine years retaining, possession of the estate directed to be sold, was sufficient to prove an intention to re-convert; and Pearson, J., in *Re Lewis* (*z*) stated that he also had so decided in another case. But in *Re Lewis* the tenant of the land had an option of purchase, and Pearson, J., held that this was a sufficient reason why the property had not been sold, and that consequently mere possession for nine years was not evidence of election. And possession for two or three years by tenants in common, without more, has been held insufficient (*a*). The circumstance that, where several are entitled in common, a sale is required for convenient division of the property, would seem to diminish the probability of their intending to put an end to the trust (*b*). But where two tenants in common had been in possession for seven years, and it was clearly shown that one of them, who was also the principal acting trustee, desired to retain the estate for building purposes, slight evidence of the concurrence of the other satisfied the Court that the latter also had elected to keep the estate unsold (*c*).

(*v*) *Lingen* v. *Sowray*, 1 P. W. 172; *Chandler* v. *Pocock*, 15 Ch. D. 491; 16 Ch. D. 648.

(*w*) *Crabtree* v. *Bramble*, 3 Atk. 680; and see *Mutlow* v. *Bigg*, 1 Ch. D. 385; *Re Douglas and Powell*, [1902] 2 Ch. 296.

(*x*) *Re Gordon*, 6 Ch. D. 531.

(*y*) *Supra*. But in *Meek* v. *Devenish*, 6 Ch. D. 566, Malins, V.-C., seemed to be of a different opinion.

(*z*) 30 Ch. D. 654.

(*a*) *Kirkman* v. *Miles*, 13 Ves. 338; *Brown* v. *Brown*, 33 Bea. 399.

(*b*) In *Sisson* v. *Giles*, 3 D. J. & S. 614, the question what facts are required to show an election by tenants in common was considered.

(*c*) *Re Davidson*, 11 Ch. D. 341.

Taking possession of deeds.

Again, in *Davies* v. *Ashford* (*d*), where a person made inquiry as to his interest in lands held upon trust for sale, and on finding that he was absolutely entitled to the money to arise from the sale, took the title deeds into his own possession (from whom or by what means he obtained them being held immaterial), it was held that there was sufficient evidence of his election that the land should not be converted.

Devising the land directed to be sold, as land.

Bequeathing as personalty a fund directed to be invested in land.

A specific devise, to the ordinary uses of a strict settlement of real estate, of the land directed to be sold, is clear evidence of an intention to retain it unsold (*e*). Even a simple devise might apparently have this effect, if the property is described as land (*f*). And where (*g*) a person entitled to the absolute reversion in a fund of this description, who described himself in a memorandum at the foot of an account of the property as being entitled to the fund as residuary legatee of the last owner, which he was, made his will, in which, after devising certain real estate, he bequeathed the residue of his personal estate in possession or reversion, Sir W. Grant decided, that as the testator had described himself as residuary legatee, and had no other personal property to which the expression "in reversion" could be applied, it amounted to a demonstration of intention to bequeath this fund as a personal estate. "There seems, however," as Mr. Jarman remarks (*h*), "to be some difficulty in drawing any such inference from the inaptitude of the terms of the bequest to any other *existing* property of the testator at the date of the will, seeing that a residuary disposition of this nature comprises after-acquired personalty" (*i*).

(*d*) 15 Sim. 42.

(*e*) *Meek* v. *Devenish*, 6 Ch. D. 566; but see *Re Sturt*, [1922] 1 Ch. 416, *post*, p. 746.

(*f*) *Sharp* v. *St. Sauveur*, L. R. 7 Ch. 343; *Re Grimthorpe*, [1908] 1 Ch. 666, where importance was attached to the fact that the devise was "in fee." But the point did not really arise: [1908] 2 Ch. 675 (C. A.). See *Re Ffennell's Settlement*, [1918] 1 Ch. 91.

(*g*) *Triquet* v. *Thornton*, 13 Ves. 345; compare *Re Skeggs*, 2 D. J. & S. 533.

(*h*) First ed., p. 535.

(*i*) "It seems, that where a person covenants to purchase land, and eventually himself becomes solely entitled to it, so that the obligation to lay out, and the right to call for, the money centre in the same person; the covenant is, without any act on his part, considered as discharge. As in *Chichester* v. *Bickerstaff*, 2 Vern. 295, where A on his marriage covenanted to lay out a sum of money in the purchase of land, to be settled to the use of himself for life; remainder to his intended wife for life; remainder to the first and other sons of the marriage in tail; remainder to the daughters in tail; remainder to his own right heirs. A did not lay out the money, and survived his wife, who died without issue; and it was decided, that the money, though once bound by the articles, became free again by the death of the wife without issue, and the consequent failure of the objects of the several limitations; and was therefore, at the death of the settlor, his personal estate. This decision, indeed, was questioned by Lord Talbot, in *Lechmere* v. *Lechmere*, Cas. t. Talb. 90; and by Sir J. Jekyll, in *Lechmere* v. *Earl of Carlisle*, 3 P. W. 221; but Lord Thurlow, in the great case of

Where person bound to lay out money in land becomes himself entitled to it.

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Cookson v. *Reay.*

Again, in *Cookson* v. *Reay* (*k*), where a sum of money subject to a trust for investment in land, which ultimately became liable to be settled upon one for life, with remainder to another in fee, was by those two persons, in a deed appointing new trustees, spoken of as moneys which they were then entitled to receive, and trusts for investment in "securities" were declared, it was held that there was sufficient evidence that they had elected that the money should not be converted, and this, although the trusts of the moneys and securities were declared by reference to a prior settlement, the trusts of which were also declared by reference to a former will, under which will it was assumed for the purpose of the decision that the money was constructively converted; this reference was held not sufficient to outweigh the direct words contained in the deed of appointment, as to the parties being entitled to the receipt of the money.

Harcourt v. *Seymour.*

In *Harcourt* v. *Seymour* (*l*) there were several circumstances, from which, taken together, election was presumed; the principal one seems to have been, that the sum of money in question, which was subject to a trust for investment in land (to which, when purchased, the testator would have been entitled in fee, subject only to a provision for his wife in bar of dower), was included in a statement of the testator's personal property found among his papers after his death.

All persons interested must concur in act of election.

"And here it may be observed," says Mr. Jarman (*m*), "that in order to amount to an election to take property in its actual, as distinguished from its eventual or destined, state, the act must be such as to absolutely determine and extinguish the converting trust (*n*); and hence it would seem to follow, that where two or more persons are interested in the property, it is not in the power of any one co-proprietor to change its character,

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Pulteney v. *Darlington*, 1 B. C. C. 238; 7 B. P. C. Toml. 530,† expressed a strong opinion that it was right; which case went, Lord Eldon has said, to this: 'that if the property was at home, in the possession of the person under whom they claimed as heir and executor, the heir could not take it;' and his lordship observed, the question, then, was not upon the equity between the heir and the executor, but whether the property was at home." (Note by Mr. Jarman.) But settled land is not "at home" during the continuance of a jointure under the settlement: *Walrond* v. *Rosslyn*, 11 Ch. D. 640.

(*k*) 5 Bea. 22, *nom. Cookson* v. *Cookson*, 12 Cl. & Fin. 121.

(*l*) 2 Sim. (N.S.) 12.

(*m*) First ed., p. 536.

(*n*) This is quoted with approval by Peterson, J., in *Re Sturt*, [1922] 1 Ch. 416.

† "The able and elaborate arguments of Sir John Scott (afterwards Lord Eldon), and Mr. Fearne, the counsel for the appellants, display the deepest research into the subject, but they did not succeed in overturning the decree."

in regard even to his own share; for, as the act of the whole would be requisite to put an end to the trust, nothing less will suffice to impress upon the property a transmissible quality, foreign to that which it had received from the testator. Thus, if lands be devised to trustees upon trust for sale, and to pay the proceeds to A, B, and C, in equal shares, and after the death of the testator, and before the sale is effected, A grants a lease of his one-third, or does any other act unequivocally dealing with it as real estate, and then dies; his share will, nevertheless, it is conceived, devolve to his personal representatives, as it would still be the duty of the trustees to proceed to a sale, on account of the other shares, the converting trust having been created for the benefit of all" (*o*).

Owner of undivided share of land cannot elect.

But if the whole of the proceeds are given to A on a contingency, and on failure of that contingency to others, the primary donee may, pending the contingency, declare his intention to keep the land unsold, so as upon the happening of the contingency before his death to re-convert the land, if no sale has been (as, of course it may nevertheless have been) previously made (*p*). And, of course, if money be directed to be laid out in land for the benefit of A, B, and C as tenants in common in fee, any one or more of them may take their shares of the money without the consent of the rest. "For," said Lord Cowper, "it is in vain to lay out this money in land for B and C when the next moment they may turn it into money, and equity, like nature, will do nothing in vain" (*q*). But it would seem that this rule does not apply where the land is directed to be settled on persons in succession (*r*).

Election by contingent owner pending the contingency.

Election by one tenant in common of money to be laid out in land.

In *Smith* v. *Gumbleton* (*s*) a remainder was devised in trust for conversion. The executor who was the residuary devisee

Remainder; intention to reconvert.

(*o*) See 1 Br. C. C. 500; *Elliott* v. *Fisher*, 12 Sim. 505; *Holloway* v. *Radcliffe*, 23 Bea. 163; *Re Davidson*, 11 Ch. D. 341, 348; *Biggs* v. *Peacock*, 22 Ch. D. 284. But this rule would not apply where the trust for sale of land was for the purpose of paying debts, legacies, etc.; the devisee (or legatee of the surplus proceeds) subject to the charges, might himself clear them off and retain the land unsold: *Griesbach* v. *Fremantle*, 17 Bea. 314. So if the legatees, though not paid, acquiesced in the retention: *Mutlow* v. *Bigg*, 1 Ch. D. 385. And after a lapse of time and where no prejudice accrues to them their acquiescence will be easily inferred, *ib.* As to the respective rights of a jointress and a portioner to insist on a trust for investment of money in land being carried out, see *Walrond* v. *Rosslyn*, 11 Ch. D. 640.

(*p*) *Meek* v. *Devenish*, 6 Ch. D. 566; this case and *Sisson* v. *Giles*, 3 D. J. & S. 614, are discussed in *Re Sturt*, [1922] 1 Ch. 416. In *Re MacDougall*, [1912] 1 Ir. R. 62, *Meek* v. *Devenish* and *Re Potter*, 3 T. L. R. 430, were applied.

(*q*) *Seeley* v. *Jago*, 1 P. W. 389. And a small sum (A's share) might be as advantageously laid out in land for A as a large sum (the entire fund) for A, B, and C.

(*r*) See *Walrond* v. *Rosslyn*, 11 Ch. D. 640.

(*s*) 54 Sol. J. 181.

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and legatee retained it unsold during his life. This was held to show an intention to reconvert.

Dispositions by partial owner before actual conversion.

Mr. Jarman also remarks (*t*) that "although it is not in the power of the owner of an undivided share, or any other partial interest in property which is directed to be converted, by his single act, to change its character, and thereby impart to it a different transmissible quality, it does not follow that every disposition by such partial owner adapted to the property in its actual state, is nugatory. On the contrary, it is clear that if a person entitled to a partial interest in money to be laid out in land, shows an intention to dispose thereof by will, or otherwise, as personal estate, it will pass by such disposition (*u*); though, on the death of the donee [intestate], it would devolve to *his* real representative (*x*). So, if the legatee of the proceeds of real estate directed to be sold devise the land in its character of real estate, the devisee will be entitled to the fund in question, though it would, when acquired, be personal estate in the hands of such devisee" (*y*).

If a testator is entitled to a share of the proceeds of sale of land subject to a trust for sale, and is not entitled to any real estate in the proper sense of the term, a gift by him of "my real estate" will *prima facie* pass his interest in the proceeds of sale (*z*).

Delegation of power by beneficiary.

Where property subject to a trust for conversion was settled by the owner on her marriage, and a power to reconvert (or retain the property in its actual state) was reserved to the trustees, to be exercised with the consent of the tenants for life or the survivor, it was held by Sir W. P. Wood, V.-C., that the power ceased as soon as the property had vested absolutely in the children, although one of the tenants for life was still living (*a*).

(*t*) First ed., p. 537.

(*u*) *Triquet* v. *Thornton*, 13 Ves. 345.

(*x*) In *Triquet* v. *Thornton* the interest was reversionary (*ante*, p. 743), and no question arose as to the ultimate devolution of the fund. Mr. Jarman's statement on this point does not seem to be borne out by the authorities. In *Crabtree* v. *Bramble*, 3 Atk. 680, Lord Hardwicke said that a person absolutely entitled to property constructively converted, subject to a prior life interest, could elect to reconvert it, and in *Meek* v. *Devenish*, 6 Ch. D. 566, Malins, V.-C., decided that a person contingently entitled could elect, but this seems to be wrong: *Re Sturt*, [1922] 1 Ch. 416. Lord Hardwicke's *dictum* was cited, apparently with approval, by Jessel, M.R., in *Re Gordon*, 6 Ch. D. 531. The election is of course liable to be defeated by an actual conversion before the interest falls into possession or becomes absolute, as the case may be.

(*y*) *Re Lowman*, [1895] 2 Ch. 348. See *Hewitt* v. *Wright*, 1 Br. C. C. 86.

(*z*) *Re Glassington*, [1906] 2 Ch. 305.

(*a*) *Doncaster* v. *Doncaster*, 3 K. & J. 26. And see *Rich* v. *Whitfield*, L. R. 2 Eq. 583. But cf. *Re Cooke's Contract*, 4 Ch. D. 454; *Biggs* v. *Peacock*, 22 Ch. D. 284.

"And here it may be observed," continues Mr. Jarman (*b*), "that where (*c*) real estate was devised upon trust for sale, and the proceeds were to be divided among several persons, one of whom was a married woman, who (the estate being unsold) joined with her husband in levying a fine of her share therein; it was held, that the wife was, by this means, barred of her equity to a settlement out of the fund. And the same effect, it is conceived, would now be produced by the husband and wife conveying the property by a deed acknowledged by her, according to the statute of 3 & 4 Will. 4, c. 74, ss. 77, 79."

Husband and wife may convey land directed to be sold as real estate.

The doctrine of election, in the ordinary sense of the term, cannot, from the nature of the case, apply to personal property which has been bequeathed upon trust for sale. But in such a case the beneficiaries, if absolutely entitled and *sui juris*, can elect to take the property in specie, so as to put an end to the trust for sale (*d*).

Election to take personal property in specie.

VI.—Destination of undisposed-of Interests in Property directed to be Converted.—A. *Doctrine of Conversion as between Claimants under Will, and Real and Personal Representatives of Testator.*—"It is clear," says Mr. Jarman (*e*), "that, where a testator directs real estate to be converted into money, for certain purposes, and the trusts of the will directing the application of the money, either as originally created, or as subsisting at the death of the testator, do not exhaust the whole beneficial interest, such unexhausted interest, whether the estate be eventually sold or not (*f*), belongs to the heir as real estate undisposed of (*g*). The heir is excluded, not by the direction

Destination of undisposed of interests in property directed to be converted.

(*b*) First ed., p. 537.

(*c*) *May* v. *Roper*, 4 Sim. 360. This doctrine is sometimes made use of (in cases not falling within the Married Women's Reversionary Interests Act, 1857, or the Married Women's Property Acts) where a married woman has a reversionary interest in a fund of this description, which, in its character of personalty, she is incompetent to deal with, so as to bar her contingent right by survivorship; this object may be effected by means of a deed (duly acknowledged as to the wife) assigning the property: *Briggs* v. *Chamberlain*, 11 Hare, 69; overruling *Hobby* v. *Collins*, 4 De G. & S. 289; and see *Tuer* v. *Turner*, 20 Bea. 560; *Franks* v. *Bollans*, L. R. 3 Ch. 717; *Re Durrant and Stoner*, 18 Ch. D. 106. The doctrine applies in the case of a married woman who with her husband is entitled to a debt secured by a mortgage of land: *Williams* v. *Cooke*, 4 Giff. 343. *Re Newton's Trusts*, 23 Ch. D. 181, is overruled: *Miller* v. *Collins*, [1896] 1 Ch. 573.

(*d*) *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296.

(*e*) First ed., p. 553. Compare the doctrine of lapse as applied to charges on land, *ante*, p. 414.

(*f*) See *Hill* v. *Cock*, 1 V. & B. 173.

(*g*) 2 Vern. 571; *ib.* 645; 3 P. W. 20; 2 Dick. 500; 1 Br. C. C. 503; 2 Br. C. C. 589; 3 B. C. C. 355; 4 B. C. C. 411; 2 Ves. jun. 271; *ib.* 683; 3 Ves. 210; 4 Ves. 542; *ib.* 803; 10 Ves. 500; 11 Ves. 87; *ib.* 205; 12 Ves. 413; 16 Ves. 188; 18 Ves. 156; 1 V. & B. 173; *ib.* 410; 2 V. & B. 294; 2 Kee, 564; 1 R. & My. 752; 5 My. & Cr. 125; 4 Y. & C. 507. The most important of the cases thus cited by Mr. Jarman, including *Ackroyd* v. *Smithson*, are referred to in detail, *post*, in this section. The case of *Ogle* v. *Cook*, cited

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to convert, but by the disposition of the converted property, and so far only as that disposition extends. Thus, in *Wilson* v. *Major* (*h*), where lands were given by a testator to his wife upon trust to sell and invest the money upon security at interest, and he gave and bequeathed the interest and dividends of the same to the use of his said wife, without making any ulterior disposition of the fund, Sir W. Grant, M.R., held that, there being no declaration of the trust of the money beyond the life of the wife, it resulted to the testator's heir.

Principle same, whether land or money is the object of conversion.

"And the same principle, it is now settled, applies in the converse case of money being directed to be laid out in land, which is then devised for a limited estate only; the fund ultra that interest, though eventually turned into land, goes as personal estate undisposed of to the residuary legatee or next-of-kin of the testator, on the ground that *the will operates to convert the fund so far only as it disposes of it.*"

Thus, in *Cogan* v. *Stephens* (*i*), where the testator directed his executors immediately to lay out the sum of £30,000 in the purchase of an estate, the income of which he settled on one for life, with remainder to others in tail, subject to which the estate (which was to be purchased and always run in the testator's name) was given to a charity. The money was not laid out, and the gift to the charity being void under the Statute of Mortmain, and the prior limitations having determined, it was held by Sir C. Pepys, M.R., that the next-of-kin, and not the heir-at-law of the testator, was entitled to the fund.

The same principle was followed by Lord Langdale, M.R., in *Hereford* v. *Ravenhill* (*k*).

Interim income of personalty to be laid out in purchase of land.

It sometimes happens that a testator devises his lands by way of executory limitation, so that the vesting is in suspense, and bequeaths personalty upon trust to be invested in the purchase of land to be settled to the same uses. In such a case, so long as the vesting is in suspense, the rents of the devised lands belong to the testator's heir-at-law, and it was at one time supposed that the same rule applied to the income of the

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1 Br. C. C. 512, had been considered as a solitary exception to this class of cases; but it was afterwards discovered that the very point which was alleged to have made it so was left undecided. See R. L., cited 2 Ves. jun. 686.

(*h*) 11 Ves. 205; see also *Robinson* v. *Taylor*, 2 Br. C. C. 589.

(*i*) 1 Bea. 482, n.; 5 L. J. (N.S.) Ch. 17; *Head* v. *Godlee*, Johns. 536; *Countess of Bective* v. *Hodgson*, 10 H. L. C. 656.

(*k*) 1 Bea. 481; *Hereford* v. *Ravenhill*, 5 Bea. 51. The decision in *Fletcher* v. *Chapman*, 3 Br. P. C. Toml. 1, where, however, no claim appears to have been made by the next-of-kin, and a *dictum* of Lord Redesdale, 3 Dow, 207 (see also 4 Br. C. C. 527), are thus virtually overruled.

personalty (*l*), but this error was corrected in accordance with the principles laid down in *Ackroyd* v. *Smithson* (*m*), and it is now settled that in the case supposed the income of the personalty follows the corpus (*n*).

Lapsed share of proceeds of real estate devolves to heir.

The general rule above stated also applies, as Mr. Jarman points out (*o*), "where the testator's disposition of the converted property, though originally complete, has partially failed in event by the decease of any one of the objects in the testator's lifetime; in which case the interest comprised in the lapsed gift devolves to the person who would have been entitled to the entire property, if the testator had died wholly intestate in regard thereto.

Ackroyd v. *Smithson.*

"The title of the heir, under such circumstances, to a lapsed share of real estate directed to be sold, was established in *Ackroyd* v. *Smithson* (*p*), well known as containing the celebrated argument of Lord Eldon (then Mr. Scott), which Lord Thurlow admitted to have changed his opinion. The testator devised all his real and personal estate in trust to be sold and converted into money, to pay debts, legacies, and funeral expenses; and the overplus to be paid to certain persons (to whom he had bequeathed pecuniary legacies), in proportion to their respective legacies. Some of these legatees died in the testator's lifetime; and, on a question whether their lapsed shares belonged to the heir-at-law or next-of-kin of the testator, Lord Thurlow at first inclined to the opinion that the next-of-kin were entitled, but, upon further argument, his Lordship decided in favour of the heir. He said, that he used to think, when it was necessary for any of the purposes of the testator's disposition, to convert land into money, that the undisposed-of money would be personalty; but the cases fully proved the contrary. It would be too much, he observed, to say, that if all the legatees had died, the heir could, as he certainly might, prevent a sale; and yet that, because a sale was necessary, the heir should not take the undisposed part of the produce.

Effect of failure of devise by contingency or illegality.

"So, if the produce of real estate directed to be sold be disposed of in a certain event which does not happen, or for a

(*l*) *Hopkins* v. *Hopkins*, Ca. t. Talbot, 44; 1 Atk. 580; Hawkins on Wills (3rd ed.), p. 57. The rule is now altered by section 175 of the Law of Property Act, 1925.

(*m*) 1 Br. C. C. 503.

(*n*) *Bective* v. *Hodgson*, 10 H. L. C. 656.

(*o*) First ed., p. 555.

(*p*) 1 Br. C. C. 503. On the question whether, where the Court or a trustee sells more than necessary of the estate of a living owner, there is an equity to reconvert for his heir: see *Steed* v. *Preece*, L. R. 18 Eq. 192, and the other cases cited, *ante*, p. 715.

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Failure of disposition of real and personal estate respectively.

purpose which is illegal, the beneficial interest comprised in the contingent or illegal gift which thus fails devolves to the heir.

"And it is, of course, immaterial that the testator has combined his personal estate in the same gift with the proceeds of the real estate; the effect in such case being that, by the failure of the intended disposition, the real estate descends to the heir, and the personalty devolves to the next-of-kin of the testator. Thus, in *Jessopp* v. *Watson* (*q*), where a testator directed a mixed fund, composed of the produce of his real and personal estate, to be applied to certain specified purposes, and the residue to be divided equally among his children or child at twenty-one, if sons, and twenty-one or marriage, if daughters; and if no such child, to such person or persons as he should by his codicil appoint. The testator died without having made a codicil, leaving an only daughter his heir, who died under twenty-one, intestate and unmarried. Sir J. Leach, M.R., held, that so much of the residuary fund as was constituted of real estate, descended to the daughter as heir-at-law (*r*), and that so much as was constituted of personalty devolved to and was divisible among the persons entitled under the Statute of Distributions to the personal estate of the testator.

Eyre v. *Marsden.*

"So, in the case of *Eyre* v. *Marsden* (*s*), where a testator gave his real and personal estate to trustees upon trust, at any time after his decease, to sell and convert the property, and during the lives of his children to accumulate the annual income; and, after the decease of such surviving child, he gave the produce of the real and personal estate (directing such part as had not been previously converted, to be then converted), to his grandchildren. One of the children having survived the testator more than twenty-one years, the trust for accumulation became void for the excess under the statute of 39 & 40 Geo. 3, c. 98 (*t*), and the income being held to be thenceforth undisposed of during the life of the surviving child, was claimed by the next-of-kin of the testator, as well of the proceeds of the real as the personal estate, on the ground that there was an absolute conversion. But Lord Langdale, M.R., decided that it belonged to the heir, observing that the sale was directed for the purposes of the will, and for the benefit of the legatees, not for the benefit of the next-of-kin, whose claim was therefore confined to the income of the personal estate.

(*q*) 1 My. & K. 665; see also *Roberts* v. *Walker*, 1 R. & My. 752; *Edwards* v. *Tuck*, 23 Bea. 268; *Bedford* v. *Bedford*, 35 *ib.* 584.

(*r*) But apparently as personalty: see *Re Richerson*, [1892] 1 Ch., p. 382.

(*s*) 2 Kee. 564, cited *ante*, pp. 365, 366. See also *Re Perkins* (1909), 53 Sol. J. 698. In both of these cases conversion took place under a power, not under a trust.

(*t*) The Thellusson Act, *ante*, p. 352.

Distinction between conversion to all intents and conversion for purposes of will.

"The position that the heir is not excluded by any conversion, however absolute, may seem, indeed, to be indirectly encountered by those cases in which a distinction has been carefully drawn between absolute and qualified conversion (*u*). The learned Editor of Peere Williams's Reports, in a note which has often been referred to with commendation (*x*), states the question in those cases to be, 'whether the testator meant to give to the produce of the real estate the quality of personalty *to all intents*, or only so far as respected the *particular purposes* of his will.' There seems to be no ground to except to this statement of the doctrine, provided that, by an indication of intention to give to real estate the quality of personalty 'to all intents,' we are allowed to understand something very special and unequivocal, amounting, in effect, not merely to a disposition of the fund as personalty to the legatees named in the will, but to an alternative gift to the persons entitled by law to the personal estate, in the event of the failure of the intended disposition. Unless such an interpretation be given to the terms of this proposition, it must, however respectable the authority from which it proceeded, be pronounced to be not strictly accurate; at all events, it is not an explicit statement of the rule, and requires, it is conceived, in order to be a safe guide in its application, the following explanatory addition: 'But that every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next-of-kin.' The respective claims of his own representatives, it may be confidently affirmed, are, in such cases, not in the contemplation of the testator, who always calculates on his legatees surviving him" (*y*).

Conversion for purposes of will—what.

Accordingly, it is now settled, that neither a direction that the proceeds of the sale of land shall be deemed personal estate (*z*), nor such a direction joined with an express declaration

Examples of conversion for purposes of will only.

(*u*) *Wright* v. *Wright*, 16 Ves. 188.

(*x*) *Cruse* v. *Barley*, 3 P. W. 19, Mr. Cox's note.

(*y*) In *Re Cameron*, 26 Ch. D. 19, an implied direction to use real estate for the purpose of carrying on a business seems to have been considered as equivalent to a trust for conversion *pro tanto* so as to bring the undisposed-of profits within the principle of *Ackroyd* v. *Smithson*.

(*z*) *Taylor* v. *Taylor*, 3 D. M. & G. 190; overruling *Phillips* v. *Phillips*, 1 My. & K. 649; and see *Robinson* v. *London Hospital*, 10 Hare, 19; *Gordon* v. *Atkinson*, 1 De G. & S. 478; *Flint* v. *Warren*, 16 Sim. 124; *Shallcross* v. *Wright*, 12 Bea. 505; *Hopkinson* v. *Ellis*, 10 *ib.* 169; *Williams* v. *Williams*, 5 L. J. (N.S.) Ch. 84; *Collins* v. *Wakeman*, 2 Ves. jun. 683 (as to the £1,000). But Jessel, M.R., though he admitted it was so settled, yet thought such a direction might well have been held to mean that the next-of-kin should take: *Court* v. *Buckland*, 1 Ch. D. 610.

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that the heir-at-law shall not take in case of lapse (*a*), will exclude the claims of the heir-at-law as against the next-of-kin. If there is a residuary bequest, a direction that the proceeds of the real estate shall form part of the personalty, will make them pass by the residuary bequest (*b*). Even if the testator gives a share of his residue to A, who happens to be his heir-at-law, and by codicil revokes the gift, this does not prevent A from claiming such part of the lapsed share of residue as consists of real estate (*c*).

As to conversion subjecting fund to simple contract debts.

Mr. Jarman continues (*d*): "Upon the principle that real estate directed to be sold is converted only for the purposes of the will, it was held by Sir W. Grant (*e*), that such a devise in trust to pay certain legacies did not throw open the fund to simple contract creditors, though he said that a substantive and independent intention to turn real estate into personalty, at all events, would have that effect. Such a conversion, however, as that referred to by his Honor, must be of a special kind. It must have no specified object, for a specification of the object, we see, will confine it; or it must contain some expressions shewing that it is not so confined. In short, it must be manifest that the property is to be considered as personalty *quoad* this purpose, or, in other words, that the fund is intended to be subjected to the claims of simple contract creditors."

Trustees entitled where no heir.

Again, where a testator, having devised lands to trustees upon trust for sale, did not dispose of the surplus proceeds, and died without heir or next-of-kin, it was held that the Crown had no title to the surplus proceeds (as it would have had if they had been personalty), but that the trustees were entitled to retain them for their own benefit (*f*).

As to proceeds of real estate, passing under a residuary bequest.

In further confirmation of the principle in question, it is now settled that the undisposed-of residue of money to arise from the sale of real estate will not pass under a general bequest of

(*a*) *Fitch* v. *Weber*, 6 Hare, 145; *Sykes* v. *Sykes*, L. R. 4 Eq. 200.

(*b*) *Infra*. As to the case of *Countess of Bristol* v. *Hungerford*, cited by Mr. Jarman under a misapprehension as to the nature of the decision, see *ante*, p. 683.

(*c*) *Gordon* v. *Atkinson*, 1 De G. & S. 478.

(*d*) First ed., p. 561.

(*e*) *Gibbs* v. *Ougier*, 12 Ves. 413.

(*f*) *Taylor* v. *Haygarth*, 14 Sim. 8. See also *Cradock* v. *Owen*, 2 Sim. & Gif. 244, 245. In the case of deaths since August 14, 1884, the Intestates Estate Act, 1884 (now repealed and replaced by the Administration of Estates Act, 1925), applied. In *Re Bond*, [1901] 1 Ch. 15, land was devised by an owner in fee simple to A for life with no devise over; the testator died in 1882 without an heir. The land was sold by A under the powers of the Settled Land Acts, and a fund representing the proceeds of sale remained in the hands of the trustees; on the death of the tenant for life it was held that the fund was money which vested in the Crown as *bona vacantia*: *Re Cullum*, [1924] 1 Ch. 540.

personalty in the same will, unless the testator expressly declares that it shall be considered as part of his personal estate, or unless such an intention can be collected from the force and meaning of the expressions used by the testator through the whole will (*g*).

Berry v. *Usher*.

Real fund will not pass under a bequest of personalty.

Thus, in *Berry* v. *Usher* (*h*), the appointment of two persons as joint residuary executrix and executor, was held not to give them the proceeds of real estate directed to be sold. And in *Maugham* v. *Mason* (*i*), where A devised freehold chambers to trustees and their heirs, upon trust to sell, and apply the money arising by such sale towards payment of the legacies by his will bequeathed; and the rents, until sold, to be applied to the same uses; and after giving certain legacies, the testator then, as to all the residue of his personal estate, after payment of his debts, etc., bequeathed the same to trustees, upon trust to convert the said residue into money, and lay the same out as therein mentioned. Sir W. Grant held that the produce of the sale of the real estate, after payment of the legacies, resulted to the heir, and did not pass under the residuary bequest.

This construction, it will be observed, was somewhat aided by the circumstance of the trust being to convert the residue into money, which could not strictly apply to the money produced by the real estate; but the M.R., though he adverted to this circumstance, decided the case upon the general principle, that where there was a direction to sell land for a particular purpose, the surplus did not form "part of the personal estate, so as to pass by the residuary bequest."

Dixon v. *Dawson*.

So, in *Dixon* v. *Dawson* (*k*), the testatrix devised and bequeathed her real and personal estate upon trust to sell and convert, and out of the proceeds of the real estate to pay her debts and testamentary expenses, and also certain legacies and annuities, and in case the proceeds should be insufficient, then to pay the same out of the personal estate, and she also bequeathed legacies to charities to be paid out of her personal estate, and then proceeded thus:—"Should any part of my personal estate and effects still remain undisposed of, after satisfying all my just debts and personal and other incidental expenses, and providing for the said charities herein mentioned, and paying the several legacies or sums of money herein

(*g*) See *per* Sir J. Leach, in *Phillips* v. *Phillips*, 1 My. & K. 661. See also *Sprigg* v. *Sprigg*, 2 Vern. 394, where land was devised to be sold, and thereout to pay a contingent legacy, which failed, and the residue to B; it was held that B, and not the heir, benefited by the failure of the legacy; otherwise, if it had been an absolute legacy.

(*h*) 11 Ves. 87.

(*i*) 1 V. & B. 410.

(*k*) 2 S. & St. 327.

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bequeathed or directed to be paid thereout, then upon trust that my said trustees shall pay and transfer the residue and remainder of my said estate and effects not hereby otherwise disposed of unto, etc." It was decided by Sir J. Leach, V.-C., that the last gift did not include the residue of the proceeds of the real estate, and that the heir-at-law was entitled.

Collis v. *Robins.*

And in *Collis* v. *Robins* (*l*), where the testator devised real estate upon trust for sale, and out of the proceeds and the rents in the meantime to pay the testator's debts and the trustees' costs and certain legacies, and the will then proceeded, "and as to all and singular my ready monies and securities for money to me belonging, and all other my personal estate and effects whatsoever and wheresoever the same may be at the time of my decease, I give and bequeath, etc.," Sir J. K.-Bruce, V.-C., held that the surplus of the proceeds of the real estate belonged to the heir-at-law.

Conversion to all intents effected by declaration that proceeds of realty shall be personalty, or by blending real and personal estates.

"But it is clear," says Mr. Jarman (*m*), "that if there be a declaration that the money arising from the sale shall be considered as part of the testator's personal estate, it will pass under a general bequest of personalty in the same will (*n*).

"And it seems, that where the testator has blended the proceeds of the real and personal estates in regard to one legatee taking a temporary interest, it is to be inferred that he does not intend them to be subsequently severed; and accordingly, in such a case, very slight circumstances will suffice to extend a bequest applicable in terms to the personalty only, to the produce of the real estate, in order to avoid such severance. Thus, where (*o*) a testator gave his real estate and the residue of his personalty to trustees, to sell and convert the same, and invest the proceeds, and then gave the interest, dividends and produce of the whole of his real estate, and of the residue of his personalty, to his wife for life, and after her decease he gave

(*l*) 1 De G. & S. 131. See also *Brown* v. *Bigg*, 7 Ves. 279, stated *ante*, p. 724.

(*m*) First ed., p. 566.

(*n*) For this proposition Mr. Jarman cites *Collins* v. *Wakeman*, 2 Ves. jun. 683, but the point does not seem to have been argued for the heir. The principle, however, is clearly established, or rather taken for granted, in several modern cases: *Robinson* v. *London Hospital*, 10 Hare, 19; *Bright* v. *Larcher*, 3 De G. & J. 148; *Field* v. *Peckett*, 29 Bea. 568. In *Kidney* v. *Coussmaker* (1 Ves. jun. 436), it was held, that where a testator had devised real estate in trust to be sold, and directed the produce to be applied in payment of the incumbrances on the estate, and the remainder to be considered as part of the residue of his personal estate, and then bequeathed the residue of his personalty after payment of his debts, the fund was subjected to the debts. Sir W. Grant, in *Gibbs* v. *Ougier*, 12 Ves. 413, expressed his doubt of the soundness of the decision, but it was approved in *Bright* v. *Larcher* and *Field* v. *Peckett*.

(*o*) *Byam* v. *Munton*, 1 R. & My. 503.

one moiety of the interest, dividends and produce of *the residue of his personal estate and effects*, or the securities on which the same should be invested, to his brother M., his executors, administrators, and assigns, and he gave the other moiety of the interest, dividends and produce of *the residue of his personal estate and effects*, or the securities on which the same should be invested, to his sister-in-law B. for life; and, after her decease, he gave the *whole* of the principal of such moieties, or the *whole residue of his estate* whatsoever and wheresoever, and the securities on which the same should be invested, to his said brother M., his heirs, executors, administrators and assigns; and the question being whether the sister-in-law was entitled to a moiety of the income arising from the proceeds of the real estate, Sir J. Leach, M.R., decided in the affirmative " (*p*).

The blending of the proceeds of the two estates for any purpose not exhausting the whole, is always taken as rendering probable an intention that they shall be kept together throughout, and as inviting such a construction of subsequent words of gift as will carry that intention into effect. Thus, in *Court* v. *Buckland* (*q*), where a testator devised and bequeathed his real and the residue of his personal estate in trust to sell, and to dispose of the net moneys to arise from such real and residuary personal estate (after payment of debts and legacies) according to the trusts thereinafter declared concerning the same. He then declared that until sale the real and personal estate should be subject to the trusts thereinafter declared concerning the said net moneys, and that the rents and annual produce thereof should be deemed income for the purposes of the same trusts, and that the real estate should be transmissible as personal estate. The testator then directed a sum to be set apart out of the said net moneys to answer a life annuity, subject to which it was to form part of his residuary personal estate; and, subject to the annuity and to legacies and debts, the testator directed his trustees to stand possessed of his residuary personal estate in trust as to one moiety for his son, and, as to the other, for his daughter and her children. Jessel, M.R., held that the net proceeds of the real estate were included in the trusts of the " residuary personal estate."

Court v. *Buckland.*

(*p*) See *Wall* v. *Colshead*, 2 De G. & J. 683, *post*, p. 757, and *De Beauvoir* v. *De Beauvoir*, 3 H. L. C. 524, stated *post*, p. 1546.

(*q*) 1 Ch. D. 605. See also *Spencer* v. *Wilson*, L. R. 16 Eq. 501; *Norreys* v. *Franks*, Ir. R. 9 Eq. 18.

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Effect, after blending, of appointing a "residuary legatee."

Again, in *Singleton* v. *Tomlinson* (*r*), a testator directed his executors to pay his funeral expenses and debts "out of the proceeds of his property." He then recited that he was possessed of "landed and chattel property," and directed his executors to sell his "landed estates" for the best price. He gave certain legacies; he specifically devised a certain estate; and specifically bequeathed his plate and furniture; and concluded, "I constitute A my residuary legatee." It was held in the House of Lords that A was entitled to the surplus proceeds of the real estate, as well as of the personal estate, after payment of the funeral expenses, debts and legacies (*s*).

At the present day, the question must be treated as one purely of construction, unaffected by any special indulgence to the heir. No case, indeed, has gone further against the heir than the early one of *Mallabar* v. *Mallabar* (*t*), where a testator devised and bequeathed all his lands in certain counties to his sister C., her heirs and assigns, upon trust that the same should

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(*r*) 3 A. C. 404. See also *Wildes* v. *Davies*, 1 Sm. & Giff. 482, and other cases, *post*, Chap. XXVII. In *Griffiths* v. *Pruen*, 11 Sim. 202, the gift was of "any sum appearing after fulfilling" the will, an expression as properly applicable to the proceeds of real estate as to personalty. And see *Bromley* v. *Wright*, 7 Hare, 334.

(*s*) In this case, the heir-at-law relied on *Kellett* v. *Kellett* (1 Ba. & Be. 533; 3 Dow, 248), where a testator bequeathed legacies to several children; he bequeathed his interest in certain lands to A, and then proceeded as follows:—"The remainder of my properties I devise to my executors to make good the above sums and the following sums, that is to say": and then, after enumerating other legacies, he concluded thus:—"And I also ordain, appoint and devise the said W. G. and H. executors to this my last will and testament; also my residuary legatees, share and share alike." It was contended by the executors that the real estates were by the will, and for the purposes of it, turned into personal estate, to the residue of which they were entitled; or that if there was no such conversion, yet, by the manifest intention of the testator, they were legally and beneficially entitled to such parts of the estates as should remain after payment of the debts, legacies, etc., except the estates specifically devised to A. But Lord Manners held that the intention was not made plain enough to disinherit the heir. The executors appealed to the House of Lords, relying principally on the argument, that by constituting them residuary legatees, the testator intended them to take the residue of all that was included under the word "properties" in the preceding devise, but the House refused to disturb the decree. Lord Eldon said, "I should very much misrepresent the state of my mind with respect to this question, if I did not say that it is a state of infinite doubt, whether, according to the rules of law, and as collecting the intention of the testator from the whole of the will, the residue was intended by the testator to include the real estate. It is a whimsical way of putting it; but I feel a strong bias towards the opinion that he did mean to include it. I cannot say that the decision in this case is wrong, and I cannot say that it is right; but as I cannot say that it is wrong, it appears to me that the decree ought to be affirmed." Lord Redesdale expressed himself nearly to the same effect. Although the trust clearly authorised a sale to pay legacies, there was no express direction to sell; a fact upon which Lord Manners laid great stress. But although the land was thus less clearly treated as "something that was all to be turned into money," it is reasonably plain that neither Lord Eldon nor Lord Redesdale, if the case had come originally before him, would have held that any part of the testator's "properties" was undisposed of.

(*t*) Ca. t. Talb. 78.

be sold, and out of the moneys arising therefrom all his just debts paid; and out of the remainder of the money he bequeathed certain legacies, including one to the heir-at-law; and then, after his "debts and legacies paid as aforesaid, and subject to the same," the testator gave the residue of his personal estate to his said sister, whom he appointed sole executrix. The produce of the real estate, after paying debts, was claimed by the heir. Lord Talbot admitted parol evidence against him; but afterwards decreed, upon the will itself, that there was no resulting trust, and that the executrix should have the whole residue, including the produce of the real estate.

"This case," as Mr. Jarman points out (*u*), "has been treated by Sir W. Grant as being governed by its particular circumstances (*x*), and certainly the giving of the residue 'after debts and legacies paid as aforesaid,' afforded an argument that it was intended to include the fund in question, which had been expressly subjected to those charges."

Conversion to all intents of land specifically devised.

In *Wall* v. *Colshead* (*y*), a testator devised several estates to his children severally for their respective lives, and after their death to his executors upon trust to sell and divide the proceeds equally between their respective children; he gave the residue of his property to two of his children in equal shares, and if any of his children died under twenty-one, he gave the part or parts intended for such child to the survivors for life, and after the decease of the survivors or survivor, he gave such part or parts to his executors upon trust to sell and pay the proceeds to their, his, or her children; two of the children died without issue: it was held by Knight-Bruce and Turner, L.JJ., though not without some hesitation, that the testator intended a conversion out and out, and not only for the purpose of division between the children of the tenants for life.

Heir takes as personalty—where.

B.—*Doctrine of Conversion as between Persons claiming under Heir or Next-of-Kin.*—"It is observable," says Mr. Jarman (*z*), "that where a *partial* undisposed-of interest in real estate directed to be sold results to the heir-at-law of the testator, it becomes personalty in his hands. Thus, in *Wright*

(*u*) First ed., p. 563.

(*x*) In *Maugham* v. *Mason*, 1 V. & B. 416, stated *ante*, p. 753. See also the observations of Sir J. Leach, M.R., in *Phillips* v. *Phillips*, 1 My. & K. 660, and *Collis* v. *Robins*, stated *ante*, p. 754.

(*y*) 2 De G. & J. 683.

(*z*) First ed., p. 568. Cited with approval by Chitty, J., in *Re Richerson*, [1892] 1 Ch., p. 382.

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v. *Wright* (*a*), where A devised his real estate in trust to be sold to pay his debts, etc., and the residue in trust for his daughter, but if she died in the lifetime of his wife, to his wife for life, and, at her decease, to go as he (the testator) should by a codicil direct. He left no codicil. The daughter died [intestate] in the widow's lifetime. The reversionary interest in the fund expectant on the widow's decease, which descended to the daughter as the heir-at-law of the testator, was, at her death, claimed respectively by her administratrix as personalty, and by her heir-at-law as real estate. Sir W. Grant, M.R., held, on the authority of the case of *Hewitt* v. *Wright* (*b*), (in which the same principle was applied to a disposition by deed,) that it was personal estate in the daughter, and accordingly belonged to her administratrix. According to the doctrine already stated (*c*), it is clear that no act on the part of the heir electing to take such partial interest as real estate, would avail to change its character."

O'Grady v. *Wilmot.*

In *O'Grady* v. *Wilmot* (*d*) the testatrix, in exercise of a general power of appointment over the proceeds of sale of real estate settled by her marriage settlement, appointed that the trustees of the settlement should stand possessed of the hereditaments, property, money, stocks, funds and securities subject to the trusts of the settlement upon trust to convey, assign, transfer and pay the same to the trustees of her will upon trust for sale and conversion. The real estate was unsold at the death of the testatrix; it was held that the will did not operate to reconvert the appointed property and that the property passed on her death as personalty.

And even where the land itself remains unsold, it results to the heir as personal estate (*e*).

Where the objects of the conversion wholly fail.

"But if the purposes of the will *wholly* fail, as if all the legatees of the moneys to be produced by the sale die in the

(*a*) 16 Ves. 188; see also *Smith* v. *Claxton*, 4 Mad. 484; *Jessop* v. *Watson*, 1 My. & K. 665; *Dixon* v. *Dawson*, 2 S. & St. 327; *Carr* v. *Collins*, 7 Jur. 165; *Tily* v. *Smith*, 1 Coll. 434; *Hatfield* v. *Pryme*, 2 Coll. 204; *White* v. *Smith*, 15 Jur. 1096; *Bagster* v. *Fackerell*, 26 Bea. 469; *Wilson* v. *Coles*, 28 Bea. 215; *Hamilton* v. *Foot*, Ir. R. 6 Eq. 572.

(*b*) 1 Br. C. C. 86. As to conversion by deed, see *Clarke* v. *Franklin*, 4 K. & J. 257; *Re Grimthorpe*, [1908] 2 Ch. 675.

(*c*) *Ante*, p. 744. In *Wright* v. *Wright*, the land had been actually converted into money, so that no question of election could have arisen. In saying that no act on the part of the heir would avail to change the character of the property, Mr. Jarman probably means "no act on the part of the heir during the continuance of the trust for conversion, and while the property remains unconverted"; but is it clear that the heir cannot elect in such circumstances? See *ante*, p. 746, n. (*x*).

(*d*) [1916] 2 A. C. 231, distinguishing *Re Lord Grimthorpe*, [1908] 2 Ch. 675.

(*e*) *Re Richerson*, [1892] 1 Ch. 379; and the cases cited in note (*b*).

testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made, the property will devolve upon the heir as real estate" (*f*). And in such a case it is immaterial that a sale has by mistake taken place on the supposition that the trusts have not wholly failed (*g*) : but the question whether the will causes a conversion or not depends on whether the objects for which the sale is directed in the result completely fail, and it makes no difference that for some time after the testator's death it remains uncertain whether conversion will be necessary for the purposes of the will (*h*).

But this doctrine only applies where the real estate is devised separately : it does not apply where the testator creates a mixed fund of his real and personal estate. Thus in *Att.-Gen.* v. *Lomas* (*i*) the testator directed his real estate to be sold and the proceeds, with his personalty, to be held in trust for the payment of debts and legacies, and as to the residue on certain trusts which failed; at the death of the testator's heiress, part of the real estate remained unsold : it was held that it devolved to her as personalty.

Next-of-kin takes as realty—where.

In the converse case, *i.e.*, where personal estate is directed to be laid out in land, which is to be held on trusts which (either originally or by lapse) leave part of the interest undisposed of, this partial interest results to the testator's next-of-kin or residuary legatee as real estate, in case of whose death it passes to his heir-at-law, or devisee (*k*).

When land is devised charged with a sum of money, which is given on trusts which do not exhaust the entire beneficial

(*f*) In support of this proposition, Mr. Jarman refers to Sir J. Leach's judgment in *Smith* v. *Claxton*, 4 Madd. 493. As to *Chitty* v. *Parker*, 2 Ves. jun. 271, see *Att.-Gen.* v. *Lomas*, L. R. 9 Ex. 29; *Simmons* v. *Rose*, 6 D. M. & G. 411. "Where a person . . . has directed a conversion for a particular special purpose, or out and out, but the produce to be applied to a particular purpose, when the purpose fails, intention fails; and this Court regards him as not having directed the conversion" : *per* Lord Eldon, *Ripley* v. *Waterworth*, 7 Ves. p. 435; *Re Grimthorpe*, [1908] 2 Ch. 675.

(*g*) *Davenport* v. *Coltman*, 12 Sim. 610. Cf. *Bowra* v. *Rhodes*, 31 L. J. Ch. 676. If the will only contains a power of sale under which the property is sold after the death of the heir the proceeds of sale devolve as realty : *Re Dyson*, [1910] 1 Ch. 750.

(*h*) *Re Hopkinson*, [1922] 1 Ch. 65. In *Carr* v. *Collins*, 7 Jur. 165, there was only a partial failure of the objects of conversion.

(*i*) L. R. 9 Ex. 29.

(*k*) *Curteis* v. *Wormald*, 10 Ch. D. 172; overruling *Reynolds* v. *Godlee*, Johns. 536, 582, where Wood, V.-C., held that it resulted to the executor, and through him to the next-of-kin, as personal estate. The V.-C. put the case of the liberated fund being wanted to make good abated legacies under the will, "in which case the land purchased must certainly be dealt with as the estate of the testator which the executors must apply as personal estate in payment of the legacies." But the case is scarcely relevant. Nothing of course results to the next-of-kin until all the purposes of the will which ought to be satisfied have been satisfied. *Curteis* v. *Wormald* was followed in *Re Skerrett's Trusts*, 15 L. R. Ir. 1.

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interest in the money, so that after it has been raised the undisposed-of interest sinks for the benefit of the devisee (*l*), the devisee takes it as he finds it, *viz.*, as personalty. This, of course, assumes him to be absolutely entitled to the land (*m*).

Specific sums payable out of the produce of real estate belong to the heir—when.

VII.—Effect of Failure by Lapse, or otherwise, of Pecuniary Gifts out of Proceeds of Land.—Under the law before the Wills Act, in cases where real estate was devised to be sold, and a sum of money forming part of the proceeds was undisposed of, the question whether it went to the heir, or to the residuary legatee of the fund, or to the general residuary legatee, was the subject of much difference of opinion. Having regard to the effect of section 25 of the Wills Act, Mr. Jarman's discussion of the cases under the old law is omitted in this edition (*o*).

General remarks on the cases.

"Here, then," says Mr. Jarman (*p*), referring to the cases before *Salt* v. *Chattaway* (*q*), "closes the long line of cases respecting the destination of pecuniary legacies, originally void or failing by lapse, so far as they are payable out of the proceeds of real estate, where *such proceeds are blended with the general personal estate*. The state of the authorities is certainly not such as to justify the hope of all litigation being at an end on this perplexing subject. An adjudication founded on a full examination of *all* the cases is still wanting.

Rule in regard to wills since 1837.

"The question, of course, will present itself under a different aspect in reference to wills made or republished since the year 1837, and containing a residuary devise, as such devise is made by the 25th section of the recent act of 1 Vict. c. 26, to extend to all *interests* in real estate comprised in any devise which fails by lapse or from being contrary to law, or otherwise incapable of taking effect; but the remarks occurring on this point have already found a place in connection with the subject of the failure of pecuniary charges on real estate, not directed to be converted, to which it will be sufficient to refer" (*r*). The general principle in such cases is that when the sum is a charge, as distinguished from an exception, the failure still (as before the Act) enures for the benefit of the specific devisee, not of the residuary devisee (*s*).

(*l*) See as to this, *ante*, p. 416.

(*m*) *Re Newberry's Trusts*, 5 Ch. D. 746.

(*o*) For a discussion of these cases see the 4th edition, vol. I, pp. 632 *seq.*, and for shorter discussion the 6th edition, pp. 777 *seq.*

(*p*) First ed., p. 586.

(*q*) 3 Bea. 576.

(*r*) *Ante*, p. 420.

(*s*) *Tucker* v. *Kayess*, 4 K. & J. 339 (will dated 1853); *Sutcliffe* v. *Cole*, 3 Drew. 135; 24 L. J. Ch. 486 (will dated 1843). And see the judgment in *Carter* v. *Haswell*, 26 L. J. Ch. 576, where it was immaterial whether charge

Express direction by testator.

Sometimes a testator, after bequeathing a sum of money which he charges on his real estate, directs that in a certain event the sum shall sink into the residue of his personal estate : in such a case, if the sum is not actually raised, and there is no necessity to raise it, the general rule is that it sinks into the real estate, the testator being considered not to have shown any intention that it should be raised out of his real estate for the mere purpose of benefiting his personal estate (*t*).

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or exception; the general (being the only) devisee could alone benefit by the failure. The case is more properly one of a void particular devise falling into residue.

(*t*) *Johnson* v. *Webster*, 4 D. M. & G. 474; *Re Duke of Somerset*, 55 L. T. 753.

CHAPTER XXIII.

POWERS OF APPOINTMENT AND DISPOSITION (*a*).

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Operation of a power of appointment.

I.—Preliminary.—A power of appointment is either a power of original disposition or a power to revoke an existing disposition and make a new one; in the latter case, it is obvious that the existing interests are vested, and (after much discussion) it is now settled that where the power is one of original disposition, and is followed by a limitation in default of appointment, the interests so limited are vested, subject to be divested by an exercise of the power (*b*). The point is of importance when it is a question whether a person's interest in a trust fund passes to his trustee in bankruptcy, or is subject to his marriage settlement, or the like (*c*).

(*a*) This chapter was written by Mr. C. Sweet for the sixth edition. It does not profess to deal with those general principles which are common to all powers of appointment, whether exercisable by deed or by will. As to these, the reader is referred to the treatises of Lord St. Leonards, Mr. Chance, and Lord Justice Farwell.

(*b*) Sugden, Powers (8th ed.), p. 452; *Doe* v. *Martin*, 4 T. R. 39; *Smith* v. *Lord Camelford*, 2 Ves. jun. 698; *Reade* v. *Reade*, 5 Ves. 744; *Re Ware*, 45 Ch. D. 269. As to *Woodcock* v. *Rennick*, see *post*, p. 796. On principle, it would seem clear that where there is a gift to the children of A, in such shares as A shall appoint, and A never has more than one child, that child takes an absolute interest, and no appointment by A can affect it, or give him a new title; on the authorities, however, the point is by no means clear: see *Sweetapple* v. *Horlock*, 11 Ch. D. 745, where *Re Frowd's Settlement*, 4 N. R. 54, and *De Serre* v. *Clark*, L. R. 18 Eq. 587, are discussed. In *Lovett* v. *Lovett*, [1898] 1 Ch. 82, the power was to appoint to issue.

(*c*) *Lee* v. *Olding*, 25 L. J. Ch. 580; *Re Vizard's Trusts*, L. R. 1 Ch. 588; *Re Andrews' Trusts*, 7 Ch. D. 635; *Sweetapple* v. *Horlock*, 11 Ch. D. 745; *Re Maddy's Estate*, [1901] 2 Ch. 820.

Class taking in default, how ascertained.

The rules for ascertaining the persons to take in default of appointment where they constitute a class are stated elsewhere (*d*).

General and special powers.

It may here be observed that it is not strictly accurate to divide powers of appointment into two classes, general and special. The essence of a general power is that the donee of the power can appoint to whomsoever he pleases (*e*), and it will be noticed that section 27 of the Wills Act does not use the words "general powers," but the words "power to appoint in any manner the donee may think proper." Even if the donee can appoint to himself, yet if certain persons are excluded as objects of the power, such a power is not of the nature of the power referred to in section 27 (*f*). There is a class of powers which are not special in the sense that there is a distinct class of objects of the power, and yet are not general; to this class belong powers where the donee can appoint to any person or persons other than himself, his executors or administrators, or other than certain classes of persons. The Legacy Duty Act, 1796, uses language which implies that for the purposes of that Act the two classes of power, special and general, were meant to include all possible cases (*g*), and in the case of *Platt* v. *Routh* (*h*) it was consequently held that limited powers of the kind above referred to were, for the purposes of that Act, general powers. The question as to whether a power is general or not is sometimes of importance with reference to the question whether estate duty is payable by virtue of the definition contained in section 22 of the Finance Act, 1894 (*i*), and also as to the applicability of the Rule against Perpetuities in relation to appointments under such powers.

Distinction between powers of appointment and powers of disposition.

A power of appointment, as a general rule, requires for its exercise some more or less formal expression of intention (*k*), while a power of disposition, although it may be expressed so as

(*d*) Chap. XLI (gifts to next-of-kin, relations, etc.); Chap. XLII (gifts to children).

(*e*) Sugden on Powers, p. 394; Farwell on Powers (3rd ed.), p. 8.

(*f*) *Re Byron's Settlement*, [1891] 3 Ch. 474.

(*g*) See *per* Lord Abinger, 6 M. & W., at p. 788.

(*h*) 3 Bea. 257; 6 M. & W. 756, affirmed *sub nom. Drake* v. *Att.-Gen.*, 10 Cl. & F. 257.

(*i*) In section 22, sub-section 2 (e) of the Finance Act, 1894, "general power" is defined to include any power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable *inter vivos* or by will or both.

(*k*) See *Irwin* v. *Farrer*, 19 Ves. 86; *Holloway* v. *Clarkson*, 2 Ha. 521; *Re Davids' Trusts*, Johns. 495; *Pennock* v. *Pennock*, L. R. 13 Eq. 144. In *Mackenzie* v. *Mackenzie*, 3 Mac. & G. 559, the donee of a general power appointed to his own executors and administrators, and this was held to make the property his own.

to confer a mere power of appointment (as where a power to dispose of property by will is given), may be expressed so widely as to include the exercise of powers incident to ownership, such as a power of using, selling, or otherwise alienating the property, which may obviously be exercised without any formal expression of intention (*l*).

Appointment operating as direct gift.

In some cases, where a person purports to charge or appoint property in exercise of a specific power, and of all other powers, and the charge or appointment cannot take effect under the specific power, it takes effect out of the appointor's own interest in the property (*m*).

Power equivalent to absolute interest.

The cases in which a person to whom a power of disposition or appointment is given takes an absolute interest are considered in Chapter XXXIII.

Power to appoint income.

An absolute power of appointing the income of a fund carries the power to appoint the capital (*n*).

Absolute interest with superadded power.

II.—What Words will create a Power.—If an absolute interest in property is given in the first instance, superadded words purporting to give a power of disposition are, as a rule, surplusage (*o*). Thus, a devise to a married woman to be her sole and separate property, and with power to her to appoint the same to her children and husband in such a way as she may think fit, gives her the absolute property (*p*).

(*l*) See *Brodrick* v. *Brown*, 1 K. & J. 328. "There is nothing in the word 'disposal' essentially indicating power rather than property, independently of the context": *per* Knight-Bruce, V.-C., in *Nowlan* v. *Walsh*, 4 De G. & S. p. 586, where the V.-C. seems to cast doubts on the accuracy of the decisions in *Reith* v. *Seymour*, 4 Russ. 263, and *Archibald* v. *Wright*, 9 Sim. 161. Compare *Re Pounder*, 56 L. J. Ch. 113; *Re Stringer*, 6 Ch. D. 1, and *Re Sanford*, [1901] 1 Ch. 939, *post*.

(*m*) *Cross* v. *Hudson*, 3 Br. C. C. 30; *Jones* v. *Southall*, 30 Bea. 187; *Sing* v. *Leslie*, 2 H. & M. 68; *Re James*, [1910] 1 Ch. 157.

(*n*) *Re L'Herminier*, [1894] 1 Ch. 675.

(*o*) See *Hixon* v. *Oliver*, 13 Ves. 108; *Doe* d. *Herbert* v. *Thomas*, 3 A. & E. 123; *Howorth* v. *Dewell*, 29 Bea. 18.

(*p*) *Brook* v. *Brook*, 3 Sm. & G. 280; *Foxwell* v. *Van Grutten*, [1900] W. N. 97. In the case of married women subject to the old law, a power of appointment by will, notwithstanding coverture, could be given in addition to absolute ownership: *Bull* v. *Kingston*, 1 Mer. 314; *Hales* v. *Margerum*, 3 Ves. jun. 299. The general principle of the Court of Chancery was that it would not allow an equitable merger or coalescence of interests given to a married woman, if the result would be to defeat its own rules aimed at the protection of married women from marital control: *Whittle* v. *Henning*, 2 Ph. 731. But since the Married Women's Property Act, 1882, this doctrine has ceased to be of importance: see *Re Davenport*, [1895] 1 Ch. 361. In Farwell on Powers (3rd ed.), p. 122, *Barrymore* v. *Ellis*, 8 Sim. 1, and *Medley* v. *Horton*, 14 Sim. 222, appear to be treated as correctly decided, notwithstanding *Brown* v. *Bamford*, 1 Ph. 620; *Harnett* v. *Macdougall*, 8 Bea. 187, and *Moore* v. *Moore*, 1 Coll. 54; *sed quære*.

So if personal property is given to A, with a power to dispose of it by will or "at his death," he takes an absolute interest (*q*).

And it is, of course, immaterial that the power of appointment or disposition is confined to a class of persons, such as the children of the devisee or legatee (*r*).

Absolute gift cut down to life interest with power of disposition.

The doctrine applies even if the absolute interest is not given directly, but is implied from an indefinite gift of the income of the property (*s*). Thus, where a testator bequeathed the dividends of stock to a woman, to be paid to her notwithstanding any future coverture, with a direction that her receipts should be a sufficient discharge, and that at her death she might leave it to anyone she chose, it was held that she took an absolute interest (*t*).

And even if words are added declaring the testator's intention to be that the devisee shall enjoy the property during his life, and by his will dispose of the same as he thinks proper, they do not, of themselves, cut down the absolute interest previously given (*u*).

On the other hand, after an apparently absolute gift, the testator may go on to use words which show that he meant to give a life interest, with a power of appointment or disposition over the capital (*x*). Thus a gift to A, to be vested in her on her attaining twenty-one, and to be subject to her disposition thereof, followed by a gift over in the event of her dying under twenty-one or without disposing of the property by her will, gives her a life interest with a power of appointment by will (*y*). So a gift to A "for her own absolute use and benefit and disposal," with a gift over of any part remaining "undisposed of" at her death, gives A a life interest, with a power of disposition by act *inter vivos*, but not by will (*z*). But the distinction between a case of this kind, and a case where the

(*q*) *Comber* v. *Graham*, 1 R. & My. 450. This was the construction adopted in *Re Mortlock's Trust*, 3 K. & J. 456, but the will seems to be wrongly punctuated.

(*r*) *Howorth* v. *Dewell*, 29 Bea. 18; *Brook* v. *Brook*, 3 Sm. & G. 280; and cases on precatory trusts, cited *post*, pp. 870 *seq.*

(*s*) *Weale* v. *Ollive*, 32 Bea. 421.

(*t*) *Southhouse* v. *Bate*, 16 Bea. 132.

(*u*) *Doe* v. *Thomas*, 3 Ad. & E. 123. In that case the devise was to a woman, but nothing seems to have turned on this.

(*x*) See *Constable* v. *Bull*, 3 De G. & S. 411, and other cases cited in Chap. XIV; *Shields* v. *Shields*, [1910] 1 Ir. R. 116.

(*y*) *Borton* v. *Borton*, 16 Sim. 552. See *Ahearne* v. *Ahearne*, 9 L. R. Ir. 144.

(*z*) *Re Pounder*, 56 L. J. Ch. 113; *Doe* v. *Glover*, 1 C. B. 448. Compare *Re Pedrotti's Will*, 27 Bea. 583; *Re Fox*, 62 L. T. 762, and *Re Richards*, [1902] 1 Ch. 76 (in all of which the power of disposition was restricted to purposes of maintenance); *Re Thomson's Estate*, 14 Ch. D. 263, and *Pennock* v. *Pennock*, L. R. 13 Eq. 144 ("power to take and apply"); *Re Ryder*, [1914] 1 Ch. 865 ("own use and benefit").

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donee takes an absolute interest, or a life interest with a general power of appointment, is now difficult to draw (*a*).

Gift to parent and children.

Where the gift is for the benefit of a person and his children, it may be so expressed as not to confer concurrent interests, but to give the parent a life interest, with a power of appointment among the children (*b*). In *Re Haly's Trusts* (*c*), a sum was bequeathed to A for her sole and separate use, "and to be appropriated by her to and amongst her children in such shares as she shall think proper." A predeceased the testator, and it was held that the children took under the implied gift to them, from which it seems to follow that if A had survived the testator she would have taken an estate for life with a power of appointment among the children (*d*).

Provision for death of legatee without having disposed of property

Where a testator gives property to A, and then provides for the case of A's dying without having disposed of it, the question arises whether the original gift is an absolute one, in which case the gift over is repugnant and void; or whether A takes an estate for life, with a general power of appointment, followed by a gift over in default of appointment.

may not affect absolute gift,

Thus, if a testator gives property to A "for his own use," or "for his absolute use and benefit," or the like, and goes on to provide that on A's death any part of the property not disposed of by him shall go to someone else, this gives A an absolute interest, and any part of the property not disposed of at his death forms part of his estate (*e*).

or may cut it down to life interest with power.

On the other hand, the whole frame of the will may negative the idea of an absolute gift. Thus, in *Re Stringer's Estate* (*f*), the testator gave to J. all his property, with full power to sell and dispose of it in any way he thought fit, by deed, will, or otherwise, and appointed him executor, but if J. did not dispose of the property, the testator gave it or the part undisposed of to other persons, and appointed other executors: there were various provisions in the will to take effect after the death of the survivor of the testator and J.: it was held that J. took a life estate with a general power of appointment. And where a testator gave all his property to his wife, "so that she may have full possession of it and entire power and control over it," with a gift over in the event of her dying without having devised

(*a*) See the cases of *Re Stringer*, 6 Ch. D. 1; *Re Jones*, [1898] 1 Ch. 438; and *Re Sanford*, [1901] 1 Ch. 939, cited *post*.

(*b*) *Bradshaw* v. *Bradshaw*, [1908] 1 Ir. R. 288.

(*c*) 23 L. R. Ir. 130; *Shields* v. *Shields*, [1910] 1 Ir. R. 117.

(*d*) Compare *Rorke* v. *Abraham*, [1895] 1 Ir. R. 334, *infra*, n. (*g*).

(*e*) *Re Yalden*, 1 D. M. & G. 53; *Re Mortlock's Trust*, 3 K. & J. 456; *Parnell* v. *Boyd*, [1896] 2 Ir. R. 571; *Re Jones*, [1898] 1 Ch. 438. See also *Re Hanbury*, [1904] 1 Ch. 415, reversed on appeal, [1905] A. C. 84.

(*f*) 6 Ch. D. 1.

or appointed it, it was held that she took an estate for life only with a general power of appointment (*g*). The decision, however, seems to have partly turned on the fact that the testator had previously by his will made a different disposition of his property, including a gift of the residue to his wife absolutely, and that the disposition above stated was contained in a codicil.

Informal words.

A power of appointment may be created by informal words, such as words giving a power of "settling" or "disposing" of property in a certain way (*h*). But vague words will not create a power if such a construction is inconsistent with the general scheme of the settlement containing them (*i*).

As a general rule, a limitation to a person for life, and after his death to his heirs and assigns, does not give him a power of appointment (*k*).

In *Re Holden* (*l*), where a testator gave a life interest in property to A, and on his death "gave all the remainder of my personal property which may then exist" to B, this was held not to give A a power of disposition.

But a gift of property to A for life, with full power to will away any part at her decease, followed by a gift over of the residue and remainder of what was undisposed of by her, was held to give her a power of appointment over the whole (*m*).

Power created by cross limitations.

In *Atkinson* v. *Jones* (*n*), a testator gave one moiety of his residue upon trust for M. for life, and after her death as to one half of it as she should appoint, and as to the other half upon the trusts thereinafter declared of the other moiety, which he gave upon similar trusts for E., with a similar cross limitation of one half upon the trusts thereinbefore declared concerning M.'s moiety: it was held that the effect was to give M. and E. between them a power of disposing of the whole of the testator's residuary estate.

(*g*) *Re Sanford*, [1901] 1 Ch. 939. See *Re Pounder*, 56 L. J. Ch. 113, *ante*, p. 765; and *Rorke* v. *Abraham*, [1895] 1 Ir. R. 334, where it was held that the power was limited to children, and in default of appointment they took equally: *Bradshaw* v. *Bradshaw*, [1908] 1 Ir. R. 288.

(*h*) *Beachcroft* v. *Broome*, 4 T. R. 441; *Kennerly* v. *Kennerly*, 10 Ha. 160; *Downes* v. *Timperon*, 4 Russ. 334. See *Comiskey* v. *Bowring-Hanbury*, [1905] A. C. 84, where there was an absolute gift, subject to an executory gift over, which in its turn was subject to a power of appointment created by informal words expressing the testator's confidence that the donee would dispose of the property for the benefit of the objects of the gift over: see Chap. XXIV.

(*i*) *Van Grutten* v. *Foxwell*, 84 L. T. 545.

(*k*) *Milman* v. *Lane*, [1901] 2 K. B. 745, in which *Tapner* v. *Merlott*, Willes, 177, and *Quested* v. *Michell*, 24 L. J. Ch. 722, are discussed. See also *Brookman* v. *Smith*, L. R. 7 Ex. 271.

(*l*) 59 L. T. 358. Compare *Re Thomson's Estate*, 14 Ch. D. 263, and the other cases cited *ante*, p. 765.

(*m*) *Cooke* v. *Farrand*, 7 Taunt. 122.

(*n*) Johns. 246.

Where a testator gave the income of his property to his wife for life, and directed that in case the income should not be sufficient she was to use such portion of the property as she might deem expedient, and that on her decease "what was left" of the property should be divided among certain persons: it was held that the wife had a general power of appointment over the capital during her life, but the question whether she could appoint by will was not decided (*o*).

Life interest enlarged into absolute interest.

A gift to A for life, followed by a general power of appointment and a gift in default of appointment to A's executors or administrators, seems to confer on A an absolute interest (*p*).

What words will create a testamentary power.

In *Bristow* v. *Skirrow* (*q*) a testator gave leaseholds upon the same trusts as his wife might declare with respect to the disposition of her residuary personal estate by her will: it was held that this gave her a general testamentary power of appointment.

A power to appoint, without saying in what manner, or a power to appoint "by writing," or "by deed or otherwise," authorises an appointment by will (*r*). And if the power is to appoint by a "writing" or "instrument" executed with certain prescribed formalities (such as sealing and delivery, or attestation), it may be exercised by a will executed with those prescribed formalities, but it cannot be exercised by an ordinary will (*s*).

A gift of property to A for life, and "at" or "after" his decease, to such persons as he shall appoint, or to be "at his disposal," gives A a power of appointment by deed or will (*t*). unless some words are added (such as "leave" or "will" or "bequeath") which imply a testamentary disposition in which

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(*o*) *Re Richards*, [1902] 1 Ch. 76. See *Re Pedrotti's Will*, 27 Bea. 583; *Re Fox*, 62 L. T. 762; *Re Rowland*, 86 L. T. 78; *ante*, p. 439.

(*p*) *Post*, p. 1158.

(*q*) 27 Bea. 585.

(*r*) Sugden on Powers, 214; *Lisle* v. *Lisle*, 1 Br. C. C. 533; *Taylor* v. *Meads*, 4 D. J. & S. 597. In *Doe* v. *Glover* (1 C. B. 448), a gift over in the event of A not disposing and parting with his interest, was held not to authorise a disposition by will: but see *Holmes* v. *Godson*, 8 D. M. & G. 166.

(*s*) *Taylor* v. *Meads*, *supra*; *Kibbet* v. *Lee*, Hob. 312; *Orange* v. *Pickford*, 4 Dr. 363; *West* v. *Ray*, Kay, 385; *Smith* v. *Adkins*, L. R. 14 Eq. 402, and cases there cited.

(*t*) *Tomlinson* v. *Dighton*, 1 P. W. 149; *Ex p. Williams*, 1 J. & W. 89; *Reith* v. *Seymour*, 4 Russ. 263; *Re Davids' Trusts*, Johns. 495; *Humble* v. *Bowman*, 47 L. J. Ch. 62; *Re Jackson's Will*, 13 Ch. D. 189: where the cases *Kennedy* v. *Kingston*, 2 J. & W. 431; *Reid* v. *Reid*, 25 Bea. 469; and *Freeland* v. *Pearson*, L. R. 3 Eq. 658, are disapproved. As to *Woodcock* v. *Renneck*, 1 Ph. 72, see *post*, p. 796.

case the power can only be exercised by will (*x*). So if the donee, being a married woman, is restrained from alienating the corpus (*y*).

On the other hand, a gift of a life estate, followed by a power of disposition, may be so expressed as to confine the power to acts *inter vivos* (*z*), or to give the donee an absolute interest (*a*).

Power created before Statute of Devises, 1540.

In *Re Bolton Estates* (*b*), it was held that a power to create a jointure conferred by a private Act of 1535, was exercisable by a testamentary instrument, although the power of disposing of land by will did not exist before 1540.

Writing in the nature of a will.

If a power is exercisable by any writing executed by the donee in the presence of two witnesses, and he executes a document of a testamentary character, this is "a writing in the nature of a will in exercise of a power" within the definition contained in section 1 of the Wills Act, and must, therefore, comply with the requirements of section 9 (*c*).

Writing purporting to be a will.

In *Re Broad* (*d*), it was held that if a power is exercisable by will or by "any writing purporting to be a will," it may be exercised by a document purporting to be the will of the donee and signed by him, although insufficiently attested and, therefore, incapable of probate.

Uncertainty.

Where a testator, after giving his wife a life interest in his property, continued as follows: "And I devise and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her," it was held that the clause purporting to give the wife a power of disposition was void for uncertainty (*e*).

(*x*) *Doe* v. *Thorley*, 10 East. 438; *Walsh* v. *Wallinger*, 2 R. & M. 78; *Paul* v. *Hewetson*, 2 My. & K. 434; *Moore* v. *Ffolliot*, 19 L. R. Ir. 499. See *Cruwys* v. *Colman*, 9 Ves. 319.

(*y*) *Archibald* v. *Wright*, 9 Sim. 161; *Re Flowers*, 55 L. J. Ch. 200. According to *Re Waddington*, [1897] W. N. 6, a mere restraint on anticipation does not have this effect.

(*z*) *Re Thomson's Estate*, 14 Ch. D. 263, and other cases cited *ante*, p. 440.

(*a*) *Re Jones*, [1898] 1 Ch. 438, and other cases cited *post*, p. 1168.

(*b*) [1903] 2 Ch. 461.

(*c*) *Re Barnett*, [1908] 1 Ch. 402; *Bainbridge* v. *Smith*, 8 Sim. 86; *Re Daly's Settlement*, 25 Bea. 456.

(*d*) [1901] 2 Ch. 86. In *Gullan* v. *Grove*, 26 Bea. 64, Romilly, M.R., refused to treat a portion of a duly signed and attested will (the other portion having been destroyed) as a writing "purporting to be a will." And see *Re Edmondstone*, 49 W. R. 555, where a testamentary document insufficiently attested, and not referring to the power or the property subject to it, was held not to be a "writing duly executed." In *Re Barnett*, [1908] 1 Ch. 402, some doubt seems to have been felt by Warrington, J., whether the decision in *Re Broad* was correct, having regard to the definition of "will" in section 1 of the Wills Act.

(*e*) *Re Hetley*, [1902] 2 Ch. 866. Compare *Buckle* v. *Bristow*, 10 Jur. (N.S.) 1095. It is hardly necessary to say that a power to appoint to A or B is not open to objection on the score of uncertainty: see *Longmore* v. *Broom*, 7 Ves. 124, and other cases cited *ante*, p. 451, and p. 587.

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Power void.

A power of appointment may be void because it transgresses the Rule against Perpetuities (*ante*, p. 281), or because it is contrary to public policy; thus a power directly tending to encourage a separation between husband and wife would no doubt be void (*f*).

A general power will not be cut down to a special power except by express words (*g*).

Contingent power.

III.—When and by whom exercisable.—The general principle is that a power given to a designated person, to be exercised upon a contingency, can be well executed before the contingency happens (*h*). Thus if a woman has a power exercisable by will in the event of her marriage, she can exercise it before the marriage (*i*).

Power given to contingent person.

A general power given to the survivor of two persons can be well exercised, during their joint lives, by the will of the one who turns out to be the survivor (*j*). And the same principle would appear to apply to any general power given to a contingent person who eventually proves to be the person entitled to exercise it (*k*).

A different rule seems to apply to special powers. Thus in *Re Moir's Trusts* (*l*), a special power was given to A and B, exercisable by deed during their joint lives, and in default of such appointment by the survivor by deed or will: it was held by Bacon, V.-C., that it was not well executed by the will, made during the joint lives, of the actual survivor.

In *Re Miller* (*ll*), a power of appointment was given to the survivor of the testator's son and his wife. The son married and his wife died in 1922. It was held that the son was not a contingent person (unless and until he married again) and consequently could exercise the power.

(*f*) See *Marlborough* v. *Marlborough*, [1901] 1 Ch. 165; *Re Morgan*, 26 T. L. R. 398, and cases cited *post*, p. 1438.

(*g*) *Mackinley* v. *Sison*, 8 Sim. 561.

(*h*) *Hanbury* v. *Bateman*, [1920] 1 Ch. 313.

(*i*) *Logan* v. *Bell*, 1 C. B. 872, and other cases cited Farwell (3rd ed.), p. 166.

(*j*) *Thomas* v. *Jones*, 1 D. J. & S. 63; 2 J. & H. 475. The decisions in *MacAdam* v. *Logan*, 3 Br. C. C. 310, and *Doe* v. *Tomkinson*, 2 M. & S. 165, seem to have been rendered obsolete by the Wills Act.

(*k*) Farwell (3rd ed.), p. 179. It does not seem to have been decided whether a general power, expressly made exercisable by the survivor of two persons after the death of the other, can be exercised by a will made during their joint lives by the person who eventually survives.

(*l*) 46 L. T. 723. In *Cave* v. *Cave*, 8 D. M. & G. 131, and *Re Blackburn*, 43 Ch. D. 75, the power was expressly made exercisable after the death of one.

(*ll*) 129 L. T. 667.

A power exercisable by persons answering a particular description at a certain time, cannot be exercised by persons who answer that description at a different time (*m*).

Where contingency does not happen.

It is hardly necessary to say that if a power is limited to arise upon a contingent event which does not happen, the power is not exercisable. Thus, if property is settled upon such trusts as a married woman shall, in the event of her predeceasing her husband, by will appoint, the power is not well exercised by a will made during coverture, if she survives him (*n*). But if the words of contingency are ambiguous or obscure, regard will be paid to the general scheme of the instrument creating the power (*o*).

Future event.

A power limited to arise upon a future or contingent event must be distinguished from a power which takes effect upon a future event, but is presently exercisable. The former, not being exercisable before the event, upon which it is limited to arise, happens, is, it seems, void for remoteness, unless the event is such that it must happen within the legal period (*p*).

Whether objects of special power must be known to donee.

In *Blight* v. *Hartnoll* (*q*), Fry, J., said : "I think that when a power of appointment amongst a class of persons is given, the appointor must know the class—must be able to ascertain the class amongst whom he or she is to divide the property. It is a discretionary power to be exercised with reference to the respective circumstances and merits of the persons who are to take, and that cannot be exercised where the persons are not known." But this statement was not necessary for the decision of the case, and is generally considered to be incorrect (*r*).

Death of one of several objects.

A power to appoint among several objects is not necessarily defeated by the death of any of them (*s*).

A power to appoint by will to any "existing member of my family" means a member living at the date of the will creating the power (*t*).

Where under a settlement the husband's life interest is deter-

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(*m*) *Valentine* v. *Fitzsimons*, [1894] 1 Ir. R. 93.

(*n*) *Price* v. *Parker*, 16 Sim. 198; *Trimmell* v. *Fell*, 16 Bea. 537; *Willock* v. *Noble*, L. R. 7 H. L. 580; *Re Cuno*, 43 Ch. D. 12. Compare *Van Grutten* v. *Foxwell*, 84 L. T. 545.

(*o*) *Wilkinson* v. *Thornhill*, 61 L. T. 362. As to the doctrine of *Avelyn* v. *Ward*, 1 Ves. Sen. 420, see *post*, pp. 1334, 2134 *seq.*

(*p*) Marsden on Perp. 238. Compare *Goodier* v. *Johnson*, 18 Ch. D. 441; *Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Blight* v. *Hartnoll*, 19 Ch. D. 294; and the other cases cited *ante*, p. 278 *seq.*

(*q*) 19 Ch. D. 294.

(*r*) See Farwell (3rd ed.), p. 168. As to the point decided in the case, see p. 282.

(*s*) See *post*, p. 1778 *seq.*

(*t*) *Sinnott* v. *Walsh*, 5 L. R. Ir. 27.

minable on bankruptcy, it is a question of construction whether this puts an end to his power of appointment (*u*).

Power to be exercised within a certain period.

If a power is exercisable by will, and the donor requires that it shall be exercised within a certain period, the question arises whether he merely means that the will shall be made within the period, or whether he means that the will must become operative by the death of the donee within the period. As a general rule, it seems to be sufficient that the will should be made within the period (*x*), but it may appear from the context or general scheme of the instrument creating the power that the donor requires the will to become operative by the death of the donee during the prescribed period (*y*).

Power to be exercised by will during coverture.

In *Re Safford's Settlement* (*z*) the power was as the wife should by will during the continuance of the intended coverture direct or appoint. The wife during the coverture made a will appointing the settled funds. She survived her husband. Held, that the power was well exercised, and that there was no reason for implying a condition that the wife should die during coverture.

Wills Act, s. 10.

IV.—Formalities to be observed.—In the case of powers which are expressly made exercisable by will (*a*), regard must be had to section 10 of the Wills Act, which enacts that: "No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity."

Accordingly, a testamentary power of appointment created before the Wills Act, is properly exercised by a will executed with the formalities required by the Act (*b*).

This enactment does not prevent the donor of the power from imposing conditions or restrictions not relating to the

(*u*) *Haswell* v. *Haswell*, 2 D. F. & J. 456; *Wickham* v. *Wing*, 2 H. & M. 436; *Potts* v. *Britton*, L. R. 11 Eq. 433; *Re Aylwin*, L. R. 16 Eq. 585; *Re Stone's Estate*, Ir. R. 3 Eq. 621; 18 W. R. 222.

(*x*) *Re Illingworth*, [1909] 2 Ch. 297, where the cases of *Burnham* v. *Bennett*, 2 Coll. 254; 1 De G. & S. 513, and *Cave* v. *Cave*, 8 D. M. & G. 131, are discussed. In *Burnham* v. *Bennett* the instrument appears to have been a fabrication.

(*y*) *Cooper* v. *Martin*, L. R. 3 Ch. 47; *Potts* v. *Britton*, L. R. 11 Eq. 433.

(*z*) [1915] 2 Ch. 211, approving *Re Illingworth*, [1909] 2 Ch. 297.

(*a*) As to powers exercisable by "writing," etc., see *ante*, p. 768.

(*b*) *Hubbard* v. *Lees*, L. R. 1 Ex. 255; *Freme* v. *Clement*, 18 Ch. D. 499, *post*, p. 833.

formalities of execution. Thus, a special power which is exercisable by the survivor of two persons after the death of the other, cannot be exercised by one during their joint lives, even although that one survives (*c*). So a special power made exercisable by will expressly referring to the power, cannot be exercised in any other way (*d*).

The Wills Act provides (section 1) that in the construction of the Act the word "will" shall extend to "an appointment by will or by writing in the nature of a will in exercise of a power." In *Re Barnett* (*e*) a fund was settled by A upon certain trusts, subject to a proviso that it should be lawful for A, by any deed or deeds, writing or writings, with or without power of revocation, to be by her duly executed in the presence of two witnesses, to revoke any of the provisions of the settlement and to appoint other trusts in their place. She signed a document by which she did not in terms revoke any of the provisions of the settlement, but she dealt with the settled fund, and with other property, and directed that her funeral expenses should be paid. This document was signed by her in the presence of two witnesses, but as her signature was not placed at the foot or end thereof, it could not be proved as a will. It was held that this was a writing in the nature of a will in exercise of a power, and not being executed in accordance with section 9 of the Act, it was invalid as an exercise of the power. If the document had been confined to an immediate disposition of the settled fund, it would apparently have been valid.

Aiding defective execution.

Before the Wills Act, the Court would in certain cases and in favour of certain persons, especially the wife and children (or adopted children) of a testator, aid the defective execution of a power by his will. Thus, if a power required to be exercised by a will signed in the presence of two witnesses, and the testator, by a will unattested, or only attested by one witness, exercised it in favour of his children, or of one or more of his children, equity would, as a general rule, hold it to be properly exercised (*f*). But since the Wills Act, a power which requires to be exercised by will cannot be exercised by a will not complying with the statutory requirements, and the Court has

(*c*) *Cave* v. *Cave*, 8 D. M. & G. 131; *Re Blackburn*, 43 Ch. D. 75, *post*, p. 808.

(*d*) *Phillips* v. *Cayley*, 43 Ch. D. 222, *post*, p. 781: see *Re Waterhouse*, 98 L. T. 30, and other cases cited, *post*, p. 780.

(*e*) [1908] 1 Ch. 402. As to *Re Broad*, [1901] 2 Ch. 86 ("writing in the nature of or purporting to be a will"), see *ante*, p. 769.

(*f*) *Wilkes* v. *Holmes*, 9 Mod. 485; *Lucena* v. *Lucena*, 5 Bea. 249; *Hume* v. *Rundell*, 6 Madd. 331; *Morse* v. *Martin*, 34 Bea. 500 (as to this case, see *Re Walker*, [1908] 1 Ch. 560).

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no jurisdiction to aid an execution which is defective in this respect (*g*), unless the testator is domiciled abroad, and special formalities are prescribed (*h*).

The old doctrine, however, applies to powers which are exercisable by deed. Thus in *Bruce* v. *Bruce* (*i*), a person who had a power of appointment by deed exercised it by will, duly executed, in favour of her children, and it was held to be a good execution of the power. But in such a case the will must be executed in accordance with the requirements of the Wills Act, by reason of the definition of "will" contained in the Act (*j*).

Operation of testamentary appointment.

There was formerly some question as to the proper functions of the Court of Probate and the Court of Construction with regard to the operation of a testamentary appointment, and it was at one time thought that the Judicature Acts would make a difference in the practice (*k*). This does not appear to have been the case, and the practice as now settled may be stated as follows :—

Probate, when necessary.

(1) A testamentary appointment in exercise of a power over personal estate is inoperative unless duly proved or recognised by the Court of Probate as a will (*l*). Under the old law, a will merely exercising a power over real estate did not require to be proved, and in the case of a married woman was not entitled to be proved (*m*). But since the Married Women's Property Act, 1882, the will of a married woman can, it seems, be proved as a matter of course in every case. And where a person makes a will in exercise of a general power over real estate, and dies after 1897, it seems that it must be proved (*n*).

(*g*) *Re Kirwan's Trusts*, 25 Ch. D. 373.

(*h*) *Re Walker*, [1908] 1 Ch. 560.

(*i*) L. R. 11 Eq. 371; *Sneed* v. *Sneed*, Amb. 64; *Cooper* v. *Martin*, L. R. 3 Ch. 47.

(*j*) See *Re Barnett*, [1908] 1 Ch. 402, *ante*, p. 769. As to the case of *Kennard* v. *Kennard*, L. R. 8 Ch. 227, see *Re Kirwan's Trusts*, 25 Ch. D. 373.

(*k*) See the remarks in the 4th edition of this work (p. 29 *seq.*), where the following cases are cited : *Draper* v. *Hitch*, 1 Hagg. 674; *Stevens* v. *Bagwell*, 15 Ves. 139; *Barnes* v. *Vincent*, 5 Moo. P. C. C. 201; 10 Jur. 233; 4 No. Cas. Supp. xxxi; *Tatnall* v. *Hankey*, 2 Moo. P. C. C. 342; *De Chatelain* v. *De Pontigny*, 1 Sw. & Tr. 411; 29 L. J. Prob. 147; *Paglar* v. *Tongue*, L. R. 1 P. & D. 158; *In b. Fenwick*, *ib.* 319; *In b. Munday*, 1 Curt. 590; *Douglas* v. *Cooper*, 3 My. & K. 378; *Ward* v. *Ward*, 11 Bea. 377; *D'Huart* v. *Harkness*, 34 Bea. 324; *In b. Hallyburton*, L. R. 1 P. & D. 90; *In b. Tharp*, 3 P. D. 76.

(*l*) *Ross* v. *Ewer*, 3 Atk. 160. As to probate in British colonies and possessions abroad, see *Re Tootal's Trusts*, 23 Ch. D. 532; *Re Vallance*, 24 Ch. D. 177; Colonial Probates Act, 1892.

(*m*) *In b. Tomlinson*, 6 P. D. 209; *In b. Hornbuckle*, 15 P. D. 149.

(*n*) Land Transfer Act, 1897, now repealed by the Administration of Estates Act, 1925.

Effect of probate.

(2) Grant of probate (*o*) is conclusive as to the testamentary character of the document proved. It only remains for the Court of Construction to determine whether the necessary formalities have been complied with (*p*), and whether in other respects the power has been duly exercised (*q*).

English domicil.

(3) In the case of a will executed in accordance with English law, by a person domiciled in England, the probate is sufficient evidence of the due execution of the power, so far as formalities are concerned (*r*).

Lord Kingsdown's Act.

(4) A will admitted to probate under Lord Kingsdown's Act may be a good exercise of a testamentary power of appointment, although not executed in accordance with section 10 of the Wills Act (*s*).

Will in English form by testator domiciled abroad.

(5) A testamentary document exercising a power of appointment executed in accordance with the requirements of English law by a person domiciled abroad, is recognised by the English Courts as a testamentary instrument, although not valid as a will according to the law of the appointor's domicil. The modern practice is not to grant probate, but letters of administration with the will annexed. If the appointor is a married woman, the grant is limited to the appointed property, unless the husband consents to a general grant being made (*t*).

Will in foreign form.

(6) Where a power is exercisable by will, and the donee is domiciled abroad, a will executed by him in accordance with the law of his domicil and recognised as a valid will by the Court of Probate in England, although not executed in accordance with the formalities required by English law, operates as an exercise of the power if an intention to exercise it appears by the will, and if no special formalities are prescribed by the instrument creating the power (*u*).

Defective execution.

(7) In such a case as that last supposed, if special formalities are prescribed by the instrument creating the power, and they

(*o*) *Re Wernher*, [1918] 1 Ch. 339; [1918] 2 Ch. 82. This includes a grant of administration with the will annexed : see *Re Price*, [1900] 1 Ch. 442.

(*p*) *Douglas* v. *Cooper*, 3 Myl. & K. 378; *D'Huart* v. *Harkness*, 34 Bea. 324.

(*q*) *Paglar* v. *Tongue*, L. R. 1 P. & D. 158.

(*r*) See *Ward* v. *Ward*, 11 Bea. 377, a case under the old law.

(*s*) *Re Leach*, [1918] 2 Ch. 391; *Re Simpson*, [1916] 1 Ch. 502; *Re Wilkinson's Settlement*, [1917] 1 Ch. 620; *Re Strong*, 69 Sol. J. 693, not following *Re Kirwan's Trusts*, 25 Ch. D. 373, and *Hummel* v. *Hummel*, [1898] 1 Ch. 642. See *per* Lord Cranworth, C., in *Dolphin* v. *Robins*, 7 H. L. C., at p. 419.

(*t*) *In b. Alexander*, 29 L. J. P. 93; *In b. Hallyburton*, L. R. 1 P. & D. 90; *In b. Huber*, [1896] P. 209; *In b. Tréfond*, [1899] P. 247; *In b. Vannini*, [1901] P. 330; *Re Baker's Settlement Trusts*, [1908] W. N. 161; *Murphy* v. *Deichler*, [1909] A. C. 446.

(*u*) *D'Huart* v. *Harkness*, 34 Bea. 324; *Re Harman*, [1894] 3 Ch. 607; *Re Price*, [1900] 1 Ch. 442; *Re Walker*, [1908] 1 Ch. 560.

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are not observed by the testator, the defective execution may be aided by the Court in accordance with its general principles (*v*).

Testamentary capacity.

(8) In a case falling within (5) or (6), the appointment takes effect according to English law, and not according to the law of the appointor's domicil. From this follow two corollaries: first, the appointor may, by exercising the power, dispose of the property in a way not permitted by the law of his domicil, but this does not give the appointor a greater power of disposition than he or she would have over property to which he or she was absolutely entitled (*w*); and secondly, a general devise or bequest contained in the will operates as an exercise of a general power under section 27 of the Wills Act (*x*).

Where special formalities must be observed.

(9) In a case where the provisions of the Wills Act do not apply, if special formalities are required by the instrument creating the power, and the donee is domiciled abroad, it is not sufficient that the instrument purporting to exercise the power should be a will according to the law of the domicil; it must also comply with the terms of the power (*y*).

Land.

(10) According to *Murray* v. *Champernowne* (*z*), a will made in exercise of a power to appoint land must be executed in accordance with the formalities required by the *lex loci*, and a will so executed is a valid appointment, although the will itself is invalid by the law of the testator's domicil. In the same case, it was held that where a person has a power of appointing the proceeds of sale of land subject to a trust for sale, but not sold, the power is to be treated as a power to appoint immoveable property within this doctrine (*a*).

Trust for sale.

Express or implied.

V.—General Powers.—(1) *Execution by Specific Disposition.*—An intention to execute a general power may be express or implied.

(*v*) *Re Walker*, [1908] 1 Ch. 560.

(*w*) *Re Pryce*, [1911] 2 Ch. 286, distinguishing *Pouey* v. *Hordern*, [1900] 1 Ch. 492, *Re Mégret*, [1901] 1 Ch. 547, and *Re Bald*, 76 L. T. 462.

(*x*) *Re Price*, [1900] 1 Ch. 442; *Re Lewal*, [1918] 2 Ch. 391, and the other cases referred to in note (*s*). The earlier cases *Re D'Este's Settlement Trusts*, [1903] 1 Ch. 898; *Re Scholefield*, [1905] 2 Ch. 408; [1907] 1 Ch. 664; *Re Baker's Settlement Trusts*, [1908] W. N. 161, seem to be overruled.

(*y*) *Barretto* v. *Young*, [1900] 2 Ch. 339.

(*z*) [1901] 2 Ir. R. 232. Compare *Bank of Africa* v. *Cohen*, [1909] 2 Ch. 129.

(*a*) The question is a difficult one, but it is submitted that the decision is correct, for the reason that in cases of conflict of laws the true nature of the property should be regarded. Otherwise English leaseholds would be subject to the law of the domicil. The distinction is not between real and personal property, but between moveable and immoveable property. It is observable that Andrew, J., relied to some extent on a note in the first edition of Dicey's Conflict of Laws: in the second edition this note does not appear and there are other alterations tending to show that the learned author thinks the point more doubtful than he at first supposed.

Power destroyed and replaced by new one.

In *Thompson* v. *Simpson* (*b*), A had a general power of appointment by deed or will: she made a will expressly exercising the power; she subsequently executed a deed in exercise of the power, by which she reserved to herself a general power of appointment by will; it was held that the will was not an exercise of the power, and that the fund went as in default of appointment.

Misdescription of property.

The fact that a testator misdescribes property which he purports to appoint, does not necessarily prevent the appointment from taking effect. Thus, if he has a power of appointment over the proceeds of sale of Blackacre, and by his will appoints Blackacre itself to X, this will *prima facie* operate as a good appointment of the proceeds of sale (*c*). And if a person has a power of appointing a limited interest in a certain property, and by his will appoints that property by name to X, this may operate as an exercise of his power, unless he has some other interest in the property which will satisfy the terms of the appointment (*d*).

Implied exercise of power.

In the absence of an express exercise, as to which no question usually arises (*e*), an intention to exercise a power may be inferred from a reference to the power itself in a preceding part of the will (*f*). Thus in *Walker* v. *Laxton* (*g*), a testatrix who had a power of appointment over a sum of £2,200 made a will in which she recited the power and proceeded to "give and bequeath" to various persons, not objects of the power, legacies amounting in all to £2,200: it was held, notwithstanding the absence of any words connecting the legacies with the power, that the gifts were intended to be appointments, and therefore could not take effect as legacies.

Again, an intention to exercise a general power of appointment may be inferred from a reference to the specific property subject to the power (*h*). Thus, where a testatrix who had

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(*b*) 50 L. J. Ch. 461.

(*c*) *Per* Cairns, L.J., in *Cooper* v. *Martin*, L. R. 3 Ch. 47. See this and other cases cited, *post*, p. 814.

(*d*) See *Farmer* v. *Bradford*, 3 Russ. 354.

(*e*) See *Davies* v. *Fisher*, 5 Bea. 201. As to the requirement that the appointment shall refer to the power, see the cases of *Re Waterhouse*, 98 L. T. 30, and *Re Lane*, [1908] 2 Ch. 581.

(*f*) As to the principles which ought to guide the Court in inferring an intention of this nature, see *Denn* v. *Roake*, 5 Barn. & C. 720; *Bennett* v. *Aburrow*, 8 Ves. 609; *Cunninghame* v. *Anstruther*, L. R. 2 Sc. & D. 223.

(*g*) 1 Y. & J. 557.

(*h*) See *Scrope's Case*, 10 Rep. 143b. *Lownds* v. *Lownds*, 1 Y. & J. 445, seems to have been decided on this ground (see *Davies* v. *Thorns*, 3 De G. & S. 347), for at that time it was not settled that parol evidence of the state of the testator's property was admissible.

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a power of appointment over certain personal property, including a sum of stock, made a will bequeathing pecuniary legacies, followed by a bequest of "all the rest and residue of my bank stock, goods, etc., and all other property, etc., excepting £50 of my bank stock," this was held to denote an intention to include in the general bequest the residue of the stock which was subject to the power, and to charge it with the legacies (*i*). Here, the expression, "my bank stock," joined with the other terms in the will, was *prima facie* evidence that the testator was pointing to a specific existing fund; parol evidence was therefore admissible, to show whether she had any such fund of her own to which the bequest was applicable; and this being proved in the negative, the decision was inevitable. And it may be stated as a general rule, that where the bequest is on the face of the will thus specific, and it is ascertained by parol evidence that the testator has no other such fund, the power will (other things attended to) be well executed (*k*). Beyond this, of course, parol evidence cannot be adduced to influence the construction in any of these cases (*l*).

Parol evidence.

But the mere bequest of a sum of money, corresponding in amount to that which is the subject of the power, raises no such inference, though the testator, when he made his will, was not possessed of any other property affording a fund for payment; as it is possible that he may have calculated on the future acquisition of property adequate to satisfy the legacy (*m*). For the same reason, the mention of "money in the funds" in a general bequest of personal estate, and the fact of the testator having no stock of his own at the date of the will, did not, under the old law, cause the bequest to operate as an appointment of stock over which the testator had a general power of disposition (*n*).

(*i*) *Walker* v. *Mackie*, 4 Russ. 76. It was also decided that leaseholds subject to the same power passed by the words "other property." This part of the decision was questioned by Pepys, M.R., *Hughes* v. *Turner*, 3 My. & K. 697; but see *Standen* v. *Macnab*, 6 B. P. C. Toml. 193, decreeing the personal estate to pass with the real; and see Sugd. Pow. 321, 8th edition; *Harvey* v. *Stracey*, 1 Drew. 73.

(*k*) *Innes* v. *Sayer* (*Sayer* v. *Sayer*), 7 Hare, 381; 3 Mac. & G. 606; *Horwood* v. *Griffith*, 4 D. M. & G. 708; *Tredennick* v. *Tredennick*, [1900] 1 Ir. R. 354. Compare *Rooke* v. *Rooke*, 2 Dr. & Sm. 38, and the other decisions with regard to special powers, *post*, p. 806.

(*l*) *Standen* v. *Standen*, 2 Ves. jun. 589. And as to the subject generally, see further Sugd. Pow. (8th ed.), 289; 2 Chance on Powers, 83.

(*m*) *Jones* v. *Tucker*, 2 Mer. 533; *Davies* v. *Thorns*, 3 De G. & S. 347, explaining *Forbes* v. *Ball*, 3 Mer. 437.

(*n*) *Webb* v. *Honnor*, 1 J. & W. 352. Compare *Re Huddleston*, [1894] 3 Ch. 595, and the other decisions with regard to special powers, *post*, p. 806.

Where testator has interest as well as power.

In *Farmer* v. *Bradford* (*o*), Blackacre was settled, subject to a term of 500 years, to such uses as A should appoint, and in default of appointment to him in fee; the trusts of the term were to raise £1,000, over which, in the event, A had a general power of appointment, with a trust, in default, for other persons; A by his will devised Blackacre to B: it was held that this devise took effect out of A's interest, and did not operate as an exercise of his power to appoint the £1,000, which therefore went in default of appointment. If he had had no interest in Blackacre except the £1,000, his devise of the estate might have operated as an execution of his power.

Power of revocation.

The general principle above stated applies where the power is one of revocation as well as appointment. Thus, if a man settles land in Dale, reserving a power of revocation and new appointment by will, and devises all his lands in Dale to J. S., having no other lands in Dale, this is a good exercise of the power (*p*). So if he makes a will by which he disposes of the property upon trusts which vary in some respects from those declared by the settlement, this *prima facie* operates as a revocation of the settlement *pro tanto* (*q*).

Where will would otherwise be inoperative.

Where a testator affects to deal with some property in general terms, not defining it, under such circumstances that the will cannot have effect except upon the property comprised in the power, this may show an intention to exercise the power (*r*).

Republication.

As to the effect of republication, see *post*, p. 816.

Interest.

If a testator, having a general power over a fund, expressly appoints a particular sum out of that fund to A, this is a specific gift, and A is entitled to interest on it from the death of the testator (*s*).

"Residue."

The construction of the word "residue," when a testator appoints part of a fund to A and the residue to B, is discussed later (*t*).

General reference to powers.

Independently of section 27 of the Wills Act (*u*), it is clear that if a testator disposes of "all property over which I have any power of disposition by will," this operates as an exercise of a general power of appointment by will. It also operates as an exercise of a general power conferred on the testator after the

(*o*) 3 Russ. 354.
(*p*) *Deg* v. *Deg*, 2 P. W. 412.
(*q*) *Quin* v. *Armstrong*, Ir. R. 11 Eq. 161.
(*r*) *Per* Wood, V.-C., in *Brodrick* v. *Brown*, 1 K. & J. 328; *Bennett* v. *Aburrow*, 8 Ves. 609.
(*s*) *Re Marten*, [1901] 1 Ch. 370
(*t*) Page 834. See *Re Bringloe*, 26 L. T. 58, stated *post*, p. 835, n. (*b*).
(*u*) *Post*, p. 780.

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date of the will (*x*). Such a clause is often inserted in wills as a common form, and in most cases it does no harm. But it sometimes happens that a settlor who gives a person a limited interest in property, with a gift in remainder, wishes to confer on him a power to appoint the whole or part of the property in any way he pleases, so as wholly or partially to defeat the interests of the remainder-men, but desires that the power shall not be exercised either by the operation of section 27 or by the common clause above referred to : in other words, he does not wish the interests of the remainder-men to be defeated, except by a deliberate exercise of the donee's discretion. In such cases it is usual to insert in the power words requiring that it shall only be exercised by a will "expressly referring to this power," or "expressly purporting to exercise this power," or the like, the object, of course, being to require the testator to refer to the power in such a way as to show that he had it in his mind. On this supposition a will disposing of "all property over which I have any power of disposition by will" would not comply with such a requirement. However, it has been held that it does (*y*). It would not be respectful to question the accuracy of these decisions, but they certainly defeated the intention of the donor of the power in each case.

Realty. What amounts to an appointment in wills made or republished since 1837.

(2) *Execution by a General Devise or Bequest.*—The Wills Act provides (section 27) that a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner (*z*), shall be construed

(*x*) *Re Old's Trusts*, 54 L. T. 677 ("property over which I have any disposing power"). See *Patch* v. *Shore*, 2 Dr. & S. 589.

(*y*) *Re Waterhouse*, 98 L. T. 30; *Re Rolt*, [1908] W. N. 76; *Re Lane*, [1908] 2 Ch. 581. Compare the cases on section 27 of the Wills Act, *post*, p. 781.

(*z*) "The language of the section is addressed to bequests of a general description, not to bequests of particular property," *per* Fry, J., *Re Greaves's Settlement Trusts*, 23 Ch. D. 318. Thus a bequest of "securities for money" will pass a sum of Consols over which the testator has a general power of appointment (*Turner* v. *Turner*, 21 L. J. Ch. 843), and a bequest of "all stock, shares, and securities which I possess or to which I am entitled" will pass railway and colonial stocks which the testator is not possessed of or entitled to, but over which he has a general power of appointment (*Re*

to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

What powers are general within s. 27.

A power is not the less general within the meaning of this section because it is to be executed by will only, and not by deed (*a*). But a power is not general within the meaning of this section if the instrument creating the power prescribes conditions as to the exercise of the power (not being conditions as to the mode of execution), and in such case a general devise or bequest will not, under section 27, be a good execution of the power unless the conditions are complied with (*b*). Thus, where a settlement gave to the settlor a general power of appointment over a sum of stock to be exercised by will or codicil expressly referring to the power, it was held by the Court of Appeal that a general bequest of his personal estate, not referring to the power, did not operate to pass the stock (*c*). So a power to appoint in favour of any persons except a specified person or class of persons, is not a general power within section 27 (*d*). But it seems that a power to appoint in favour of any persons except A, B, and C may become a general power by the death of A, B, and C before the power is exercised (*e*). And a power given to a woman by her marriage settlement to appoint to any "person or persons, child or children," is a general power (*f*).

Sum charged on land.

A general bequest will operate under section 27 as an exercise of a power to appoint a sum charged on land, even where the testator also has a power of appointing the land itself, which he exercises by the same will (*g*).

Jacob, [1907] 1 Ch. 445). Any words which would operate as a residuary gift (such as, "I constitute A my residuary legatee") will operate as an execution of a power under this section: *Re Spooner's Trust*, 2 Sim. (N.S.) 129; *Frankcombe* v. *Hayward*, 9 Jur. 344 ("possessed of or entitled to").

(*a*) *Hawthorn* v. *Shedden*, 3 Sm. & Gif. 293; *Lefevre* v. *Freeland*, 24 Bea. 403; *Re Powell's Trusts*, 39 L. J. Ch. 188.

(*b*) *Re Phillips*, 41 Ch. D. 417; *Re Tarrant's Trust*, 58 L. J. Ch. 780; *Re Davies*, [1892] 3 Ch. 63.

(*c*) *Phillips* v. *Cayley*, 43 Ch. D. 222, overruling *Re Marsh*, 38 Ch. D. 630. But a requirement that the will shall "expressly purport" to exercise the power is sufficiently complied with if the testator bequeaths property over which he has "any disposing power": *Re Waterhouse*, 98 L. T. 30. So if the donor requires that the will shall "expressly refer to this power": *Re Lane*, [1908] 2 Ch. 581, following *Re Rolt*, [1908] W. N. 76. See *ante*, p. 780.

(*d*) *Re Byron's Settlement*, [1891] 3 Ch. 474; *ante*, p. 763, where the question whether powers can be accurately divided into "general" and "special" is referred to.

(*e*) *Ib.* The question whether a power was general or restricted also arose in *Bristow* v. *Skirrow*, 27 Bea. 585, stated *ante*, p. 768.

(*f*) *Cofield* v. *Pollard*, 3 Jur. (N.S.) 1203.

(*g*) *Clifford* v. *Clifford*, 9 Ha. 675. See *Farmer* v. *Bradford*, 3 Russ. 354, *ante*, p. 779.

Power to direct sum to be raised.

If a testator has power by will to charge certain real estate with a maximum sum of money (say £10,000) for such purposes or for the benefit of such persons as he may direct, this power is not exercised by a will containing merely a general or residuary bequest. Such a power is really a double power, namely, a power to create a sum not exceeding £10,000 and a power to appoint it; it "requires a distinct intention and a distinct act to bring the subject into existence before the general power of appointment can operate upon it" (*h*), and this intention is not implied by section 27 (*k*).

In *Re Jones* (*l*), a testator gave his residuary real and personal estate upon trust for conversion, and directed the proceeds to be held upon certain trusts for the benefit of his widow and issue; and he empowered his widow by will to appoint that any sum not exceeding £20,000 should be raised and paid or applied for the benefit of such persons as she should think fit: it was held by Kay, J., that this power was exercised by a general bequest contained in the widow's will. In *Re Salvin* (*m*), Buckley, J., distinguished *Re Jones* from the case before him on the ground that the effect of the trust for conversion in *Re Jones* was to create a fund of personal estate, and that the power was simply a power of appointment over part of the fund.

Power of revocation.

A general devise or bequest will not, under section 27, operate as an exercise of a power of revocation and new appointment (*n*), although a general devise or bequest may, it seems, have that operation on the ground of implied intention; for example, in a case where the gift would otherwise be wholly inoperative (*o*). The general rule applies to the case where the power of revocation is contained in the instrument originally creating it, as well as to the case where the power is reserved by an appointment made in exercise of the original power (*p*).

The doctrine in question only applies to powers which are strictly powers of revocation (*q*).

Power to charge money on land.

In *Re Wallinger's Estate* (*r*), a person had power to create a mortgage or charge on certain lands as security for any sum not

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(*h*) *Per* Fitzgibbon, L.J., in *Re Wallinger's Estate*, [1898] 1 Ir. R., at p. 150.

(*k*) *Re Salvin*, [1906] 2 Ch. 459.

(*l*) 34 Ch. D. 65; followed in *Re Wilkinson*, [1910] 2 Ch. 216, distinguishing *Re Salvin*.

(*m*) *Supra*.

(*n*) *Palmer* v. *Newell*, 20 Bea. 32; *Charles* v. *Burke*, 43 Ch. D. 223, n.; *Re Brace*, [1891] 2 Ch. 671; following the principle laid down in *Pomfret* v *Perring*, 5 D. M. & G. 775, *post*, p. 804.

(*o*) *Ib.*

(*p*) *Re Goulding's Settlement*, 48 W. R. 183.

(*q*) *Re Jones*, 34 Ch. D. 65, stated *supra*.

(*r*) [1898] 1 Ir. R. 139.

exceeding £2,000, for such purposes as he should appoint: it was held that this power was not exercised by a residuary gift.

Conversion.

Where a testator has a power of appointment over lands which have been sold, and the proceeds are liable to be applied in the purchase of other lands, the question whether the power is exercised by a residuary bequest of personalty seems to depend on two questions. One is, whether any person other than the testator has a right to require the money to be re-invested in land, for if so, the residuary bequest will not operate as an appointment under section 27 (*s*). But if no one other than the testator has that right, the further question arises whether he has shown an intention of treating the money as personalty; if he has, the money will pass under the bequest (*t*); if he has not, it will only pass as land—*e.g.*, under a residuary devise (*y*).

Conversely, a devise of all lands which the testator has power to dispose of, or (what is now the same thing) a residuary devise, will not pass moneys to arise from the sale of lands (*z*).

As to the effect of conversion in adeeming appointments of specific property, see *post*, p. 814.

Particular residue is not within s. 27.

Although it is now settled that a devise may be residuary under section 25 of the Wills Act, notwithstanding that it is limited to a particular description of real estate (*a*), it is clear that a particular residue is not within either section 25 (*b*) or section 27. Thus, where by marriage settlement a testatrix had power to appoint estates A and B, and she made her will reciting the power and giving A to one person, and "all other the hereditaments comprised in the settlement not hereinbefore disposed of" to another; she then by codicil revoked the appointment of estate A and appointed it on charitable trusts, which were void: it was held that estate A did not pass by the appointment of "all other hereditaments," etc., for that this was not a general or residuary gift, but clearly specific (*c*). And a gift by a married woman of the "residue

(*s*) *Gillies* v. *Longlands*, 4 De G. & S. 372; *Re Greaves's Settlement*, 23 Ch. D. 313.

(*t*) *Gale* v. *Gale*, 21 Bea. 349; *Blake* v. *Blake*, 15 Ch. D. 481. In *Chandler* v. *Pocock*, 15 Ch. D. 491; 16 Ch. D. 648, the testatrix obtained a transfer of the proceeds of sale from the trustees to herself: *Re Harman*, [1894] 3 Ch. 607.

(*y*) *Re Duke of Cleveland's S. E.*, [1893] 3 Ch. 244. In that case the further question arose whether the money was to be treated as land in Staffordshire, from the sale of which it arose: the C. A. held that as it might be invested in land situate anywhere in England, it did not pass under a devise of land in Staffordshire. See *Basset* v. *St. Levan*, 43 W. R. 165.

(*z*) *Adams* v. *Austen*, 3 Russ. 461.

(*a*) *Mason* v. *Ogden*, [1903] A. C. 1, *post*, p. 927.

(*b*) See *Springett* v. *Jenings*, L. R. 6 Ch. 333, *post*, p. 927.

(*c*) *Re Brown's Trusts*, 1 K. & J. 522.

of her separate property" was held not to include a lapsed share of a fund over which she had a general power (*d*).

1 Vict. c. 26, s. 27, applies to wills of married women.

The applicability of this section to the construction of the wills of married women has been disputed, but without success. Their testamentary capacity is not enlarged by the statute, but their wills, when made, have the benefit of the more liberal rules of interpretation laid down by it (*e*).

Pecuniary legacies are appointments within s. 27,

and directions to pay debts.

General pecuniary legacies are "bequests of personal property described in a general manner," and operate under this section as appointments, so far as the subject of the power is required in aid of the testator's own estate for payment of the legacies (*f*). To the same extent a direction to pay the testator's debts will operate as an appointment (*g*). And although in the cases where these points were decided executors had also been appointed, that circumstance does not appear to be essential (*h*). "It seems not unreasonable to hold that a testator having a general power, and directing a certain application of his property, must be taken in all cases to exercise the power to the extent to which the direction is effectual" (*i*). Thus where the donee of a general power of appointment appoints executors and gives general pecuniary legacies, but makes no residuary bequest and the donee's own estate is insufficient to pay the debts and legacies, this will operate to exercise the power to the extent of the amount required to enable both the debts and the legacies to be paid (*j*). But "it has not yet been decided that an appointment of an executor without more would make the fund assets. And so to hold would appear to give a very unnatural construction to the section" (*k*).

Operation of s. 27.

Where a power of appointment is exercised by a general bequest by virtue of section 27, the property appointed is included in and passes by the bequest according to the terms of the will, and not as if a separate execution of the power were read into the will; the will operates, in fact, as if the testator

(*d*) *Wilkinson* v. *Schneider*, L. R. 9 Eq. 423, 429. See *Freme* v. *Clement*, 18 Ch. D. 511, 512.

(*e*) *Bernard* v. *Minshull*, Johns. 276; *Thomas* v. *Jones*, 2 J. & H. 475; 1 D. J. & S. 63; *Noble* v. *Willock*, L. R. 8 Ch. 778; 7 H. L. 580; *Re Ludlam*, 63 L. T. 330.

(*f*) *Hawthorn* v. *Shedden*, 3 Sm. & Gif. 293; *Wilday* v. *Barnett*, L. R. 6 Eq. 193; *Re Wilkinson*, L. R. 8 Eq. 487; 4 Ch. 587; notwithstanding *Hurlstone* v. *Ashton*, 11 Jur. (N.S.) 725. See *Re Ludlam*, 63 L. T. 330, where a married woman, who had a general power of appointment over a reversionary fund, but no separate estate, bequeathed to A a legacy of £400: it was held that it was not payable until the fund fell into possession.

(*g*) *Att.-Gen.* v. *Brackenbury*, 1 H. & C. 782; *Laing* v. *Cowan*, 24 Bea. 112.

(*h*) *Per* Wickens, V.-C., *Re Davies' Trusts*, L. R. 13 Eq. 166.

(*i*) *Ib.*

(*j*) *Re Seabrook*, [1911] 1 Ch. 151.

(*k*) *Ib.* Stuart, V.-C., thought otherwise, 3 Sm. & Gif. 304.

had added to the bequest: "in thus disposing of my personal estate I include any personal estate over which I have a general power of appointment." If, therefore, the testator charges his debts and legacies on his real estate, in aid of his personal estate, and his own personal estate is insufficient for payment of his debts and legacies, the fund over which he has a power of appointment is deemed to form part of his personal estate, and the residuary legatees (to whom the fund goes under section 27) are not entitled to throw the debts and legacies on the real estate in exoneration of the fund (*l*). But this result of section 27 does not follow if the testator has no property of his own; in such a case the dispositions of his will are read as being express exercises of the power of appointment (*m*).

Powers created after date of will.

By the combined operation of sections 24 and 27 of the Wills Act, where a will contains a general devise or bequest, a general power of appointment created after the date of the will, but in the testator's lifetime, will, unless a contrary intention appears, be executed by the will, if the will would have operated to execute the power had it been in existence at the date of the will (*n*).

Where donee predeceases donor.

It is hardly necessary to say that if A by will gives B a general power of appointment over property, and B predeceases A, having made a will containing a residuary gift, this does not operate as an exercise of the power (*o*). The power lapses.

How a contrary intention may appear.

The effect of section 27 is to reverse the old rule, and to throw on those who deny that a general devise or bequest executes a general power the burden of proving by what appears on the face of the will the testator's intention that it shall not do so (*p*). This intention must, it seems, be clearly expressed.

(*l*) *Re Hartley*, [1900] 1 Ch. 152, see *post*, p. 1977.

(*m*) *Re Ludlam*, 63 L. T. 330.

(*n*) Sugd. R. P. Stat. 379; and see *Carte* v. *Carte*, 3 Atk. 174; *Stillman* v. *Weedon*, 16 Sim. 26; *Cofield* v. *Pollard*, 3 Jur. (N.S.) 1203; *Patch* v. *Shore*, 2 Dr. & Sm. 589; *Hodsdon* v. *Dancer*, 16 W. R. 1101; *Lake* v. *Currie*, 2 D. M. & G. 536; *Thomas* v. *Jones*, 2 J. & H. 475; 1 D. J. & S. 63; *Meredyth* v. *Meredyth*, Ir. R. 5 Eq. 565; *Boyes* v. *Cook*, 14 Ch. D. 53; *Re Hernando*, 27 Ch. D. 284; *Airey* v. *Bower*, 12 A. C. 263. The power in *Stillman* v. *Weedon* seems to have been a special power, and the actual decision was, therefore, erroneous: see *Re Hayes*, [1900] 2 Ch. 332. As to *Re Old's Trusts*, 54 L. T. 677, see Farwell (3rd ed.), p. 253. The better opinion is that section 24 does not apply to any powers of appointment except those coming within section 27; see *per* Stirling, J., in *Re Wells' Trusts*, 42 Ch. D. 656, and *post*, p. 813.

(*o*) *Jones* v. *Southall*, 32 Bea. 31; *post*, p. 814; *Re Young*, [1920] 2 Ch. 427; *Sharpe* v. *McCall*, [1903] 1 Ir. R. 179. See *Holyland* v. *Lewin*, 26 Ch. D. 266.

(*p*) *Walker* v. *Banks*, 1 Jur. (N.S.) 606; *Harrington* v. *Harrington*, 13 Sim. 318. But a specific exercise of a power existing at the date of the will is not converted by section 24 into an exercise of a new power substituted for the old power after the date of the will: *Thompson* v. *Simpson*,

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Even if the testator gives his residue to A for life with remainders over, this will operate as an exercise of a power which is only given to the testator in the event of his surviving A (*q*).

The fact that an appointment has been actually made will not show an intention to exclude the appointed property from a general residuary gift, where the appointment fails by lapse (*r*), or through uncertainty (*s*), or otherwise (*t*), or is revoked (*u*): And where the property was over-ridden by a power to sell and re-invest to the same uses, and, after the execution of the will, the property was sold accordingly: it was held that the express appointment was adeemed, but that the substituted property passed by the residuary devise in the will (*v*). The effect of the residuary gift upon the void or imperfect particular appointment is analogous to its effect upon a void or imperfect particular bequest; and the suggestion of a learned Judge (*x*), that the gift of a partial interest (as a life estate) in the subject of a power is so inconsistent with an appointment of the entire interest to the same person as to show an intention to exclude it from a residuary request to that person, would probably not be followed, although founded on common sense (*y*).

Re Stokes.

The dictum of Wood, V.-C., in *Scriven* v. *Sandom*, was considered in *Re Stokes* (*z*), where the testatrix had a general power of appointment in default of issue over the capital and income of a trust fund and also a special power to appoint the income to her husband for life. By her will she exercised the special power, and then devised and bequeathed all her estate and effects to trustees upon trust to pay the income to her husband for life. It was held that the general power was well exercised.

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50 L. J. Ch. 461. The decision seems to be questioned in Farwell on Powers (3rd ed.), p. 254, but it is submitted that it is correct; the will contained no residuary gift.

(*q*) *Thomas* v. *Jones*, 2 J. & H. 475; 1 D. J. & S. 63.

(*r*) *Re Spooner's Trust*, 2 Sim. (N.S.) 129; *Bush* v. *Cowan*, 32 Bea. 228 (personalty). See as to realty, *Freme* v. *Clement*, 18 Ch. D. 499, 512. The reasoning of Jessel, M.R., on this point does not appear to be affected by the decision of the C. A. in *Holyland* v. *Lewin*, 26 Ch. D. 266.

(*s*) *Bernard* v. *Minshull*, Johns. 276. See also *Hickson* v. *Wolfe*, 9 Ir. Ch. Rep. 144.

(*t*) In *Re Elen*, 68 L. T. 816, the appointment was contingent, and failed.

(*u*) *Re Jarrett*, [1919] 1 Ch. 366,

(*v*) *Gale* v. *Gale*, 21 Bea. 349; *Re Dowsett*, [1901] 1 Ch. 398, *post*.

(*x*) Wood, V.-C., *Scriven* v. *Sandom*, 2 J. & H. 745. See *Hopewell* v. *Ackland*; *Scott* v. *Alberry*; *Roe* v. *Gilbert*; *Day* v. *Daveron* (all stated in next chapter), where remainders in fee were held to pass by general residuary devises to the same persons to whom life estates in the same property were specifically devised in a former part of the will.

(*y*) See *Bush* v. *Cowan*, 32 Bea. 228, where the testator gave his residuary legatee the arrears of income of the settled fund.

(*z*) [1922] 2 Ch. 406.

Re Andrews.

In *Re Andrews* (*a*) the testatrix devised all the residue of her estate to X, and recited one power which in the events which happened did not arise and purported to exercise it, but did not recite or purport to exercise another power which in the events which happened did arise. Held that there was no contrary intention within the meaning of section 27, and that the latter power was well exercised.

Moss v. *Harter.*

Effect where appointment would defeat testator's own settlement.

In *Moss* v. *Harter* (*b*), by a voluntary settlement personalty was settled as the settlor should appoint generally, and in default on himself for life, and after on several named persons. The settlor then under his power executed a deed appointing part of the fund; and afterwards made a will by which he bequeathed his residue "not otherwise effectually disposed of." It was held by Stuart, V.-C., that this bequest did not include the unappointed portion of the settled fund, on the ground that the whole fund was in fact "effectually disposed of" by the partial appointment, and, so far as that did not extend, by the limitation in default contained in the settlement. It was argued strongly against this construction that the words "not otherwise effectually disposed of" must be read "not otherwise by the will effectually disposed of," but the V.-C. thought that this would be to violate the express language of the will. He added that it was probably the intention of the Legislature that section 27 should apply only to cases like *Cox* v. *Chamberlain* (*c*), where the power was in such ample terms as to amount to absolute property. The terms of this section, however, are certainly of more extensive import.

Remarks on *Moss* v. *Harter.*

With reference to this decision, Lord St. Leonards says (*d*), "The case is not without difficulty; but where the property is, as in this case, settled by the testator himself upon others, in default of any appointment by him under his power, it would seem to require some indication of an intention by him to defeat his settlement in order to hold a general gift in his will, which can be satisfied by other property, to be an execution of his power." But this observation was disapproved of by the Court of Appeal in *Re Clark's Estate* (*e*), where it was held that the will would execute the power, whether the property was settled by the testator himself or by another person. In that case Cotton, L.J., said: "With respect to the extract that has been read from Lord St. Leonards' Treatise on Powers, I do not

(*a*) 66 Sol. J. 284.
(*b*) 2 Sm. & Gif. 458.
(*c*) 4 Ves. 631. See *Re Griffith's Settlement*, [1911] 1 Ch. 246, stated *post*, p. 804.
(*d*) Sug. Pow. p. 305 (8th ed.).
(*e*) 14 Ch. D. 422.

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quite understand whether it is a statement of his own opinion, or merely a comment on the effect of *Moss* v. *Harter*. But if it is to be taken as an expression of his opinion that, in the case of a power of appointment in a settlement created by the testator himself, an indication of his intention to defeat his settlement must be shown, that appears to me to contradict the words of the statute, and I should hesitate to act, even upon Lord St. Leonards' authority, against the expressed intention of the Legislature." And James, L.J., expressed himself to the like effect. And in *Boyes* v. *Cook* (*f*), it was held by the Court of Appeal that a power was duly exercised by will, though the settlement creating the power was made after the will, for that only the will could be looked at to show a contrary intention.

Boyes v. *Cook*.

Airey v. *Bower*.

This decision was approved by the House of Lords in *Airey* v. *Bower* (*g*). There a testatrix who had a general power of appointment by deed or will over the A property, by her will in 1854 devised and bequeathed the residue of her estate to X. By deed poll in 1855 she appointed the A property upon such trusts as she by deed or by her last will should "from time to time or at any time thereafter appoint," and in default of appointment upon trust for Y. She died in 1857. It was held that the will operated as an exercise of the power reserved by the deed poll of 1855, and that the property went to X.

Confirmation of settlement.

Where a testator has a general power of appointment under a settlement, followed by a limitation over in default of appointment, a residuary devise or bequest contained in his will operates as an exercise of the power, even if the will contains an express confirmation of the settlement; the confirmation is considered to apply to those parts of the settlement which the testator has no power to disturb (*h*).

Whether an express confirmation of the settlement would show a "contrary intention" within section 27 in a case where the testator's power covered the whole subject matter of the settlement, as in *Moss* v. *Harter* (*supra*), seems doubtful.

In *Re Doherty-Waterhouse* (*i*) the testatrix bequeathed all her stock in a certain undertaking to A, and bequeathed all

(*f*) 14 Ch. D. 53, disapproving *Re Ruding's Settlement*, L. R. 14 Eq. 266. See also *Re Hernando*, 27 Ch. D. 284; *Re Marsh*, 38 Ch. D. 630.

(*g*) 12 A. C. 263.

(*h*) *Lake* v. *Currie*, 2 D. M. & G. 536; *Hutchins* v. *Osborne*, 4 K. & J. 252; 3 De G. & J. 142; and see *Atherton* v. *Langford*, 25 Bea. 5, where an expressed intention that lands over which the testator had a power should not be included in his will, but should go according to the settlement, was held not to prevent a share in the lands vested in the testator in default of the exercise by him of the power from passing under the residuary gift in his will. In *Re Bringloe*, 26 L. T. 58 (stated *post*, p. 835, n. (*b*)), the point did not arise, as the case turned on the meaning of "residue" in an express appointment.

(*i*) [1918] 2 Ch. 269.

her real estate and the residue of her personal estate, including any property over which she might have an absolute power of appointment, to trustees upon trusts. She was absolute owner of some of the stock and had a general testamentary power of appointment over £550 of the same stock. Held that there was no contrary intention and that the £550 stock was appointed to A.

In *Pettinger* v. *Ambler* (*k*), a testator made a will containing a residuary devise; then he made a voluntary settlement of certain lands, under which he had a general power of appointment by his "last will"; then he made another will purporting to be his "last will," by which, in pursuance of the power, he charged the lands with an annuity: it was held by Romilly, M.R., that the residuary devise in the first will did not operate as an execution of the power. So far as the decision turned on the question of what was the testator's "last will," the M.R.'s reasoning seems somewhat artificial.

Sect. 27 often defeats testator's intention.

Where a testator makes a will containing a residuary gift, and afterwards settles part of his property, subject to an overriding general power of appointment reserved to himself, it is obvious that the statutory rule above stated probably defeats his intention (*l*).

Uses declared by reference.

A residuary devise operates as an execution of a general power of appointing land, although it has been conveyed to uses similar to those of an existing settlement, and the testatrix has excepted the lands comprised in that settlement from the residuary devise (*m*).

How a contrary intention may be shown.

But a "contrary intention" within the meaning of section 27 may appear by implication. In *Thompson* v. *Simpson* (*n*), where there were two settlements, one made before, and the other after, the will, it was held that a reference in the will to the power created by the first settlement showed that the testatrix did not mean the will to operate as an execution of the power contained in the second settlement.

Liability to debts.

(3) *How far Exercise of General Power makes Property part of Testator's Estate.*—Where a general power is effectually exercised by will, the property, whether real or personal, becomes

(*k*) L. R. 1 Eq. 510.

(*l*) See *Re Ruding's Settlement*, L. R. 14 Eq. 266 (overruled by *Boyes* v. *Cook*, 14 Ch. D. 53), and *Airey* v. *Bower*, 12 A. C. 263.

(*m*) *Hughes* v. *Jones*, 11 W. R. 898.

(*n*) 50 L. J. Ch. 461.

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liable for the testator's debts (*o*), so far as his own property is insufficient to satisfy them (*p*). This liability is created by law, and the donee of the power cannot give any individual creditor a charge on the property, or priority over the other creditors, by making an appointment with that object, even if he has entered into a covenant to do so (*q*).

Foreign property.

The general rule above stated does not apply to property abroad, for the administration of such property is governed by the law of its locality. Consequently, if an Englishman exercises a general power of appointment over a trust fund subject to foreign law, he does not thereby make it assets for the payment of his debts (*r*).

Where a testator with a general power of appointment gives legacies and appoints an executor, he must be taken as exercising his general power to the extent to which the fund subject to it is required to make the legacies effective, and even where a testator having such a power makes a will directing the payment of his debts without more and appointing an executor, the appointed fund is liable for the payment of his debts if his own estate is insufficient (*s*). But it seems that the mere appointment of an executor will not have that effect (*t*).

If a person who has exercised a testamentary power is a bankrupt at the time of his death, the appointed property does not pass to the trustee in bankruptcy, but to the testator's executors, and is only liable to the payment of debts incurred by the testator since the bankruptcy (*u*) unless the terms of the will provide for the payment of debts provable in bankruptcy (*x*).

Married woman.

Before the Married Women's Property Act, 1882, the question whether an appointment by a married woman made the property liable for her general engagements was a matter of doubt. Fine distinctions were drawn, or attempted to be drawn, depending on whether the married woman had a power

(*o*) *Holmes* v. *Coghill*, 12 Ves. 206; *Fleming* v. *Buchanan*, 3 D. M. & G. 976; *Williams* v. *Lomas*, 16 Bea. 1; *Re Hartley*, 69 L. J. Ch. 79. See *Re Newnham's Estate*, [1881] W. N. 69, where it was held that the creditors had no claim against the trustees for a breach of trust. As to the rule where the testator becomes bankrupt, see *Jenney* v. *Andrews*, 6 Madd. 264; *Re Guedalla*, [1905] 2 Ch. 331.

(*p*) See *post*, p. 1976.

(*q*) *Re Lawley*, [1902] 2 Ch. 799; affirmed on appeal *sub nom. Beyfus* v. *Lawley*, [1903] A. C. 411.

(*r*) *Re Bald*, 66 L. J. Ch. 524.

(*s*) *Per* Wickens, V.-C., in *Re Davies' Trusts*, L. R. 13 Eq. 163, 166; quoted and approved by Warrington, J., in *Re Seabrook*, [1911] 1 Ch. 151; cited *ante*, p. 784.

(*t*) *Re Thurston*, 32 Ch. D. 508.

(*u*) *Jenney* v. *Andrews*, 6 Madd. 264; *Re Guedalla*, [1905] 2 Ch. 331.

(*x*) *Re Imray*, 50 Sol. J. 59.

of appointment by deed or will, or by will only, whether she had a separate life estate, and whether the property was limited to her or her representatives in default of appointment (*y*).

What were "debts."

The "general engagements" of a married woman under the old law were not "debts" in the proper sense of the word. However, in a case (*z*) where a married woman who had a general testamentary power of appointment over an estate, by her will directed her executors to pay her just debts, and appointed the estate in express exercise of the power, it was held by Stirling, J., that certain sums owing by her at her death were a charge upon the appointed property, apparently on the ground that in the administration action these sums had been found by the chief clerk's certificate to be debts of the testatrix.

Married W. P. Act, 1882.

The Married Women's Property Act, 1882, enacts (section 4) that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

As to contracts made during coverture, the section only applies to those made after 1882 (*a*), but it applies to contracts made by the testatrix while a feme sole, whether before 1883 or not (*b*).

"Debts and other liabilities" means engagements entered into by a married woman during coverture, for which her separate estate (if she had any) would be liable. Unless contracted since December 5, 1893 (*c*), it is necessary that she should have had separate estate at the time she contracted them (*d*).

An appointment is operative under this section, although it eventually fails to take effect in favour of the appointee by reason of events happening after the testatrix's death (*e*).

Personalty appointed under general power vests in personal representative of appointor.

Where a testator exercises a general power of appointment over personal estate, his executor, or his administrator with the will annexed, is the proper person to administer and give a

(*y*) *Vaughan* v. *Vanderstegen*, 2 Drew. 165, 363; *Hobday* v. *Peters*, 28 Bea. 354; *Blatchford* v. *Woolley*, 2 Dr. & Sm. 204; *Johnson* v. *Gallagher*, 3 D. F. & J. 494; *Shattock* v. *Shattock*, L. R. 2 Eq. 182; *London Chartered Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572; *Re Harvey's Estate*, 13 Ch. D. 216; *Hodges* v. *Hodges*, 20 Ch. D. 749; *Mayd* v. *Field*, 3 Ch. D. 587; *Pike* v. *Fitzgibbon*, 17 Ch. D. 454 (at p. 466). See the result of the balance of the authorities stated in Farwell on Powers (3rd ed.), p. 289, *seq.*

(*z*) *Re De Burgh Lawson*, 41 Ch. D. 568.

(*a*) *Re Roper*, 39 Ch. D. 482.

(*b*) *Re Parkin*, [1892] 3 Ch. 510. See *Re Hughes*, [1898] 1 Ch. 529.

(*c*) The date of the passing of the Married W. P. Act, 1893.

(*d*) *Re Fieldwick*, [1909] 1 Ch. 1, overruling *Re Ann*, [1894] 1 Ch. 549. See *Re Hughes*, [1898] 1 Ch. 529.

(*e*) *Re Hodgson*, [1899] 1 Ch. 666.

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discharge for the appointed fund (*f*), and the same result follows even if the testator appoints the fund to special trustees and directs them to distribute it (*g*). The rule applies to married women dying before the Married Women's Property Act, 1882, came into operation (*h*). The property does not pass to "the executor as such" within the meaning of the Finance Act, 1894 (*i*).

Failure of appointment.

If an appointment under a general power fails to take effect (*j*), the question arises whether the property, or the part of it ineffectually appointed, devolves as in default of appointment, or as part of the testator's estate. There is no difference in this respect between real and personal estate (*k*). The question "is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed" (*l*). The cases are not quite consistent. The principal rule is that if the testator deals with the whole of the settled property as his own (*e.g.*, by giving it to his executors (*m*) or trustees (*n*)), or if, without giving it to executors or trustees, he deals with the settled property and his own property as one mass (*o*), then he shows an intention to take the settled property out of the settlement for all purposes, so that if any of the dispositions of his will fail, the settled property, or so much of it as is undisposed of, devolves as part of his estate, and does not go to the persons entitled in default of appointment.

(*f*) *Re Philbrick's Trusts*, 13 W. R. 570; *Hayes* v. *Oatley*, L. R. 14 Eq. 1; *Re Hoskin's Trusts*, 5 Ch. 229; 6 Ch. D. 281; *Re Davies' Trusts*, L. R. 13 Eq. 163; *Re Peacock's Settlement*, [1902] 1 Ch. 552.

(*g*) *Re Peacock's Settlement*, *supra*.

(*h*) *Ib.*

(*i*) *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231.

(*j*) As to the lapse of appointments, see *post*, p. 818.

(*k*) *Re Van Hagan*, 16 Ch. D. 18.

(*l*) *Per* Chatterton, V.-C., in *Re De Lusi's Trusts*, 3 L. R. Ir. 232, cited with approval in *Re Pinède's Settlement*, 12 Ch. D. 667; *Willoughby Osborne* v. *Holyoake*, 22 Ch. D. 238; and *Coxen* v. *Rowland*, [1894] 1 Ch. 406.

(*m*) *Chamberlain* v. *Hutchinson*, 22 Bea. 444; *Brickenden* v. *Williams*, L. R. 7 Eq. 310. Compare *Re Scott*, [1891] 1 Ch. 298. Where there is an appointment to trustees, the testator's representatives take under the doctrine of resulting trust: *ib.*

(*n*) *Lefevre* v. *Freeland*, 24 Bea. 403; *Wilkinson* v. *Schneider*, L. R. 9 Eq. 423; *Re Van Hagan*, 16 Ch. D. 18.

(*o*) *Re Pinède's Settlement*, 12 Ch. D. 667; *Re Ickeringill's Estate*, 17 Ch. D. 151; *Willoughby Osborne* v. *Holyoake*, 22 Ch. D. 238; *Re Horton*, 51 L. T. 420; *Coxen* v. *Rowland*, [1894] 1 Ch. 406; *Re Marten*, [1902] 1 Ch. 314; *Re Keown's Estate*, Ir. R. 1 Eq. 372. The reasoning in *Hoare* v. *Osborne*, 33 L. J. Ch. 586, is not satisfactory, and the decision may be considered overruled.

If, however, the testator merely shows an intention to appoint the settled property for a limited purpose, then any part of it which is undisposed of by the failure of the residuary gift goes as in default of appointment (*p*). Thus, in *Laing* v. *Cowan* (*q*), where the donee of a general power directed her debts and funeral and testamentary expenses to be paid, but did not dispose of her residuary estate, or expressly exercise the power, it was held by Romilly, M.R., that the balance of the settled fund, after payment of debts, etc., went as in default of appointment (*r*). In *Re Davies' Trusts* (*s*), the donee of a general power bequeathed the residue of her personal estate, without referring to the power, to four persons equally, two of whom died in her lifetime : Wickens, V.-C., held that the lapsed shares of the settled property went as in default of appointment, apparently on the ground that the appointment being to the legatees direct, and not to executors or trustees, showed that the testatrix did not intend to make the settled property her own for all purposes. *Re Davies' Trusts* was followed in *Re Russell Skinner* (*t*).

Re Davies' Trusts.

It seems that if the donee of a power makes a will which deals only with the property which is the subject of the power, and appoints an executor, this alone is not sufficient to make the property his own for all purposes (*u*).

The general rules above stated apply to married women (*x*).

If the donee of a general power expressly exercises the power by his will, and deals with his own property separately, then, if the residuary gift fails, the settled property will, as a rule, go as in default of appointment (*y*).

Separate dispositions.

Re Creed (*z*) was a clear case. There the testatrix exercised a general power by giving £200 to A, and directing that the residue of the fund should go as in default of appointment; she also bequeathed legacies; one of the persons entitled in default

(*p*) See *Easum* v. *Appleford*, 5 My. & C. 56, where the will was made before 1837.

(*q*) 24 Bea. 112.

(*r*) The decision in *Bristow* v. *Skirrow*, L. R. 10 Eq. 1, by the same Judge, turned chiefly on the language of the instrument creating the power.

(*s*) L. R. 13 Eq. 163. According to Romer, L.J., the decision turned on the fact that the testatrix did not expressly purport to execute the power : see *Re Marten*, [1902] 1 Ch., at p. 324.

(*t*) 68 Sol. J. 440.

(*u*) *Re Thurston*, 32 Ch. D. 508.

(*x*) See the cases cited, *ante*, p. 791.

(*y*) *Re De Lusi's Trusts*, 3 L. R. Ir. 232; *Re Boyd*, [1897] 2 Ch. 232. In both these cases the learned Judges professed to follow *Re Davies' Trusts*. In that case, however, the testatrix did not deal with her own property and the settled property separately. See also *Blight* v. *Hartnoll*, 23 Ch. D. 218, where the testatrix dealt with the settled property separately, in such a way as to make it part of her estate.

(*z*) [1905] W. N. 94.

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of appointment predeceased her : it was held that she had shown a clear intention not to make the fund her own; consequently the lapsed share devolved as in default of appointment, and the legacies were payable only out of the testatrix's own property.

Uncertainty.

VI.—Special Powers.—(1) *Who are Objects of a Special Power.*—The doctrine of uncertainty applies to powers. Thus a power to dispose of the testator's property "in accordance with my wishes verbally expressed," is void for uncertainty (*a*). But although a simple gift to "A or B" is, it would seem, void for uncertainty (*b*), a bequest to A or B at the discretion of C is good, for he may divide it between them (*c*).

Absolute gift cut down.

The cases where a gift which is in terms absolute has been cut down to an estate for life, with a power of appointment among children or the like, are referred to elsewhere (*d*).

Rejection of words.

Where a power is apparently intended to be limited to certain classes of persons, but some of the terms used are too vague to be given effect to, it seems that they may be rejected. Thus a power to appoint to "friends and relations," or "relations or friends," has been construed to be a power to appoint to relations only (*e*).

Illegitimate persons, whether objects of power.

As a general rule, the objects of a power are determined by the same rules of construction as those which apply to direct gifts in similar terms. Accordingly, in a power to appoint to "children," "sons," "issue," "relations," "next-of-kin," or the like, the words *prima facie* mean legitimate children, sons, issue, etc. (*f*), unless it appears from the whole will that the testator intended the power to extend to illegitimate children, sons, issue, etc. (*g*).

"Issue."

On the same principle, "issue," in a power of appointment, includes descendants of every degree (*h*), unless there is something to restrict its meaning (*i*). But "issue" may be used in

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(*a*) *Re Hetley*, [1902] 2 Ch. 866; *ante*, p. 449.
(*b*) See Chap. XVI; *ante*, p. 450 n. (*h*).
(*c*) *Longmore* v. *Broom*, 7 Ves. 124.
(*d*) *Post*, pp. 1152, 1168.
(*e*) *Gower* v. *Mainwaring*, 2 Ves. sen. 87; *Re Caplin's Will*, 2 Dr. & Sm. 527.
(*f*) *Wilkinson* v. *Adam*, 1 V. & B. 422; *Re Standley's Estate*, L. R. 5 Eq. 303.
(*g*) *Re Deakin*, [1894] 3 Ch. 565. In *Humble* v. *Bowman*, 47 L. J. Ch. 62, where there was a power to appoint to the testator's family, Hall, V.-C., said: "No doubt illegitimate children are not included under a gift to children, but . . . under the description 'family' in a power of appointment a natural child may be included."
(*h*) *Hockley* v. *Mawbey*, 1 Ves. jun. 143; Farwell on Powers (3rd ed.), p. 558, citing *Donoghue* v. *Brooke*, Ir. R. 9 Eq. 489; *Re Howard*, 7 Ir. Ch. R. 344. See *Re Warren's Trusts*, 26 Ch. D. 208 (deed).
(*i*) *Leigh* v. *Norbury*, 13 Ves. 344.

the sense of "children" (*k*). Sometimes a testator uses the terms "issue" and "children" interchangeably; in such cases "issue" may be construed as meaning "children," or "children" may be construed as meaning "issue" (*l*), whichever may best give effect to the testator's intention (*m*).

"Descendants."

A power to appoint to the "descendants" of A does not authorise a substitutional appointment to the personal representatives of a deceased descendant, even if those representatives should happen themselves to be descendants of A (*n*).

"Children."

A power to appoint to "children" does not authorise an appointment to grandchildren (*o*), or to the representatives of a deceased child (*p*).

"Family."

The primary meaning of the word "family," in a bequest of personal estate, as explained elsewhere (*q*), is "children," but the context may show that the testator used it in another sense. Thus, a power to appoint for the benefit of a married woman and her family may authorise an appointment in favour of her husband (*r*). Again, "family" may mean "relations" (*s*) or "descendants" (*t*), and in *Snow* v. *Teed* (*x*), and *Lambe* v. *Eames* (*y*), James, L.J., seemed to think it a word of very wide meaning; in the former case he thought it included any relative, and in *Lambe* v. *Eames*, where the testator gave all his property to his widow, "to be at her disposal in any way she may think best for the benefit of herself and family," a gift by her to an illegitimate son of one of the testator's sons was upheld.

"Existing member of my family."

In *Sinnott* v. *Walsh* (*z*), a testator gave freeholds to his two sons, and directed that if either of them died without issue, his part of the property should fall "to whatever existing

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(*k*) *Post*, p. 1568. See *Swift* v. *Swift*, 8 Sim. 168 (marriage articles).

(*l*) As in *Harley* v. *Mitford*, 21 Bea. 280. See *Dalzell* v. *Welch*, 2 Sim. 319.

(*m*) As to the construction of a power to appoint land to issue in strict settlement, see *Bell* v. *Bell*, 13 Ir. Ch. R. 517.

(*n*) *Re Susanni's Trusts*, 47 L. J. Ch. 65.

(*o*) *Kennerley* v. *Kennerley*, 10 Hare, 160; *Reid* v. *Reid*, 25 Bea. 469, and other cases cited in Sugden on Powers, 664.

(*p*) *Maddison* v. *Andrew*, 1 Ves. sen. 57.

(*q*) *Post*, p. 1155 *seq.*; *Re Hutchinson and Tenant*, 8 Ch. D. 540; *Sinnott* v. *Walsh*, 5 L. R. Ir. 27; 3 L. R. Ir. 12.

(*r*) *MacLeroth* v. *Bacon*, 5 Ves. 159.

(*s*) *Cruwys* v. *Colman*, 9 Ves. 319, and other cases cited *post*, p. 1556, and *Sinnott* v. *Walsh*, *supra*.

(*t*) *Williams* v. *Williams*, 1 Sim. (N.S.) 358.

(*x*) L. R. 9 Eq. 622. The power was given to a single woman in the event of her not marrying.

(*y*) L. R. 6 Ch. 597. The L.JJ. were disposed to think that the widow took absolutely (see *post*, p. 849), and if so it was not necessary to decide whether the illegitimate child was an object of the power; but the point was expressly decided by Hall, V.-C., in *Humble* v. *Bowman*, 47 L. J. Ch. 62.

(*z*) 5 L. R. Ir. 27.

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member of my family he may be disposed to will it to." It was held that "existing" meant living at the date of the will creating the power, and that the power authorised an appointment to one or more persons.

"Relations."

In the case of powers to appoint to the relations (*a*) of a certain person, there is a distinction between powers of distribution and powers of selection in respect of construction. If the power is non-exclusive, or a power of distribution merely, the donee is confined to the statutory next-of-kin (*b*), while if the power is expressly made exclusive, or a power of selection, the donee can appoint to any relations, although not within the degree of next-of-kin (*c*). And this rule has not been altered by the Powers of Appointment Act, 1874 (*d*).

"Friends."

A power to appoint to "friends and relations," or to "relations or friends," seems to be equivalent to a power to appoint to "relations" (*e*). It is not clear what construction would be placed on a power to appoint to "friends" (*f*).

"My people." Illegitimate relation.

In *Re Keighley* (*g*) a wife bequeathed all she died possessed of to her husband for life, and at his death "to be willed to my people as he knows I should wish it." By his will the husband gave the property to the child of an illegitimate daughter of his wife's mother. Held a valid exercise of the selective power of appointment given to him by his wife.

Class of objects may be impliedly restricted.

In *Woodcock* v. *Renneck* (*h*), property was given upon trust for A and B and the survivor for their lives, and after their decease for their children, in such shares as the survivor of A and B should by will appoint: it was held that the only objects of the power were children living at the death of the survivor of A and B.

Construction of appointments.

The construction of appointments under special powers is considered in a subsequent part of this chapter (*i*).

Whether power exclusive or non-exclusive.

The question whether a power is exclusive or non-exclusive is one of intention, to be collected from the instrument creating the power: "no general rule can be laid down, except, perhaps,

(*a*) As to powers to appoint to "relations," see the remarks of Chitty, J., in *Wilson* v. *Duguid*, 24 Ch. D. 251.

(*b*) *Pope* v. *Whitcombe*, 3 Mer. 689; *Re Patterson*, [1899] 1 Ir. R. 324.

(*c*) *Grant* v. *Lynam*, 4 Russ. 292; *Harding* v. *Glyn*, 1 Atk. 469; *Lawlor* v. *Henderson*, 10 Ir. R. Eq. 150; *Salusbury* v. *Denton*, 3 K. & J. 529; *Re Gun*, [1915] 1 Ir. R. 42; *Re Swan*, [1911] 1 Ir. R. 405 (relatives—in default of appointment the next-of-kin took).

(*d*) *Re Deakin*, [1894] 3 Ch. 565.

(*e*) *Gower* v. *Mainwaring*, 2 Ves. sen. 87, 100; *Re Caplin's Will*, 2 Dr. & S. 527.

(*f*) See *Coogan* v. *Hayden*, 4 L. R. Ir. 585, *post*, p. 1628.

(*g*) [1919] 2 Ch. 388, following *Humble* v. *Bowman*, 47 L. J. Ch. 62 (family).

(*h*) 4 Bea. 190; 1 Ph. 72. See L. R. 2 Eq., at p. 158, and *post*, p. 1680.

(*i*) *Post*, p. 831.

that the words 'all and every' are mandatory, and make it necessary that each object should have a share (5 Ves. 857), and that 'such' authorises exclusion, unless a contrary intention appear" (*k*). In *Re Veale's Trusts* (*l*), a testatrix bequeathed a fund to her daughter for life, and after her death "to and amongst my other children or their issue in such parts, shares, proportions, manner, and form as my said daughter shall appoint": this was held to be an exclusive power.

Acts of 1830 and 1874.

Since the Illusory Appointments Act, 1830 (*m*), and the Powers of Appointment Act, 1874, the distinction between exclusive and non-exclusive powers has lost much of its importance, except in the case of powers to appoint to relations (*n*). Every power of appointment unless so expressed as to forbid the exclusion of one or more objects, authorises an exclusive appointment. It seems clear that each statute is retrospective; that is to say, it applies to powers existing at the time of, but executed after, the passing of the Act (*o*).

Perpetuities and remoteness.

The application of the Rule against Perpetuities and (in the case of real estate) the rule in *Whitby* v. *Mitchell*, to appointments under special powers, is considered elsewhere (*p*).

Joint tenancy.

Where a person has power to appoint among several objects, in such shares and proportions as he thinks proper, he can, if he wishes to do so, appoint part of the fund to two or more of the objects as joint tenants (*q*).

Appointment to trustees;

As a general rule, a power to appoint "in such manner and form" as the appointor thinks fit, authorises an appointment to trustees upon trust for the objects of the power (*r*). Where one of the objects is a married woman, such a power, even under the old law, authorised an appointment to trustees for her

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(*k*) Farwell (3rd ed.), p. 414; approved by Jessel, M.R., in *Re Veale's Trusts*, 4 Ch. D. 61 (aff. 5 Ch. D. 622); and by Hall, V.-C., in *Chamberlain* v. *Napier*, 15 Ch. D. 634. See also *Re Deakin*, [1894] 3 Ch. 565, and *Re Patterson*, [1899] 1 Ir. R. 324.

(*l*) 5 Ch. D. 622, *supra*; and see *Longmore* v. *Broom*, 7 Ves. 124; *Penny* v. *Turner*, 2 Ph. 493; and the cases of *Garthwaite* v. *Robinson*, 2 Sim. 43, and *Stolworthy* v. *Sancroft*, 10 Jur. (N.S.) 762, commented on by Jessel, M.R., in *Re Veale's Trusts*.

(*m*) The following cases have been decided on appointments made since this Act: *Bulteel* v. *Plummer*, L. R. 6 Ch. 160; *Minchin* v. *Minchin*, 3 Ir. Ch. R. 167; *Re Capon*, 10 Ch. D. 484; *Re Stone*, Ir. R. 3 Eq. 621; *Re Crofton's Trusts*, 7 L. R. Ir. 279. The result of these decisions is that if a fund is appointed to all the objects of a non-exclusive power, a gift over, in the event of any of them dying under age, or the like, to the others, is good, independently of the Act of 1874.

(*n*) *Ante*, p. 796.

(*o*) Farwell (3rd ed.), p. 426, citing *Reid* v. *Reid*, 25 Bea. 469. See *Moynan* v. *Moynan*, 1 L. R. Ir. 382; *Re Walsh*, 1 L. R. Ir. 320.

(*p*) Chap. X, *ante*, pp. 258, 288.

(*q*) *Alloway* v. *Alloway*, 4 Dr. & W. 380.

(*r*) *Thornton* v. *Bright*, 2 My. & Cr. 230.

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—upon trust for sale.

separate use (*s*). Such a power also authorises an appointment of the property to trustees upon trust to sell and hold the proceeds in trust for the objects of the power (*t*). In *Dowglass* v. *Waddell* (*u*) a testator had power to appoint land to his sons, charged in favour of his female issue; by his will he directed the property to be sold and the proceeds divided among his sons and daughters: it was held that this was a good exercise of the power.

Range of investments.

But the donee of a special power cannot, by a mere declaration, enlarge the range of investments authorised by the instrument creating the power (*x*).

Power to appoint life interest to wife.

Where a power is given to a person to appoint a life interest in real or personal estate to any wife of his, although it is expressed in general terms, it may appear from the context that the power was intended to be one in the nature of a power to jointure; consequently no appointment can be made under it so as to take effect until after the donee's death (*y*).

Power to appoint portions.

The donee of a power to charge money on land by way of portions has a right to fix the rate of interest (*z*); but where the sum is charged by the settlor, and the testator has merely a power of distributing it, he has no power to fix the rate of interest (*a*).

How intention may be shown.

(2) *Execution of Special Powers.*—"In order to exercise a special power there must be a sufficient expression or indication of intention in the will . . . either a reference to the power, or a reference to the property subject to the power, constitutes in general a sufficient indication of purpose" (*b*).

Inaccurate reference to power.

In exercising a special power by express reference, an inaccurate or incomplete description of the power is sufficient, if the intention is clear (*c*).

(*s*) *Thornton* v. *Bright*, 2 My. & Cr. 230.

(*t*) *Long* v. *Long*, 5 Ves. 445, where a power to charge portions was held to be well exercised by a will directing a sale and appointing the money; see *Crozier* v. *Crozier*, 3 Dr. & W., at p. 371. *Kenworthy* v. *Bates*, *Cowx* v. *Foster*, and other cases (which are referred to *post*, p. 830) are cited in *Re Paget*, [1898] 1 Ch. 290, and *Re Redgate*, [1903] 1 Ch. 356.

(*u*) 17 L. R. Ir. 384. *Re Ainsworth*, 125 L. T. 755 (where powers of management pending the sale were held good).

(*x*) *Re William Falconer's Trusts*, [1908] 1 Ch. 410.

(*y*) *Re De Hoghton*, [1896] 2 Ch. 385, where *Jamieson* v. *Trevelyan*, 10 Exch. 269, is explained; *Re Lindo*, 59 L. T. 462.

(*z*) *Boycot* v. *Cotton*, 1 Atk. 552; *Lewis* v. *Freke*, 2 Ves. jun. 507.

(*a*) *Balfour* v. *Cooper*, 23 Ch. D. 472.

(*b*) *Per* Sargant, J., in *Re Ackerley*, [1913] 1 Ch., at p. 515; see also *per* Buckley, J., in *Re Weston's Settlement*, [1906] 2 Ch., at p. 624. For an illustration of a sufficient indication, see *Re Wright*, [1920] 1 Ch. 108. As to the trust fund thereby settled including an accretion to the fund, see *Re Paul's Settlement Trusts*, [1920] 1 Ch. 99.

(*c*) *Re Wilmot*, 29 Bea. 644; *Harvey* v. *Stracey*, 1 Drew. 73; *Carver* v. *Richards*, 27 Bea. 488. See *Bruce* v. *Bruce*, L. R. 11 Eq. 371, *post*, p. 806.

Indirect appointment.

An appointment may be made indirectly. Thus, in *Oke* v. *Heath* (*d*), a testatrix appointed a fund of £4,000 to A, an object of the power, "upon condition" or "in consideration" of his paying B, another object of the power, £100 a year during B's life. A died in the testatrix's lifetime, so that the gift in A's favour lapsed, but it was held that the annuity to B did not lapse.

Implied intention.

Where a testator does not express an intention to exercise a special power, an intention to do so can only be inferred from the words of the will, and from the circumstances which at the time of executing it were known to the testator (*e*).

Appointment by implication.

Where a person who has power to appoint to A and B, expressly exercises it in favour of A, he may do it in such a way that "by necessary implication" he will be deemed to have exercised it in favour of B as well (*f*). And if a person deals with property over which he has a special power of appointment in a way which does not of itself constitute an exercise of the power, he may show a sufficient intention to exercise it by referring to that transaction in his will (*g*). But the reference must be specific (*h*). Again, if the donee of a power erroneously recites that he has made an appointment in favour of X, an object of the power, this is evidence of an intention to exercise the power in favour of X; but if he recites that X is entitled to the property, this is evidence that he supposes that X possesses an independent title, and negatives any intention to exercise the power (*i*). So, if he exercises the power as to part in favour of X, and expressly states that he makes no further appointment because he wishes the rest of the property to go to Y and Z, the other objects of the power, this does not operate as an appointment by implication in favour of Y and Z (*k*).

Ambiguous or erroneous recital.

Mistake.

Effect of gift over

And if there is a gift over in default of appointment an intention to exercise the power will not be easily implied (*l*).

(*d*) 1 Ves. sen. 135.

(*e*) *Re Mills*, 34 Ch. D. 186; *Re Esther Williams*, 42 Ch. D. 93; *per* Romer, L.J., in *Re Hayes*, [1901] 2 Ch. 531. The doctrine laid down in *Re Morgan* (7 Ir. Ch. R. 18) by the majority of the Court cannot, it is submitted, be supported.

(*f*) See *Foster* v. *Cautley*, 6 D. M. & G. 55 (settlement).

(*g*) *Lees* v. *Lees*, Ir. R. 5 Eq. 549.

(*h*) *Re Walsh*, 1 L. R. Ir. 320.

(*i*) *L'Estrange* v. *L'Estrange*, 25 L. R. Ir. 399; *Pennefather* v. *Pennefather*, Ir. R. 7 Eq. 300, citing *Carver* v. *Richards*, 27 Bea. 488; *Garth* v. *Townsend*, L. R. 7 Eq. 220 (not testamentary appointments); *Haverty* v. *Curtis*, [1895] 1 Ir. R. 23; *Minchin* v. *Minchin*, Ir. R. 5 Eq. 178, 258 (deed); Farwell (3rd ed), p. 222, *seq.* Compare the similar doctrine as to gifts by implication, Chap. XIX, *ante*, p. 599.

(*k*) *Re Jack*, [1899] 1 Ch. 374; *Langslow* v. *Langslow*, 21 Bea. 552.

(*l*) *Henderson* v. *Constable*, 5 Bea. 297, stated *post*, p. 832.

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Indirect reference.

Sometimes an intention to exercise a power may be inferred from a reference to it in another part of the will (*m*); and where a testator refers to the instrument creating the power, and makes a disposition of a nature authorised by the power, it will generally be presumed that he intended to exercise it : it is a question of intention to be collected from the whole will (*n*). In *Disney* v. *Crosse* (*o*), the testatrix had a power of appointing a fund among her children; she bequeathed legacies to her children, and (in express exercise of the power) appointed the fund, "subject and charged with" the legacies, to A B (not an object of the power) absolutely : it was held that this operated as an appointment of the legacies out of the fund.

If a testator expressly exercises a power, but only partially, and makes a residuary disposition in terms *prima facie* applying only to his own property, this will not operate as an exercise of the unexhausted part of the power (*p*), unless such an intention can be inferred from the whole will (*q*).

Effect of residuary gift.

Doubts as to a testator's intention of exercising a special power arise most frequently in connection with residuary gifts. The following propositions are, it is believed, justified by the authorities.

Reference to powers generally.

An intention to exercise a special power may appear from the use of words referring to powers generally (*r*).

Thus, if a testator, having a power of appointment in favour of his children, devises and bequeaths "all my real and personal estate and effects whatsoever whereof I have power to dispose," or "over which I have any power of appointment," or the like, upon trust for his children, this operates as an execution of the power (*s*). Even if he merely says "I appoint, devise, and

Use of word "appoint."

(*m*) *Re Comber's Settlement*, 11 Jur. (N.S.) 968; *Harvey* v. *Stracey*, 1 Drew. 73. But if a will does not itself amount to an exercise of a power, the fact that it is made in favour of an object of the power, and that it revokes an earlier will which exercised the power, is not a sufficient indication of an intention to exercise the power : *Harvey* v. *Harvey*, 32 L. T. 141. In *Wrigley* v. *Lowndes*, [1908] P. 348, the circumstances were similar, but the decision really turned on the language of the later will.

(*n*) *Hunloke* v. *Gell*, 1 R. & Myl. 515; *Peirce* v. *M'Neale*, [1894] 1 Ir. R. 118.

(*o*) L. R. 2 Eq. 592. In *Gainsford* v. *Dunn*, L. R. 17 Eq. 405, a similar inference was drawn from the use of the word "residue"; but see *Re Boards*, [1895] 1 Ch. 499.

(*p*) *Butler* v. *Gray*, L. R. 5 Ch. 26, where there was also a reference to general powers.

(*q*) *Elliott* v. *Elliott*, 15 Sim. 321 : in that case the specific disposition did not refer to the power, but to the subject-matter. *Re Nicoll*, 65 Sol. J. 8.

(*r*) Compare *Maddison* v. *Andrew*, 1 Ves. Sen. 57.

(*s*) *Bailey* v. *Lloyd*, 5 Russ. 330; *Pidgely* v. *Pidgely*, 1 Coll. 255; *Cowx* v. *Foster*, 1 J. & H. 30; *Ferrier* v. *Jay*, L. R. 10 Eq. 550; *Gainsford* v. *Dunn*, L. R. 17 Eq. 405; *Re Swinburne*, 27 Ch. D. 696; *Re Blackburn*, 43 Ch. D. 75. *Wrigley* v. *Lowndes*, [1908] P. 348 ("everything I have power to will"). As to *Clogstoun* v. *Walcott*, 13 Sim. 523, see below,

bequeath my real and personal estate upon trust for" persons who are objects of the power, this may operate as an exercise of the power, if it appears that he has no other power (*t*). Where the testator has more than one power, other considerations arise (*post*, p. 803).

Such a devise or bequest is not necessarily prevented from operating as an execution of the power by the fact that it includes the testator's own property (*u*), and that he gives the whole to trustees upon trust to sell and pay his debts or debts and legacies out of the proceeds (*v*), or by the fact that the testator professes to give part of the property subject to the power to persons not objects of the power (*w*), or to create interests which are illegal (*x*), or in excess of what the power authorises (*y*). But in most of the cases in which circumstances of this nature were present, the construction was assisted by the fact that the testator had no other power (*z*).

Examples of special power not being exercised by general words.

On the other hand, the inference arising from the use of the word "appoint," or any other expressions referring to powers generally, may be rebutted by the context or by the nature of the gift. Thus, a special power to appoint an annuity to children is not exercised by a general gift of property "over which I have any disposing power" upon trust for the testator's wife for life, with remainder to his children (*a*).

In *Re Mackenzie* (*b*) evidence of surrounding circumstances was admitted. In *Re Slack's Settlement* (*c*) the words "if any" were held to negative an intention of exercising a special power. In *Re Sanderson* (*d*) where the testatrix dealt with her property in a mass, the word "appoint" was held to be insufficient.

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p. 802, n. (*g*). In *Re Hunt's Trusts*, 31 Ch. D. 308, the testatrix appointed part of a fund to A, a person not an object of the power, and gave "all the residue of my personal estate . . . over which I have any power of disposal by this my will" to objects of the power; it was held by Bacon, V.-C., that this operated as an appointment of the part badly appointed to A.

(*t*) *Re Milner*, [1899] 1 Ch. 563; *Re Mayhew*, [1901] 1 Ch. 677 (disapproving dictum in *Re Richardson's Trusts*, 17 L. R. Ir. 436); *Kent* v. *Kent*, [1902] P. 108.

(*u*) *Byrne* v. *Cullinan*, [1904] 1 Ir. R. 42; *Wrigley* v. *Lowndes*, *supra*.

(*v*) See cases in notes (*s*) and (*t*) *supra*. That a special power of appointment over land authorises an appointment to trustees upon trust to sell and divide the proceeds among the objects of the power, see *Kenworthy* v. *Bate*, 6 Ves. 793; *Re Redgate*, [1903] 1 Ch. 356; *post*, p. 830.

(*w*) *Re Swinburne*, 27 Ch. D. 696; *Re Boyd*, 63 L. T. 92; *Re Milner*, [1899] 1 Ch. 563.

(*x*) *Re Boyd*, 63 L. T. 92.

(*y*) *Re Teape's Trusts*, L. R. 16 Eq. 442, and cases cited *supra*, n. (*s*).

(*z*) *Post*, p. 802.

(*a*) *Sykes* v. *Carroll*, [1903] 1 Ir. R. 17.

(*b*) [1917] 2 Ch. 58.

(*c*) [1923] 2 Ch. 359.

(*d*) 106 L. T. 26.

In *Re Barker's Settlement* (*e*) the word "appoint" was held to exercise a power of revocation and new appointment.

And if the will contains indications that the testator either had not the power in his mind at all, or that he did not intend to exercise it, then such vague expressions as "property which I have power to dispose of," or "appoint," or the like, will not include property over which he has a special power of appointment. Thus, in *Cooke* v. *Cunliffe* (*f*), a devise of "all my real estate over which I have any disposing power," by a testator who had real estate of his own, was held not to be an exercise of a special power, where, if it had been, it would have defeated certain interests under the settlement creating the power, which interests the testator clearly intended to take effect after his death. So if the trusts of the original settlement and of the will are inconsistent with one another, something more than a mere reference to powers generally is required to exercise the power (*g*).

Re Weston's Settlement.

The case of *Re Weston's Settlement* (*h*) is an example of what may be called cumulative indications of the absence of an intention to exercise a power. In that case the testator had a power to appoint certain leaseholds among his children, and had no other power. By his will he gave, devised, bequeathed, and appointed all the residue of his estate to trustees upon trust to convert, and out of the proceeds to pay his debts, etc., and to divide the residue among three out of his seven children; he empowered his trustees to postpone conversion, to manage his real and leasehold estates while unsold, and to invest the shares of two children who were infants: it was held by Buckley, J., that the power was not exercised.

Where testator has a general as well as a special power.

If a testator uses words referring to powers generally, and he has a general power of appointment to which those words may refer, they will not, as a general rule, operate as an exercise of a special power (*i*).

In most of the cases above referred to, in which a gift of property which the testator had power to dispose of or appoint has been held to be an exercise of a special power, it was proved or assumed that the testator had no other power, and this fact was referred to as the basis of the decision, or, at all events, as

(*e*) [1920] 1 Ch. 527.

(*f*) 17 Q. B. 245.

(*g*) *Re Cotton*, 40 Ch. D. 41. See *Hope* v. *Hope*, 5 Giff. 13; *Re Blackburn*, 43 Ch. D. 75; *Re Denton*, 63 L. T. 105. In *Clogstoun* v. *Walcott* (13 Sim. 523) there was a trust for sale and investment, and the decision turned partly on this. It was disapproved by Selborne, L.C., in *Re Teape's Trusts*, L. R. 16 Eq. 442.

(*h*) [1906] 2 Ch. 620; *Re Sanderson*, 106 L. T. 26.

(*i*) *Re Richardson*, 17 L. R. Ir. 436, distinguished in *Re Ackerley*, [1913] 1 Ch. 510. See *Re Mayhew*, [1901] 1 Ch. 677, *ante*, p. 801.

assisting the construction (*k*). But it does not appear to have been decided that the existence of another power would prevent a gift, expressed in general language, from exercising a special power. On the contrary, in *Ferrier* v. *Jay* (*l*), where a testatrix, having a general power to appoint £500, and a special power to appoint certain property, gave all her real and personal estate which she had any power to appoint or dispose of to trustees to pay her debts, etc., and to divide the residue among the objects of the special power: it was held by Malins, V.-C., that the special power was well executed, notwithstanding the direction to pay debts, because, *reddendo singula singulis*, she meant her debts to be paid out of the property subject to the general power. In *Re Milner* (*m*), Stirling, J., after observing that the special power in question was the only testamentary power to which the testatrix was entitled, said: "This is a circumstance which has in many cases been held to afford evidence of considerable cogency of an intention to exercise such a power." Again, in *Re Sharland* (*n*), where the testatrix had two general powers of appointment, and a special power to appoint the income of certain property to her husband for life, she appointed all real and personal estate over which she might have a power of appointment to her husband absolutely, and it was held that this operated as an exercise of the special power.

Where testator has more than one power.

In *Re Rickman* (*o*), on the other hand, the testatrix had a power of appointment among her children, and in default of children a general power. She made a will by which, "in pursuance of all powers and authorities enabling me thereto," she directed, limited, and appointed all her residuary estate to trustees upon trust as to one moiety for her son for life; all the other trusts were beyond the scope of the power: it was held that the special power was not exercised.

Re Rickman.

The principle of construction *reddendo singula singulis* was also applied by Malins, V.-C., in the case of *Thornton* v. *Thornton* (*p*), where a testator had two special powers, one to appoint among his children subject to a life interest in his wife, and the other to appoint a life interest to his wife in a fund which, subject to the power, was held in trust for his children at twenty-one in equal shares. The testator, by his will, gave "all my property over which I have any disposing power" to trustees upon trust

(*k*) This consideration does not appear to have influenced the decision in *Bailey* v. *Lloyd*, 5 Russ. 330, or *Re Blackburn*, 43 Ch. D. 75.

(*l*) L. R. 10 Eq. 550.

(*m*) [1899] 1 Ch. 563. See also *Re Mayhew*, [1901] 1 Ch. 677, where similar evidence was admitted: *ante*, p. 801.

(*n*) [1899] 2 Ch. 536.

(*o*) 80 L. T. 518.

(*p*) L. R 20 Eq. 599.

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for his wife for life, and after her death for his children at twenty-one equally. The V.-C. held that both powers were well exercised.

"Beneficial" power.

In *Ames* v. *Cadogan* (*q*), Fry, J., held that a special power was not exercised by a devise and bequest of all real and personal estate over which the testator had "any beneficial power of disposition." But in *Von Brockdorff* v. *Malcolm* (*r*), Pearson, J., held that the use of the word "beneficial" did not necessarily prevent such a gift from being an exercise of a special power.

Power of revocation.

An appointment expressed to be made in exercise of every power enabling the appointor, does not extend to property which he cannot appoint without the exercise of a power of revocation, if there be other property to which the appointment can apply (*s*). But if there is no power except one of revocation and new appointment, then general words of appointment are sufficient to exercise the power (*t*).

Effect of a general devise or bequest.

Formerly the question whether a special power was exercised by a general devise or bequest was governed by the same considerations as those applying to general powers, and therefore, under the old law, a devise of land operated as an exercise of a special power of appointing land, if the testator had no land of his own (*u*).

Re Griffith's Settlement.

In *Re Griffith's Settlement* (*x*), the testator under his marriage settlement had a testamentary power of appointment in favour of the children of the marriage over the funds settled by both his wife and himself, and in default of appointment the trust of the latter fund was for the testator absolutely. By his will he devised all the remainder of his real estate and bequeathed all his personal estate, and by virtue of the provisions contained in the settlement executed upon his marriage he appointed the funds subject to the trusts thereof unto his trustees upon trust after payment of his just debts and funeral and testamentary expenses to divide the same equally between his five children. It was held that the word appoint was not used in any narrow sense as merely exercising the special power, but that the testator disposed of the funds which in default of exercising the special power belonged to him absolutely.

(*q*) 12 Ch. D. 868.
(*r*) 30 Ch. D. 172.
(*s*) *Pomfret* v. *Perring*, 5 D. M. & G. 775. Compare the cases on general powers, *ante*, p. 779.
(*t*) *Re Barker's Settlement*, [1920] 1 Ch. 527.
(*u*) *Wallop* v. *Lord Portsmouth*, Sugd. Powers, 916 (8th ed.).
(*x*) [1911] 1 Ch. 246.

Sect. 27 does not apply to special powers.

Special powers to appoint in favour of particular persons or classes, as children (*y*), or kindred (*z*), are not within section 27 of the Wills Act. Generally, therefore, the question whether such powers are executed by a general devise or bequest still depends on the old law. But if the question arises with regard to a special power over realty, then, inasmuch as by section 24 a will now takes effect, with reference to the testator's own property, as if made immediately before the death of the testator, no presumption can be raised in favour of the appointment by reason of the testator having no real estate of his own at the date of the will, however short may be the interval between the execution of the will and the testator's death.

Accordingly, a testator who makes a general devise, though having no real estate of his own, does not thereby sufficiently indicate an intention of exercising a special power of appointing real estate, even although the person in whose favour the devise is made is the sole object of the power (*a*); the argument against such a construction would, of course, be even stronger if the testator included in the general devise persons who are not objects of the power (*b*).

Where testator has no property of his own.

It sometimes happens that a testator has a special power of appointment over personal property, but has no property of his own, or property of insufficient value to satisfy his testamentary dispositions and that those dispositions are all in favour of objects of the power, from which facts it might be inferred that he intended to exercise the power in their favour: it seems clear, however, that no such inference can be drawn (*c*).

Married woman.

In the case of a married woman having a power of appointment in favour of A, and making a disposition by will in his favour within the scope of the power, but not expressly referring to it, the general rule seems formerly to have been that it operated as an appointment, unless it was proved that the testatrix had separate property of her own at the date of the will; but this rule no longer exists (*d*).

Reference to subject of power.

If a testator has a special power over certain property, and by his will, without referring to the power, disposes of that

(*y*) *Cloves* v. *Awdry*, 12 Bea. 604; *Pidgely* v. *Pidgely*, 1 Coll. 255; *Elliott* v. *Elliott*, 15 Sim. 321; *Cronin* v. *Roche*, 8 Ir. Ch. Rep. 103; *Russell* v. *Russell*, 12 Ir. Ch. R. 377; *Doyle* v. *Coyle*, [1895] 1 Ir. R. 205; *Humphery* v. *Humphery*, 36 L. T. 91.

(*z*) *Hawthorn* v. *Shedden*, 3 Sm. & Gif. 293; *Re Caplin's Will*, 2 Dr. & Sm. 527.

(*a*) *Harvey* v. *Harvey*, 32 L. T. 141; *Re Esther Williams*, 42 Ch. D. 93.

(*b*) *Re Mills*, 34 Ch. D. 186.

(*c*) See *Humphery* v. *Humphery*, 36 L. T. 91; *Re Huddleston*, [1894] 3 Ch. 595. Such facts may, however, have weight if combined with other circumstances: see *Peirce* v. *M'Neale*, [1894] 1 Ir. R. 118.

(*d*) See *Re Herdman's Trusts*, 31 L. R. Ir. 87.

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specific property in favour of the objects of the power, it will generally be inferred that he meant to exercise the power (*e*). Thus, in *Re David's Trusts* (*f*), a testatrix had a power of appointment over a sum of $3\frac{1}{4}$ per cent. stock in favour of certain persons : by her will she gave £10 to each of two objects of the power, and bequeathed to the remaining object "all the residue of my property in the $3\frac{1}{4}$ per cent. annuities"; the testatrix had no such stock of her own at the date of the will or subsequently, and it was held that the three gifts took effect as an exercise of the power. But the mere fact that the donee of a special power has dealt with part of the appointable property is not enough to justify the inference that in other parts of the document he is dealing with the rest of the property (*g*).

What description required.

The description of the property must be specific and unambiguous, so as to show beyond a doubt that the testator has in mind the property subject to the power (*h*). And if he attempts to deal with the property in a manner not authorised by the power, the presumption that he intended to exercise it may be rebutted (*i*).

Where testator has property of his own which will satisfy gift.

Moreover, if the testator has property of his own, which answers the description and is sufficient to satisfy the gift, it will generally be assumed that he did not mean to exercise the power (*j*). But an intention to do so may appear from the context : *e.g.*, if the testator excepts from the gift a certain part of the property subject to the power (*k*).

Reference to wrong power.

In *Bruce* v. *Bruce* (*l*) a testatrix had a special power to appoint property to A, B, and C, but she thought that under a certain deed she had a general power of appointment over the property; by her will, not referring to the former power, but in professed exercise of the supposed general power, and of every other power enabling her in that behalf, she purported to

(*e*) *Davies* v. *Davies*, 4 Jur. (N.S.) 1291; *Elliott* v. *Elliott*, 15 Sim. 321; *Forbes* v. *Ball*, 3 Mer. 437.

(*f*) John. 495. *Innes* v. *Sayer*, 3 Mac. & G. 606; *Rooke* v. *Rooke*, 2 Dr. & Sm. 38; *Re Gratwick's Trusts*, L. R. 1 Eq. 177, and *Fletcher* v. *Fletcher*, 7 L. R. Ir. 40, were similar cases. Compare the analogous cases of general powers, *Walker* v. *Mackie*, 4 Russ. 76, etc., *ante*, p. 778.

(*g*) *Re Nicoll*, 65 Sol. J. 8, applying *Hughes* v. *Turner*, 3 My. & K. 666; *Elliott* v. *Elliott*, 15 Sim. 321; and *Re Comber's Settlement*, 11 Jur (N.S.) 968; and dissenting from *Re Wait*, 30 Ch. D. 617 : see *Reid* v. *Reid*, 25 Bea. 469.

(*h*) *Bennett* v. *Aburrow*, 8 Ves. 609; *Mattingley's Trusts*, 2 J. & H. 426; *Re Huddleston*, [1894] 3 Ch. 595, where the question of admitting parol evidence was discussed.

(*i*) *Wildbore* v. *Gregory*, L. R. 12 Eq. 482; *Re Rickman*, *ante*, p. 803. In *Re Gratwick's Trusts*, L. R. 1 Eq. 177, the appointment was partly to objects and partly to a stranger; it was held good *pro tanto*.

(*j*) *Noel* v. *Noel*, 4 Drew. 624.

(*k*) *Reid* v. *Reid*, 25 Bea. 469.

(*l*) L. R. 11 Eq. 371. The special power was exercisable by deed only, but the defective execution was aided : *ante*, p. 773.

appoint to B, C, D, and E; it was held by Romilly, M.R., that the will operated as an exercise of the special power.

Exercise of future power.

How far a will can operate as an exercise of a special power created after the date of the will is a question of some difficulty. The only case in which it has been held that a special power can be effectively exercised in this manner seems to be *Stillman* v. *Weedon* (*m*), but the decision in that case can only be supported, if at all, on the ground that the will disposed specifically of the property, which afterwards, by the testator's own act, became subject to a special power of appointment by him in favour of the persons to whom it was given by the will. The better opinion is that section 24 of the Wills Act has not the same effect with regard to special powers as it has in the case of general powers falling within section 27 (*n*), and the question is therefore one of intention. In *Re Hayes* (*o*), a testator gave " all the residue of the property over which at the time of my death I shall have a disposing power " to trustees upon trust for sale, conversion, and investment, and directed them to pay the income to his wife for life, and subject, as aforesaid, to stand possessed of the trust estate upon trusts for his children; after the date of his will he became entitled to a power authorising him to appoint the income of certain settled funds in favour of his wife for life : it was held by Byrne, J., and by the Court of Appeal, that the language of the testator was not sufficient to show an intention to exercise the special power in favour of his wife. The Court of Appeal expressed some doubt whether it is possible in any case to execute by anticipation a special power created after the attempted execution. It was not, however, necessary to consider this in the case in question, because the testator's dispositions clearly showed that he did not contemplate the contingency of his becoming entitled to exercise a special power of the nature afterwards created.

Re Hayes.

(*m*) 16 Sim. 26.

(*n*) See the operation of these sections explained by Stirling, J., in *Re Well's Trusts*, 42 Ch. D. 656; *post*, p. 813. See also Farwell on Powers (3rd ed.), pp. 251, 259. In an article in the Solicitors' Journal, vol. liii, p. 240, it is suggested that the conclusion to be drawn from the decisions in *Wilkinson* v. *Duncan*, 30 Bea. 111; *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172, and *Re Thompson*, [1906] 2 Ch. 199 (all referred to in Chapter X, *ante*, p. 304 is " that section 24 of Wills Act, 1837, does apply to limited powers." But it is submitted that the application of the Rule against Perpetuities does not depend on section 24; the general principle of the Rule was established before 1837, and the ambulatory nature of a will exercising a special power was then well settled : thus in *Crompe* v. *Barrow* (1799), 4 Ves 681, Sir R. P. Arden, M.R., said : " I do construe the will at the death of the testatrix; and I think the ultimate appointment is good."

(*o*) [1900] 2 Ch. 332; [1901] 2 Ch. 529, following *Doyle* v. *Coyle*, [1895] 1 Ir. R. 205. *Walker* v. *Armstrong*, 21 Bea. 284, and *Cowper* v. *Mantell*, 22 Bea. 223, were also cited. See *Re Bower*, [1929] W. N. 198.

If a testator declares that in the event of his becoming subsequently entitled to exercise a power in favour of A, he wishes his will to operate as an appointment under it, there seems, on principle, no reason why effect should not be given to his intention, if it is in accordance with the power (*p*).

A limited power of appointment given to a contingent person cannot be exercised until the contingency has been ascertained (*pp*).

On principle, it would seem clear that if a testator by his will expressly exercises a special power, which is subsequently destroyed and replaced by a new power, the will does not operate as an exercise of the new power (*q*).

Republication.

A will may be made to operate as an exercise of a subsequently acquired power, if it is republished after the acquisition of the power (*r*).

Appointment taking effect partly out of testator's own property.

In *Gainsford* v. *Dunn* (*s*), a testatrix had power to appoint certain funds in favour of A, B, C, D, and E. By her will she gave legacies of £5 each to A, B, and C, and "all the residue of my property, over which I have any power of appointment or disposition," to D and E; it was held by Jessel, M.R., that the legacies were payable partly out of the testatrix's own property and partly out of the appointed fund. But the principle of the decision has been questioned (*t*).

Power of revocation.

Where a testator has a power of revocation and new appointment, exercisable by deed or will, and he exercises it by will, and afterwards exercises it by deed, reserving to himself a fresh power of revocation and new appointment, the will does not, by virtue of section 24 of the Wills Act, operate as a revocation and new appointment under the latter power (*x*).

Failure of appointment.

(3) *Ineffectual Execution.*—An intention to execute a special power may be ineffectual either for some reason applying to all

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(*p*) In *Charlton* v. *Charlton*, ([1906] 2 Ch. 523), A by his marriage settlement covenanted to charge all real and personal estate which might come to him from his father with a jointure of £400 a year for his intended wife; a year afterwards the father died, having by his will given A a power of charging certain real estate by deed or will with a jointure of £400 for his wife: it was held that the covenant in the marriage settlement operated as a defective execution of the power to which the Court would give effect; it was treated as a question of intention.

(*pp*) *Re Miller*, 129 L. T. 666, *ante*, p. 770, where however it was held that the appointor was not a contingent person.

(*q*) See Farwell (3rd ed.), p. 254. The decision in *Thompson* v. *Simpson*, *ante*, p. 777, seems to involve this principle, for although the power in that case was a general one, the appointment could only have operated under section 24. In *Airey* v. *Bower*, 12 A. C. 263, it was suggested by Lord Macnaghten that section 23 of the Wills Act applies to powers of appointment, *sed quære*: see *post*, p. 816.

(*r*) *Re Blackburn*, 43 Ch. D. 75; *post*, p. 817.

(*s*) L. R. 17 Eq. 405. (*t*) *Re Boards*, [1895] 1 Ch. 499.

(*x*) *Re Wells' Trusts*, 42 Ch. D. 646.

testamentary gifts (*y*), or for some reason applying to special powers. The rules as to the failure of an appointment under a special power, by reason of the appointment being a fraud on the power (*z*), or exclusive (*a*), or made in favour of a person not an object of the power (*b*), or being otherwise an excessive execution of the power (*c*), are not peculiar to testamentary powers, and are, therefore, not treated of in this work (*c*).

Delegation of power.

A power to appoint for such interests in such proportions and in such manner in all respects as the appointor should appoint among a class does not enable an appointment under which the trustees can turn a contingent interest into an absolute one (*d*). That is an unauthorised delegation of the power. But a power of advancement may be attached to an absolute interest (*e*).

In *Re Boulton's Settlement Trust* (*ee*), a testator in exercise of a power to appoint to issue contained in his marriage settlement directed his trustees to hold part of his trust property upon protective trusts (see section 33 of the Trustee Act, 1925), for the benefit of his son O. It was held that the trusts in the event of a forfeiture were bad as a delegation of the power and in excess of it and that accordingly the clause contained in section 33, sub-section (1) (ii) of the Trustee Act, 1925, must be struck out of the will for all purposes.

Absolute appointment followed by void addition.

The effect of the failure of an appointment under a special power is considered in a later part of this chapter (*f*).

Where there is an absolute appointment under a special power, with a superadded modification which is in excess of the power, or otherwise void, the modification is rejected and the appointment stands (*g*).

(*y*) See *Champney* v. *Davy*, 11 Ch. D., at p. 958. As to charitable gifts, see Chap. IX; as to the Rule against Perpetuities, see Chap. X; as to ademption, lapse, abatement, etc., see *post*, pp. 814 *seq.*

(*z*) As in *Re Crawshay*, 43 Ch. D. 615. Other cases on fraudulent appointments are *Re Cohen*, [1911] 1 Ch. 37; *Cloutte* v. *Storey*, [1911] 1 Ch. 58; *Vacher* v. *Paull*, [1915] A. C. 372; *Re Wright*, [1920] 1 Ch. 108; *Re Jones's Settlement*, [1915] 1 Ch. 373 (fraudulent revocation); *Tharp* v. *Tharp*, [1916] 1 Ch. 142.

(*a*) As in *Bulteel* v. *Plummer*, L. R. 6 Ch. 160. See also *White* v. *Wilson*, 1 Dr. 298; *Re David's Trusts*, Johns. 495; *Gainsford* v. *Dunn*, L. R. 17 Eq. 405: all cases before the Powers of Appointment Act, 1874, *ante*, p. 797.

(*b*) As in *Jeaffreson's Trusts*, L. R. 2 Eq. 276, *post*, p. 834, *Re Hunt's Trusts*, 31 Ch. D. 308, *ante*, p. 801; *Re Enever's Trusts*, [1912] 1 Ir. R. 511 (ultimate appointment, dependent on failure of void appointments, void).

(*c*) As to the powers exercisable with consent, see *Re Dilke's Settlement Trusts*, 123 L. T. 386; 37 T. L. R. 13; *Re Barker's Settlement*, [1920] 1 Ch. 527; and *Frazer* v. *Riverdale*, [1913] 1 Ir. R. 539.

(*d*) *Re Joicey*, [1915] 2 Ch. 115 (advancement).

(*e*) *Re May's Settlement*, [1926] 1 Ch. 136; as to a power of maintenance, see *Re Greenslade*, [1915] 1 Ch. 155.

(*ee*) [1928] Ch. 703.

(*f*) *Post*, pp. 813 *seq.*

(*g*) *Post*, p. 821.

VII.—Miscellaneous Questions as to Powers.—Where a testator makes a will purporting to execute a power, and the power proves to be invalid, or to have been destroyed, or not to have arisen, or not to authorise the disposition which the testator desires to make, then if the testator has an interest in the property, it will make good the defect in the appointment (*h*).

Defect in power supplied by testator's interest.

A covenant to exercise a general testamentary power of appointment is good, and an action lies for a breach of it, but specific performance will not be decreed (*k*). It may be satisfied by the covenantee taking in default of appointment (*l*). A covenant to exercise a general power in favour of a creditor, so as to give him a first charge on the fund, followed by a will purporting to comply with the covenant, does not give him priority over the other creditors (*m*).

Covenant to exercise general power.

A general testamentary power of appointment, like any other general power, may be released, or the donee may by covenant debar himself from exercising it (*n*). A married woman may by unacknowledged deed release a power given to her in respect of personal property (or, *semble*, in respect of real property), even if her life estate is subject to a restraint on anticipation (*o*).

Release of general power.

If a special power of appointment is exercisable by will only, a covenant to exercise it in a particular way is, it would seem, void (*p*), but an appointment made in accordance with such a covenant is good (*q*). And if the power is exercisable by deed as well as by will, the covenant may operate as a defective execution of the power to which the Court will give effect (*r*).

Covenant to exercise special power.

(*h*) Farwell (3rd ed.), p. 302, citing *Mandeville* v. *Roe*, 1 J. & L. 371; *Cross* v. *Hudson*, 3 Br. C. C. 30; *Mortlock* v. *Buller*, 10 Ves. 292; *Sing* v. *Leslie*, 2 H. & M. 68; *Jones* v. *Southall*, 30 Bea. 187; *Re James*, [1910] 1 Ch. 157 (married woman).

(*k*) *Robinson* v. *Ommaney*, 23 Ch. D. 285; *Re Parkin*, [1892] 3 Ch. 510. As to married women, see *Re Ann*, [1894] 1 Ch. 549, *ante*, p. 791.

(*l*) *Thacker* v. *Key*, L. R. 8 Eq. 408, where the power was special, but the principle seems to be the same. Compare the cases on covenants to leave a sum of money by will, *ante*, p. 30.

(*m*) *Re Lawley*, [1902] 2 Ch. 799; *S.C.* nom. *Beyfus* v. *Lawley*, [1903] A. C. 411.

(*n*) Law of Property Act, 1925, s. 155, replacing Conveyancing Act, 1881, s. 52.

(*o*) *Re Chisholm's Settlement*, [1901] 2 Ch. 82. See *Heath* v. *Wickham*, 5 L. R. Ir. 285.

(*p*) *Thacker* v. *Key*, L. R. 8 Eq. 408; *Re Bradshaw*, [1902] 1 Ch. 436; *Re Evered*, [1910] 2 Ch. 147.

(*q*) *Coffin* v. *Cooper*, 2 Dr. & Sm. 365; *Palmer* v. *Locke*, 15 Ch. D. 294.

(*r*) *Affleck* v. *Affleck*, 3 Sm. & G. 394; *Charlton* v. *Charlton*, [1906] 2 Ch. 523.

Re Cooke.

In *Re Cooke* (*s*) the donee of a special testamentary power of appointment covenanted to appoint to her son not less than £4,000 and not to revoke that appointment. She made a will appointing more than £4,000 to the son, but afterwards made a second will, revoking the first, by which she appointed less than £4,000 to her son. Russell, J., held that the covenant did not prevent the donee of the power from exercising it so as to defeat the covenant; that the covenant to appoint in a particular way was void; and that the covenant not to revoke the appointment, though negative in form, was in substance a covenant to exercise a testamentary power in a particular way and was void.

Release of special power.

The donee of a special testamentary power may release it, unless it is a fiduciary power, or power coupled with a duty (*t*). The rule above stated as to the release of a power by a married woman applies also to special powers (*u*).

An administrative power, such as a power of sale, may be accelerated, but not a power of charging (*v*).

Revocation of power.

A power given by will can, of course, be revoked by a codicil, or a subsequent will. In *Re Brough* (*w*), a testator gave H. a life interest in a fund, and a special power of appointment by will over the capital; by a codicil he revoked all devises and bequests "in favour of" H.; it was held that the power was revoked as well as the life interest.

Power of revocation.

Sometimes property is settled by deed, subject to a power of revocation by will; the question whether such a power can be exercised by implication has been already considered (*x*).

A will exercising a power of appointment is only in certain cases revoked by the marriage of the testator (*y*), but with this exception the rules as to revocation of wills apply to such a

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(*s*) [1923] 1 Ch. 292, distinguishing *Re Evered*, [1910] 2 Ch. 147, where the effect of the covenant was to release the power to such an extent that the covenantee would in default of appointment take a certain sum.

(*t*) *Re Radcliffe*, [1892] 1 Ch. 227; *Re Somes*, [1896] 1 Ch. 250; *Foakes* v. *Jackson*, [1900] 1 Ch. 807. A covenant not to exercise a testamentary power operates as a release: *Davies* v. *Huguenin*, 1 H. & M. 730; *Isaac* v. *Hughes*, L. R. 9 Eq. 191. The principle of these cases is altogether wrong, for their effect is to enable the donee of a testamentary power to convert it into a power to appoint by deed; this view is put with great force by Neville, J., in *Re Evered*, [1910] 2 Ch. 147.

(*u*) *Re Chisholm's Settlement*, *supra*, n. (*o*).

(*v*) *Truell* v. *Tysson*, 21 Bea. 437.

(*w*) 38 Ch. D. 456.

(*x*) As to general powers, *ante*, p. 779. As to special powers, *ante*, p. 805. As to the construction of a special power of revocation, see *Morgan* v. *Gronow*, L. R. 16 Eq. 1; Farwell (3rd ed.), p. 237. The confirmation of an appointment does not release a power of revocation: *Re Lee's Trusts*, [1926] W. N. 220.

(*y*) *Ante*, p. 129. *In b. Russell*, 15 P. D. 111.

Revocation of appointment.

will (*z*). Consequently, a general clause in a will, revoking all former wills, revokes a prior express testamentary appointment, whether the power under which it was made is general or special (*a*), and although the latter will does not execute the power (*b*).

Implied revocation.

The doctrine of implied revocation by a later inconsistent will or codicil also applies to appointments (*c*), so that if a testator, having a general power, makes a will containing a residuary bequest operating as an execution of the power, and afterwards makes another will containing a residuary bequest, this would, it seems, by virtue of section 27 of the Wills Act, operate as a revocation of the previous appointment. Whether a general residuary gift would operate as an implied revocation of an express appointment under a general power made by an earlier will, does not seem to have been decided (*d*). On principle it seems clear that it would not, the doctrine of implied revocation being based on intention. If a testatrix having a special power makes a will expressly exercising it, and makes a subsequent will by which she "gives, devises, and bequeaths" all her property, this does not operate as an implied revocation of the appointment contained in the first will (*e*). But if the second will operates as an exercise of the power (either by referring to it, or by a general gift containing the word "appoint" (*f*)), then the second will impliedly revokes the appointment made by the first (*g*).

Special power.

Implied revocation *pro tanto*.

If a testator exercises a special power of appointment in favour of some of the objects, and by a codicil, without expressly revoking the appointment, makes an appointment of part of the fund in favour of other objects, this only revokes the will to the extent to which it effectively interferes with the original appointment (*h*). In *Duguid* v. *Fraser* (*i*) the testatrix had a power of appointment among her husband and children; she appointed the fund to her husband and children in equal shares;

(*z*) As to these rules, see *ante*, Chap. VII. In *Re Gore-Booth's Estate*, [1908] 1 Ir. R. 387, there were two powers, one to charge a sum by deed, and the other to appoint the sum by deed or will. As to the formalities required to revoke an appointment under the old law, see *Richardson* v. *Barry*, 3 Hagg. 249.

(*a*) *Sotheran* v. *Dening*, 20 Ch. D. 99; *Re Kingdon*, 32 Ch. D. 604; *Cadell* v. *Wilcocks*, [1898] P. 21; *Kent* v. *Kent*, [1902] P. 108.

(*b*) *Harvey* v. *Harvey*, 23 W. R. 476. Some old decisions to the contrary are, it seems, no longer law: see *ante*, p. 154.

(*c*) *In b. McFarlane*, 13 L. R. Ir. 264.

(*d*) See *Cadell* v. *Wilcocks*, [1898] P., at p. 27.

(*e*) *Cadell* v. *Wilcocks*, *supra*.

(*f*) See *Re Mayhew*, [1901] 1 Ch. 677.

(*g*) *Kent* v. *Kent*, [1902] P. 108; *In b. Tenney*, 45 L. T. 78, and other cases cited *ante*, p. 801.

(*h*) *Re Walker*, [1908] 1 Ch. 560.

(*i*) 31 Ch. D. 449.

one of the children predeceased her, and she made a codicil appointing his share to his children; it was held that this invalid appointment did not operate as a revocation *pro tanto* of the appointment by the will to the class, and that the husband and surviving children took the whole fund.

It has been held that if a testator expressly exercises a power by a special testamentary instrument of appointment (not admitted to probate), and afterwards executes a will containing a residuary bequest, the bequest operates as an exercise of the power and as a revocation of the special testamentary appointment, because to prevent this effect a contrary intention must appear from the will, and the Court cannot infer it from the terms of the special appointment (*j*). This unsatisfactory result, it seems, might have been avoided by applying to the Probate Court to allow the special appointment to be proved as part of the will.

Double appointment by will and deed.

In *Re Wells' Trusts* (*k*), the donee of a special power of appointment made a will expressly exercising the power; some years afterwards he executed a deed (not referring to the will) by which he expressly and effectually exercised the power as to four-fifths of the fund, and ineffectually exercised it as to the remaining one-fifth : it was held that the fact of the will being dated before the deed was sufficient evidence of "a contrary intention" within section 24 of the Wills Act, and, consequently, that the will did not speak from the death of the testator so as to revoke the appointment by that deed. It was also held that, as to the one-fifth ineffectually appointed by the deed, the will took effect.

Dependent relative revocation.

The doctrine of dependent relative revocation applies to wills exercising powers of appointment. Consequently, if a testator makes a will exercising a power, and afterwards cancels it under the mistaken impression that in default of appointment the fund will be divided among a certain class of persons, this does not operate as a revocation, and the will stands (*l*). But as in the case of direct gifts, so in the case of appointments under powers, the doctrine is less easy of application where the revocation is effected by an express clause of revocation in a subsequent testamentary instrument. Thus, where a testator made a valid appointment in favour of his younger children, and by a codicil revoked this appointment, and made a fresh appointment which

(*j*) *Re Gibbes' Settlement*, 37 Ch. D. 143.
(*k*) 42 Ch. D. 646.
(*l*) *Stamford* v. *White*, [1901] P. 46. This appears to be the effect of the decision, but the case is badly reported.

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was ineffective, it was held that the revocation nevertheless took effect (*m*).

Ademption.

A testamentary appointment has no operation until the death of the testator; there is no relation back to the date of the will (*n*). It follows that an appointment under a testamentary power may be adeemed by subsequent dealings with the settled property. And there is no distinction, in this respect, between a general and a special power (*o*). Thus, if a testator in exercise of a power appoints Blackacre to A, and Blackacre is subsequently sold and the proceeds invested in the purchase of Whiteacre, the appointment is adeemed, and A takes nothing under the appointment (*p*). So, if part of Blackacre is sold, the appointment is deemed *pro tanto* (*q*). In the case of personal property, such as stock, the same principle applies (*r*). But whether the property is real or personal, the appointment may be so expressed as to show an intention to appoint whatever property may for the time being be subject to the power, and not merely the specific property which is subject to it at the date of the will. Thus, an appointment of stock may take effect notwithstanding changes in investment (*s*).

Jones v. *Southall.*

In *Jones* v. *Southall* (*t*), the settlement under which the testatrix professed to appoint certain investments was invalid, and the appointments appear to have operated merely as bequests: they were held to be adeemed *pro tanto* by reason of the testatrix having called in some of the securities and reinvested the proceeds.

Cooper v. *Martin.*

In *Cooper* v. *Martin* (*u*), the testator devised an estate upon trust for sale, with power of pre-emption to his younger children, and the proceeds were to be held upon such trusts in favour of his issue as his wife should, within a prescribed period, appoint; she appointed the estate by name to the eldest son; this appointment was invalid, not being made within the prescribed

(*m*) *Quinn* v. *Butler*, L. R. 6 Eq. 225. See *Onions* v. *Tyrer*, 1 P. W. 343; *Richardson* v. *Barry*, 3 Hagg. 249, and other cases cited *ante*, p. 150.

(*n*) *Re Moses*, [1902] 1 Ch. 100, aff. s. n. *Beddington* v. *Baumann*, [1903] A. C. 13.

(*o*) *Re Dowsett*, [1901] 1 Ch. 398, approved in *Beddington* v. *Baumann*, *supra*. As to the effect of conversion, see Chap. XXII.

(*p*) *Gale* v. *Gale*, 21 Bea. 349; *Re Dowsett*, [1901] 1 Ch. 398. In *Collinson* v. *Collinson*, 24 Bea. 269, the appointment was by deed. *Gale* v. *Gale* and the other cases are discussed in Farwell (3rd ed.), pp. 246 *seq.*

(*q*) *Blake* v. *Blake*, 15 Ch. D. 481.

(*r*) *Re Brazier Creagh's Trusts*, [1913] 1 Ir. R. 232.

(*s*) See *Re Johnstone's Settlement*, 14 Ch. D. 162; *Re Dowsett*, *supra*; *Willett* v. *Finlay*, 29 L. R. Ir. 497; as to which, see *Re Moses*, [1902] 1 Ch. 100.

(*t*) 32 Bea. 31.

(*u*) L. R. 3 Ch. 47. The case was really one of *falsa demonstratio*: see *post*, p. 1240.

period, and it was therefore unnecessary to decide whether the proceeds of sale would have passed under it: Lord Cairns thought that they would.

In *Beddington* v. *Baumann* (*x*) a testator had a power of appointment among his children over some freehold houses, of which he was tenant for life: he made a will appointing them to two sons; after the date of the will he granted leases of these houses under the Settled Land Acts, partly in consideration of premiums, and these premiums were paid to the trustees and invested by them: on the death of the testator it was held that the investments representing the premiums did not go to the appointees, but went as in default of appointment.

Transfer of property to donee of power.

It has been held that where a married woman, having a power of appointment under a settlement, exercises it by will, and the settlement afterwards comes to an end, the mere fact of her obtaining a transfer to herself of the property comprised in the settlement does not operate as an ademption of the appointment (*y*). But if in such a case the power is exercisable by deed as well as by will, and the transfer professes to be made in exercise of the power to appoint by deed, this operates as an execution of the power, and the appointment by will is revoked (*z*).

Advancement.

In *Re Fox* (*a*), a trust fund was settled upon A. for life, with a power of appointment among four children, who were to take equally in default of appointment; there were the usual hotchpot and advancement clauses. During A.'s life £705 was advanced to R., one of the children, and A., by her will, subsequently appointed an equal fourth part of the fund in favour of each of the children: it was held that R. was not bound to account for the £705.

Destruction of power and creation of new power.

An appointment may also be adeemed by the power under which it was expressed to be made being destroyed. And its efficacy will not, as a general rule, be restored by another equally extensive power being conferred on the testator (*b*), unless the power is a general one, and the will contains a residuary gift; this *prima facie* operates as an exercise of the power (*c*).

(*x*) [1903] A. C. 13, affirming the decision of the Court of Appeal in *Re Moses*, [1902] 1 Ch. 100, *supra*, note (*n*).

(*y*) *Dingwell* v. *Askew*, 1 Cox, 427; *Clough* v. *Clough*, 3 My. & K. 296. These decisions seem contrary to principle, although they probably gave effect to the testatrix's intentions.

(*z*) *Lawrence* v. *Wallis*, 2 Br. C. C. 319.

(*a*) [1904] 1 Ch. 480.

(*b*) *Thompson* v. *Simpson*, 50 L. J. Ch. 461.

(*c*) *Ante*, p. 785. In *Thompson* v. *Simpson* the power was general, but the will contained no residuary gift.

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Effect of s. 23.

It must, however, be observed that the effect of section 23 of the Wills Act (*d*) on cases of this kind has not been fully considered (*e*). In *Airey* v. *Bower* (*f*), most of the learned lords thought that the case fell within that section, and with the same result as that produced by sections 24 and 27. That was the case of a general power being exercised by a general bequest. Whether the same principle would apply to an appointment expressed to be made in exercise of a power, whether general or special, which is subsequently destroyed and replaced by a new power, is another matter, because an appointment of this kind depends on intention, and it seems somewhat difficult to hold that section 23 of the Wills Act can convert an intention to exercise power X into an intention to exercise power Y (*g*). Moreover, it is by no means certain that section 23 applies to powers of appointment at all, for it relates only to property "comprised" in the will, and the better opinion is that property subject to a power of appointment is not "comprised" in the will of the person who exercises the power. The contrary view involves a confusion between property and power (*h*).

Mistake.

If by mistake a deed is so framed as to defeat a previous testamentary appointment, the Court may reform it (*i*).

Act done after testator's death.

It is hardly necessary to say that an appointment is not adeemed by the act of a stranger after the testator's death: the contrary proposition was put forward, unsuccessfully, in the case of *Re Hodgson* (*k*).

Effect of republication.

Under the old law, the republication of a will did not render it a good execution of a power given to the testator after the

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(*d*) "No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

(*e*) In *Walker* v. *Armstrong*, 8 D. M. & G. 531, *infra* n. (*i*), the will was subject to the old law.

(*f*) 12 A. C. 263, *ante*, pp. 788, 808.

(*g*) See *Thompson* v. *Simpson*, 50 L. J. Ch. 461; *ante*, p. 808. In *Gale* v. *Gale*, 21 Bea. 349, Lord Romilly, M.R., thought there was a new estate and a new power in relation to it, and that the will did not operate as an exercise of the old power; but, as Lord St. Leonards points out (Powers, 309), there was no new power. He thought the decision "a narrow construction" of section 23: it has, however, been treated in *Blake* v. *Blake*, 15 Ch. D. 481, *Re Dowsett*, [1901] 1 Ch. 398, and *Re Moses*, [1902] 1 Ch. 100, all cited *supra*, as laying down the correct rule on the question of ademption.

(*h*) As to the meaning of "comprised" in section 24, see *per* Stirling, J., in *Re Wells' Trusts*, 42 Ch. D., at p. 656; Farwell on Powers (3rd ed.), p. 256. The contrary view was expressed by Jessel, M.R., in *Freme* v. *Clement*, 18 Ch. D., at p. 509, but it was dissented from by the Court of Appeal in *Holyland* v. *Lewin*, 26 Ch. D. 266.

(*i*) *Walker* v. *Armstrong*, 8 D. M. & G. 531.

(*k*) [1899] 1 Ch. 666.

date of the will; and consequently, if a testator appointed property in exercise of a power, and the power was afterwards destroyed and replaced by a new power, the republication of the will did not make it a good execution of the new power, even if it was a general power (*l*). It is, of course, clear that, since the Wills Act, a general devise or bequest operates as an execution of a general power conferred on the testator since the date of the will, unless a contrary intention appears by the will (*m*), but the Act does not seem to have made any further alteration in the law as to the execution of powers (*n*).

If this is so, it follows that where a testator by his will expressly exercises a power, whether special or general, in favour of A, and the power is afterwards destroyed and a new power substituted, the mere republication of the will would not make it operate as an execution of the power in favour of A (*o*). And even if the will is expressed to be made in exercise of all powers then vested in the testator, the republication of the will does not, apparently, make it operate as an exercise of an intermediately acquired special power (*p*). But if a testator disposes of property in exercise of all powers which may be vested in him at the time of his death, and republishes it after he has acquired a new power, this makes the will operate as an exercise of it, even if it is a special power, provided, of course, the dispositions of the will are in accordance with the terms of the power (*q*).

Exercise of power in anticipation

The question whether a special power can be exercised by a will made before the power comes into existence has been already discussed (*r*).

Lapse of power.

A power given by will lapses by the death of the donee in the lifetime of the donor (*s*).

The question whether a power to appoint to a number of named persons lapses *pro tanto* by the death of one in the lifetime of the testator is discussed in another chapter (*t*).

(*l*) *Holmes* v. *Coghill*, 7 Ves. 499; 12 Ves. 206; *Lane* v. *Wilkins*, 10 East, 241; *Cowper* v. *Mantell*, 22 Bea. 223.

(*m*) *Cofield* v. *Pollard*, 3 Jur. (N.S.) 1203, and the other cases cited *ante*, p. 785.

(*n*) Unless section 23 affects the question: *ante*, p. 816.

(*o*) The contrary of this proposition seems to be implied in Farwell on Powers (3rd ed.), p. 255.

(*p*) *Hope* v. *Hope*, 5 Giff. 13. In this case the republication was before the Wills Act, but nothing seems to turn on this. See *Re Blackburn*, 43 Ch. D. 75.

(*q*) *Re Blackburn*, 43 Ch. D. 75. As to what amounts to a republication, see *Re Smith*, 45 Ch. D. 632.

(*r*) *Ante*, p. 807.

(*s*) *Jones* v. *Southall*, 32 Bea. 31; *Sharpe* v. *M'Call*, [1903] 1 Ir. R. 179; *Re Young*, [1920] 2 Ch. 427.

(*t*) *Post*, p. 1779, in connection with *Reade* v. *Reade*, 5 Ves. 744.

It has been suggested (*u*) that section 33 of the Wills Act might apply to powers, so that if a testator gave one of his children a power of appointment, and the child died in the testator's lifetime, leaving issue, and having made a will which in terms would be an exercise of the power, the appointment thus made would take effect. It is submitted that this is not so, because the gift of a power of appointment is not a "devise or bequest" of "real or personal estate for any estate or interest" within the meaning of the section 33 (*x*).

Lapse of appointment.

Appointments under powers are liable to failure by lapse if the beneficiary dies during the lifetime of the testator (*y*). But if an appointment is made to A upon trust for B, or upon condition of his giving part of the benefit of the appointment to B, and A dies in the lifetime of the testator, B's interest does not lapse (*z*).

The fact that an appointment is made in pursuance of a covenant does not save it from lapse (*a*).

There are differences between general and special powers in respect of lapse. If a testator specifically executes a general power in favour of A, and A predeceases him, the power will, as a general rule, still be executed by a residuary gift in the will, if there is one (*b*). And it seems that a testamentary appointment, under a general power, to A, in trust for B, which lapses as to the beneficial interest by B's death before the testator, operates as a good appointment to A, who holds the property on the same trusts as if it had been the testator's own (*c*). Again, if a testator executes a general power in favour of a child who predeceases him, leaving issue, the appointment is preserved from lapse by section 33 of the Wills Act (*d*). But special powers stand on a different footing, for in the case of an appointment under a special power lapsing, it will only be executed by a residuary devise or bequest if the residuary devise or bequest is within the scope of the power, and if an intention to exercise it in that way appears by the

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(*u*) Farwell on Powers (3rd ed.), 255.

(*x*) In *Griggs* v. *Gibson*, 35 L. J. Ch. 458, Wood, V.-C., decided that the power was not exercised, because it was determinable at the death of the donee.

(*y*) *Duke of Marlborough* v. *Godolphin*, 2 Ves. sen. 61, and *Re Susanni's Trusts*, 47 L. J. Ch. 65, *ante*, p. 404.

(*z*) *Oke* v. *Heath*, 1 Ves. sen. 135.

(*a*) *Re Brookman's Trust*, L. R. 5 Ch. 182; see *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18.

(*b*) See cases *ante*, p. 786.

(*c*) *Per* Wickens, V.-C., in *Re Davies' Trusts*, L. R. 13 Eq. 163, citing *Chamberlain* v. *Hutchinson*, 22 Bea. 444, and *Wilkinson* v. *Schneider*, L. R. 9 Eq. 423.

(*d*) *Eccles* v. *Cheyne*, 2 K. & J. 676.

will (*e*), because, as already noticed, section 27 of the Wills Act does not apply to special powers (*f*). Nor are special powers within section 33 of the Act, so that an appointment under such a power is not saved from lapse by that section (*g*); nor can the testator prevent an appointment to A under a special power from lapsing by appointing to A's executors or administrators in substitution for him, because they are not objects of the power (*h*).

As to the cases in which an appointment of the "residue" or "remainder" of a fund is held to be an appointment of a specific sum, and those in which it operates as an appointment of the "residue" in the technical sense, so as to include specific appointments which fail, see *post*, pp. 834 *seq.*

As to the result of the failure of a residuary devise or bequest as regards general powers of appointment, see *ante*, pp. 792, 793.

Appointment in discharge of obligation.

An appointment under a general power is like an ordinary legacy in this respect, that if it is made in discharge of a moral or legal obligation, it does not necessarily lapse by the death of the appointee in the testator's lifetime (*i*).

Failure of appointment under general power.

An appointment under a general power may fail *ex post facto* in other cases besides that of lapse, as where it is made to take effect upon a contingency which does not happen. In such a case it will, as a general rule, be executed by a general devise or bequest (*k*).

Failure of appointment under special power.

An appointment under a special power may also fail in other cases besides that of lapse, and the result is, it seems, the same as if it had lapsed (*l*) : the property so appointed may pass under an appointment of the "residue" of the property subject to the power, or under a residuary devise or bequest, or it may go as unappointed.

Acceleration.

As to the acceleration of appointments, see *ante*, p. 707.

Cy-près.

Where a testator, in exercising a special power of appointment over land, attempts to create an estate tail by purchase

(*e*) As in *Oke* v. *Heath*, 1 Ves. sen. 135; *Re Hunt's Trusts*, 31 Ch. D. 308, *post*, p. 835.

(*f*) *Ante*, p. 805. In *Freme* v. *Clement*, 18 Ch. D. 499, Jessel, M.R., held that the word "devise," in section 25 of the Wills Act, includes an appointment under a special power, so that property appointed by an appointment which fails would pass by the residuary devise, but this is erroneous : *Holyland* v. *Lewin*, 26 Ch. D. 266.

(*g*) *Griffiths* v. *Gale*, 12 Sim. 327; *Freeland* v. *Pearson*, L. R. 3 Eq. 658 : *Holyland* v. *Lewin*, 26 Ch. D. 266, disapproving *Freme* v. *Clement*, 18 Ch. D. 499.

(*h*) *Maddison* v. *Andrew*, 1 Ves. sen. 57; *Butcher* v. *Butcher*, 1 V. & B. 79.

(*i*) *Stevens* v. *King*, [1904] 2 Ch. 30.

(*k*) *Re Elen*, 68 L. T. 816.

(*l*) *Per* Hall, V.-C., in *Champney* v. *Davy*, 11 Ch. D., at p. 958.

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beyond the limits allowed by law, effect will, if possible, be given to his intention under the doctrine of *cy-près* (*m*).

Perpetuities.

The validity of appointments under special powers, with reference to the Rule against Perpetuities, is considered elsewhere in Chapter X (*n*).

Composite fund.

Where a testator has a special power of appointment over property, and also has property of his own, and disposes of both properties in one mass in favour of objects of the power, upon trusts which are good as regards his own property, and void for remoteness as regards the appointed property, the fund will be apportioned (*o*).

"Demonstrative" appointment.

Where a testatrix, having a power of appointment in favour of her children, bequeathed pecuniary legacies to them, and appointed the settled fund, subject to those legacies, to X, it was held that the legacies were primarily payable out of the settled fund (*p*).

"Specific" appointment.

Where a testator has property of his own, and also a power of appointment (whether general or special) over settled property, and bequeaths sums of money to various persons, the question whether they are ordinary legacies, or whether they are appointments of the settled fund, depends on the wording of the will. The point is of importance with reference to the question of interest (*q*) as well as of ademption (*r*).

Appointment to objects and non-objects in shares.

If a testator who has a special power of appointment appoints the fund to six people as tenants in common, of whom only three are objects of the power, each of them takes one-sixth, and the rest of the fund goes as unappointed. It is immaterial that the appointment is in form an appointment to a class (*s*). But if a fund is appointed to a number of persons in such a way that it is impossible to say how much goes to objects and how much to non-objects, the appointment fails altogether (*t*).

Where the appointment is to objects and non-objects as joint tenants, the rule does not seem to be settled. In accordance with the principle above stated, the appointment would be bad. But in *Alexander* v. *Alexander* (*u*), a testatrix, who had a power

(*m*) *Line* v. *Hall*, 43 L. J. Ch. 107, *ante*, p. 262, n. (*x*).
(*n*) *Ante*, p. 288.
(*o*) *Re Wright*, [1906] 2 Ch. 288.
(*p*) *Disney* v. *Crosse*, L. R. 2 Eq. 592.
(*q*) *Davies* v. *Fowler*, L. R. 16 Eq. 308, and other cases cited, *post*, p. 829.
(*r*) *Re Young*, 52 L. T. 754.
(*s*) *Sadler* v. *Pratt*, 5 Sim. 632; *per* Kindersley, V.-C., in *Harvey* v. *Stracey*, 1 Drew. 136-7; *Re Gratwick's Trusts*, L. R. 1 Eq. 177; *Re Farncombe's Trusts*, 9 Ch. D. 652; *Re Witty*, [1913] 2 Ch. 666.
(*t*) *Re Brown's Trust*, L. R. 1 Eq. 74.
(*u*) 2 Ves. sen. 640. See Sugden, V. & P. 504.

of appointment among her children, appointed a share for the benefit of her son Francis and his wife and children, and it was held by Sir T. Clarke, M.R., that Francis took the whole. The M.R. recognised the principle that where a power is so executed that "the boundaries between the excess and execution are not distinguishable, it [the appointment] will be bad," but he read the will as equivalent to an appointment to such of the appointees as were capable of taking. In *Re Kerr's Trust* (*x*), where the donee of a power to appoint among children, appointed the fund to her children E. and C. (E. being illegitimate), it was held by Jessel, M.R., that the testatrix's obvious intention was to appoint the fund in moieties, and that consequently C. took one half and the other half went in default of appointment. The M.R. disapproved of the decision in *Alexander* v. *Alexander*, which is, indeed, clearly bad law.

Rule in *Lassence* v. *Tierney*.

The doctrine laid down in *Lassence* v. *Tierney* (*y*) and other cases—namely, that if there is an absolute gift, followed by directions or conditions which are void, the absolute gift takes effect—applies to appointments under powers; and consequently, if a testator makes an absolute appointment, and adds some direction or condition which is void (whether because it infringes the Rule against Perpetuities, or is in excess of the power, or for any other reason), the absolute appointment takes effect (*z*). But if the condition is not severable from the appointment, the latter is void *in toto* (*a*).

Alternative appointment.

If the testator makes an appointment in favour of an object, subject to conditions which are void, and then goes on to provide that if the conditions cannot take effect, he appoints the fund to X, an object of the power, this latter appointment takes effect (*b*).

Invalid, followed by valid, appointment.

If the testator makes an appointment in favour of a person who is not an object of the power, and subject thereto appoints to objects, the later appointment takes effect (*c*).

(*x*) 4 Ch. D. 600, where *Humphrey* v. *Tayleur*, Amb. 136, is referred to. *Bruce* v. *Bruce*, L. R. 11 Eq. 371, seems to have been erroneously decided on this point.

(*y*) 1 Mac. & G. 551. See *post*, p. 1151.

(*z*) *Thornton* v. *Bright*, 2 My. & C. 230; *Fry* v. *Capper*, Kay, 163: *Re Jeaffreson's Trusts*, L. R. 2 Eq. 276; *Dowglass* v. *Waddell*, 17 L. R. Ir. 384; *Churchill* v. *Churchill*, L. R. 5 Eq. 44; *Cooke* v. *Cooke*, 38 Ch. D. 202; *Re Boyd*, 63 L. T. 92; *Stephens* v. *Gadsden*, 20 Bea. 463; *Gerrard* v. *Butler*, 20 Bea. 541; *Re Lord Sondes' Will*, 2 Sm. & G. 416; *Woolridge* v. *Woolridge*, Johns. 63; *Webb* v. *Sadler*, L. R. 8 Ch. 419. See also *Re Witty*, [1913] 2 Ch. 666; *Re Oliphant's Trusts*, 116 L. T. 115.

(*a*) *Re Perkins*, [1893] 1 Ch. 283, where *Sadler* v. *Pratt*, 5 Sim. 632, and *Watt* v. *Creyke*, 3 Sm. & G. 362, are commented on.

(*b*) *Re Crawshay*, 43 Ch. D. 615.

(*c*) *Carr* v. *Atkinson*, L. R. 14 Eq. 397; *Williamson* v. *Farwell*, 35 Ch. D. 128, where the earlier authorities are examined. Compare *Re Crawshay*, *supra*.

Valid, followed by invalid, appointment.

So a valid appointment made by will is not impliedly revoked by an invalid appointment made by codicil (*d*).

Mistake of testator as to amount of fund.

As a general rule, where a testator appoints a specific part of a fund to A and makes no substitutional or residuary appointment which can apply to it, and the appointment fails to take effect in favour of A, the appointed sum goes to the persons entitled in default of appointment. To this rule there seems to be an exception in cases where the testator has made a mistake as to the amount of the fund. Thus, in *Eales* v. *Drake* (*e*), the testator thought he had a power of appointing £10,000, and he accordingly appointed various specific sums, amounting in all to £10,000, to various objects of the power; he really only had power to appoint £7,000. One of the appointees predeceased him. It was held by Jessel, M.R., that the surviving appointees, and not the persons entitled in default of appointment, took the benefit of the lapse. It is not easy to justify the exception on principle, but no doubt it works substantial justice.

Implied gift to objects.

The cases where a gift to the objects of a power is implied in default of appointment are referred to in Chapter XIX (*f*).

Effect of appointment.

Any alienation (whether voluntary or by act of law) on the part of a person, in respect of a share or interest to which he is entitled in default of appointment is, as a general rule, overridden by a subsequent exercise of the power by the donee (*g*).

Death of one tenant in common.

The doctrine of Lord St. Leonards, that where one of several persons to whom property is given in default of appointment dies in the lifetime of the testator this defeats the power *pro tanto*, is discussed elsewhere (*h*).

Abatement.

Appointments are subject to abatement. Thus, if a testator appoints £9,900 to A and £10,000 to B, having, in fact, only power to appoint £10,000 in all, that sum is divided between A and B in the proportion of 99 to 100 (*i*).

Whether residue of fund abates.

If a testator appoints specific sums out of a fund to A and B, and the "residue" to C, and the fund realises less than the testator contemplated, the question whether the three abate rateably, or whether the deficiency falls primarily on the

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(*d*) *Duguid* v. *Fraser*, 31 Ch. D. 449; *Re Wells' Trusts*, 42 Ch. D. 646.

(*e*) 1 Ch. D. 217. Compare the rules as to abatement in cases where the fund is insufficient.

(*f*) *Ante*, p. 628.

(*g*) *Re Vizard*, L. R. 1 Ch. 588; *De Serre* v. *Clarke*, L. R. 18 Eq. 587; *Re Maddy's Estate*, [1901] 2 Ch. 820. See *Lord* v. *Bunn*, 2 Y. & C. C. C. 98; *Chambers* v. *Smith*, 3 A. C. 795.

(*h*) *Post*, p. 1779; *Reade* v. *Reade*, 5 Ves. 744.

(*i*) *Laurie* v. *Clutton*, 15 Bea. 65.

" residue " appointed to C, depends on whether the testator used the word " residue " (or some equivalent word) in the technical sense (*k*). A similar question arises when there is no appointment of the residue. These questions are discussed later (*l*).

Augmentation.

Conversely, an appointment of a specific sum out of a fund may operate to give the appointee a larger sum if the fund increases in amount (*m*).

Limitations in default of appointment.

Limitations in default of appointment, following a power which is void for remoteness, are not invalid unless they themselves contravene the Rule against Perpetuities (*n*). So a limitation in default of appointment may be good, although the power itself cannot be exercised, or fails by reason of the death of the donee in the testator's lifetime (*o*).

Effect of proviso.

In some cases a question arises whether a proviso following a gift in default of appointment, is intended to limit the power, or only to apply in default of appointment (*p*).

Restriction of gift in default of appointment.

" There is, it seems," says Mr. Jarman (*q*), " no necessary inference that the testator intends that a qualification, applied by him exclusively to the objects of the power, should be extended to the objects of the gift, expressly limited in default of appointment to a class of objects identical in other respects with that of the power." Thus, where (*r*) the devise was to A for life, with remainder to such child and children of A and him surviving, who should be educated as a member of the Church of England, in such parts and proportions, etc., as A should appoint, and in default of such appointment, to the first son of A who should be educated as aforesaid and the heirs of the body of such son, with divers remainders over : it was contended that as the power of appointment was restricted to " surviving " children, the gift over was to be construed with a like limitation; but Sir J. Leach, M.R., held that such a construction would be contrary to the force of the expressions used, and was not warranted by necessary or rational inference.

(*k*) *Petre* v. *Petre*, 14 Bea. 197; *Harley* v. *Moon*, 1 Dr. & Sm. 623; *Miller* v. *Huddlestone*, L. R. 6 Eq. 65; *De Lisle* v. *Hodges* (appointment by deed), L. R. 17 Eq. 440; *Re Currie*, 36 W. R. 752.

(*l*) *Post*, p. 834.

(*m*) See *Re Cruddas*, [1900] 1 Ch. 730, stated *post*, p. 834.

(*n*) *Re Abbott*, [1893] 1 Ch. 54.

(*o*) *Edwards* v. *Saloway*, 2 Ph. 625, and other cases cited *ante*, p. 404. *Webb* v. *Sadler*, L. R. 8 Ch. 419, and *Williamson* v. *Farwell*, 35 Ch. D. 128, were both cases on settlements, but the principle appears to be the same.

(*p*) *Re Simmons*, 87 L. T. 594.

(*q*) First ed., p. 486.

(*r*) *Smith* v. *Death*, 5 Madd. 371. Mr. Jarman's citation of the case is not quite accurate.

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Effect of subsequent events.

In considering whether an appointment by will in exercise of a special power is good within the Rule against Perpetuities, the test is to place the appointment in the instrument creating the power, in lieu of the power itself (*s*), and it is, therefore, sometimes said that a will executing a special power is to be read into the instrument creating it. But this is not true for all purposes; in questions of lapse and ademption, for example, events subsequent to the execution of the will must be considered (*t*).

Appointment by reference.

Where a testator, having a special power, appoints to the uses or trusts of an existing settlement, or "such of them as are capable of taking effect," these words may be construed as meaning what the law allows to take effect (*u*). The question is considered in Chapter XX.

Doctrine of election.

It is clear that the doctrine of election is applicable to cases of appointment under a power, so that if one having a special power by his will gives benefits out of his own property to the objects of the power, and appoints the subject of the power to strangers, or to an object of the power charged in favour of strangers, the former will be obliged to elect in favour of the latter (*x*). And a similar rule applies where the testator purports to exercise a power which he erroneously supposes himself to possess (*y*). But the doctrine of election may be excluded if the testator shows that he is aware that the appointment is of doubtful validity (*z*). And in cases where the appointment is made to the objects of the power absolutely, and the donee superadds a proviso or condition in favour of strangers to the power, though the proviso is void, no case of election arises. The Court reads the will as if all the passages in which such attempts are made were swept out of it for all purposes; that is, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee, but also so far as they might otherwise have been relied upon as raising a case of election (*a*).

Where doctrine does not apply.

(*s*) Sugden, Powers, 396. The rule as so stated is somewhat misleading, for it may be necessary to regard the state of facts at the time the appointment takes effect: *ante*, p. 290.

(*t*) *Re Dowsett*, [1901] 1 Ch. 398. The appointment does not relate back in point of time to the creation of the power: Farwell (3rd ed.), p. 331.

(*u*) *Re Finch and Chew's Contract*, [1903] 2 Ch. 486.

(*x*) *Whistler* v. *Webster*, 2 Ves. jun. 367; and see *Kater* v. *Roget*, 4 Y. & C. 18; *Prescott* v. *Edmunds*, 4 L. J. (o.s.) Ch. 111; *Fearon* v. *Fearon*, 3 Ir. Ch. 19; *Reid* v. *Reid*, 25 Bea. 469; *Tomkyns* v. *Blane*, 28 Bea. 422; *Cooper* v. *Cooper*, L. R. 6 Ch. 15; 7 H. L. 53; *White* v. *White*, 22 Ch. D. 555; *Re Wheatley*, 27 Ch. D. 606; *King* v. *King*, 13 L. R. Ir. 531.

(*y*) *Re Brooksbank*, 34 Ch. D. 160.

(*z*) *Post*, p. 827.

(*a*) *Carver* v. *Bowles*, 2 R. & My. 301; *Church* v. *Kemble*, 5 Sim. 525; *Blacket* v. *Lamb*, 14 Bea. 482; *Woolridge* v. *Woolridge*, Johns. 63; *Churchill* v. *Churchill*, L. R. 5 Eq. 44; *King* v. *King*, 15 Ir. Ch. 479. See this class

Where appointment is void for remoteness and there is a residuary appointment.

A residuary appointment that carries an ill-appointed portion of the fund is, in this respect, undistinguishable from an absolute appointment with ineffectual modifications. Thus, where the donee of a special power appointed part of the fund upon trusts that were void for remoteness, and the residue to A and B, to whom also he bequeathed part of his own estate, it was held first that the ill-appointed part did not pass as in default of appointment, but fell into the residue, and, secondly, that A and B were not bound to elect in favour of the remote objects. James, V.-C., collected from the authorities that: "The rule as to election is to be applied as between a gift under a will and a claim dehors the will and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will" (*b*).

Where appointment is void for remoteness and property goes as in default of appointment.

It has been held that the same rule applies where the ill-appointed property goes as in default of appointment. Thus, in *Re Warren's Trusts* (*c*), a testatrix made an appointment which was void for remoteness, and bequeathed property of her own to the persons entitled in default of appointment, and it was held that they were not bound to elect. It is true that in *Re Bradshaw* (*d*) a different rule was applied. There the testator made an appointment which was void for remoteness, and bequeathed property of his own to A. E. B., one of the persons entitled in default of appointment, and it was held by Kekewich, J., that A. E. B. was bound to elect. The learned Judge said that he did not see any difference in principle between an appointment which is void for remoteness and one which is void because it is made to persons who are not objects of the power. But this decision was disapproved by Farwell, J., in *Re Oliver's Settlement* (*e*), on the ground that the Rule against Perpetuities is a rule of public policy, and that the Court will not apply the doctrine of election in order to enable a testator to evade it. It is difficult to see why an attempt to evade the Rule against Perpetuities should be treated with greater severity than an attempt by a testator to give away property which does not belong to him. However, the principle thus laid down was

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of cases distinguished, 22 Ch. D., at p. 559. The doubts expressed in *Moriarty* v. *Martin*, 3 Ir. Ch. 26, whether this is law except in cases where the proviso is in terms "so far as lawfully may be" (as in *Carver* v. *Bowles*) have not prevailed. And see the doctrine recognised in *Roach* v. *Trood*, 3 Ch. D. 429, where, however, it was excluded by the appointee having executed the appointment (which was by deed) and so accepted the proviso. As to the question whether the appointment is in the first instance absolute, *vide ante*, p. 336 *seq.* Mr. Gray does not approve of the doctrine (Perp. §§ 557 *seq.*).

(*b*) *Wollaston* v. *King*, L. R. 8 Eq. 165; *Wallinger* v. *Wallinger*, L. R. 9 Eq. 301; *Burton* v. *Newbery*, 1 Ch. D. 242; *Bizzey* v. *Flight*, 3 Ch. D. 274.

(*c*) 26 Ch. D. 208; *Re Handcock's Trusts*, 23 L. R. Ir. 34.

(*d*) [1902] 1 Ch. 436.

(*e*) [1905] 1 Ch. 191.

acted on by Warrington, J., in *Re Beale's Settlement* (*f*), by Buckley, J., in *Re Wright* (*g*), and by Eve, J., and the Court of Appeal, in *Re Nash* (*h*), where the appointment was bad under the rule in *Whitby* v. *Mitchell* (*i*).

But the principle of these cases does not apply where a disposition is bad by foreign law and the foreign heirs are put to their election (*k*).

Express appointment by way of substitution.

In *Re Swinburne* (*l*), a testatrix having a special power of appointment, by her will appointed part of the fund to persons who were, and part to persons who were not, objects of the power, and she declared that in case of the failure of any of the trusts thereinbefore declared, the parts as to which the trusts should fail should be held upon the trusts declared of the parts as to which the trusts should not fail : it was held that no case of election arose.

There must be an actual disposition of property belonging to the person who is to be put to his election.

Where a person having a testamentary power of appointment over a fund which in default of appointment belongs to A, makes his will and thereby expressly declares that he abstains from making any appointment, on the ground that the fund will devolve (as he supposes) to B, and gives A certain benefits by his will; A is not put to his election, since by taking both he disappoints no actual disposition of the testator : all that can be said is that the testator was mistaken (*m*).

Whether married woman can raise case of election.

The question whether a married woman can raise a case of election against her husband, next-of-kin, or other persons, by exercising a power of appointment, is discussed in Chapter XVI.

There must also be property of the testator to compensate the disappointed devisee.

A case of election arises where a testator, whether under a power or not, gives property which belongs to one person to another, and gives to the former some property of the testator; but there must be some " free disposable property " given to the person who is put to his election, which, if he elects to take against the will, may be laid hold of to compensate the dis-

(*f*) [1905] 1 Ch. 256.

(*g*) [1906] 2 Ch. 288.

(*h*) [1909] 2 Ch. 450; [1910] 1 Ch. 1. The doctrine of election in cases of appointments under powers is not very consistent or satisfactory. Mr. Gray (Perp. §§ 561 *seq.*) has some remarks on the cases which are well worth reading. He approves of the decision in *Re Bradshaw*. Mr. Gray is a staunch defender of the modern Rule against Perpetuities, and his protest against the tendency of our Courts to regard the Rule as so *sacrosanct* that a conscious or unconscious attempt to evade it is something morally wrong, is therefore of especial weight. Mr. Theobald also has some excellent remarks on the decisions in *Re Warren's Trusts*, *Re Bradshaw*, and *Re Oliver*, in the preface to the 7th ed. of his treatise on Wills; they did not, however, commend themselves to the Court of Appeal in *Re Nash*.

(*i*) *Ante*, p. 257.

(*k*) *Re Ogilvie*, [1918] 1 Ch. 492.

(*l*) 27 Ch. D. 696.

(*m*) *Langslow* v. *Langslow*, 21 Bea. 552; see also *Box* v. *Barrett*, L. R. 3 Eq. 244; *Re Jack*, [1899] 1 Ch. 374.

appointed beneficiary (*n*). The doctrine is therefore inapplicable where the will dealt only with property subject to special powers of appointment. Thus, where a man had an exclusive power of appointing an estate to his children and grandchildren, and an exclusive power of appointing a fund to his children only; and appointed the estate to some of his children, and the fund to his children and to a grandchild, it was held that the children were not bound to elect between giving effect to the appointment of a share in the fund to the grandchild and rejecting the estate appointed to them under the first power (*o*).

Doubtful intention.

Where a testator purports to exercise a power of appointment in favour of persons who are not objects of it, and gives his own property to the persons entitled in default of appointment, the doctrine of election is excluded if the testator appoints "so far as he lawfully can," or provides for the case of the appointment failing (*p*).

Other cases of election.

Questions of election may also arise in cases where a testator having a power of appointment does not dispose of his own property in favour of the objects of the power. Thus, in *Re Wells' Trusts* (*q*), there was a marriage settlement under which several appointments by deed and will were made : in the result, the eldest son of the marriage took the settled real estate by title paramount, adversely to the settlement, and also took part of the settled personalty under the appointments made by deed : it was held that the terms of the appointments showed that the benefits thereby appointed to the son were intended to be in addition to the real estate, and that he was not bound to elect between them (*r*). One of the appointments, however, was made in favour of persons not objects of the power, and this share consequently passed by the will of the appointor, by which the residue of the settlement funds was appointed to the eldest son : it was held that he was bound to elect between the real estate and the appointed residue.

Hotchpot.

Where there is a power to appoint to a class, and a gift to the class in default of appointment, and the will creating the power contains a provision directing that members of the class to whom

(*n*) *Per* Lord Loughborough, *Bristow* v. *Warde*, 2 Ves. jun. 350.
(*o*) *Re Fowler's Trusts*, 27 Bea. 362; *Re Aplins' Trust*, 13 W. R. 1062.
(*p*) *Church* v. *Kemble*, 5 Sim. 525; *Re Swinburne*, 27 Ch. D. 696. Compare *Re Wells' Trusts*, 42 Ch. D. 646.
(*q*) 42 Ch. D. 646.
(*r*) A question also arose whether section 24 of the Wills Act had the effect of making the appointment by will revoke one of the appointments by deed. As to this, see *ante*, p. 813.

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the testator has made advances during his lifetime shall bring them into account, this operates only on such part of the fund, if any, as remains unappointed (*s*).

A hotchpot clause will not, as a general rule, be implied, either in the will creating the power or in the will by which it is exercised, the result being that if part of the fund is appointed to one of the class, and the rest of the fund is unappointed, the appointee is entitled to share in the unappointed part without bringing the appointed part into hotchpot, even if the appointor expressly says that he makes no appointment of the unappointed part in order that it may pass directly to the other members of the class (*t*). In the case of appointments by deed, an appointment to a member of the class "as his share" does not imply a hotchpot clause (*u*). But whether the appointment is made by deed or will, the appointor may, of course, show, expressly or impliedly, an intention to exclude an appointee from sharing in the unappointed part; in other words, this operates as an implied appointment to the other objects (*x*).

In *Re Buckley's Trusts* (*y*) a testator who had a power of appointment among his children, with a limitation in default to the children equally (but no hotchpot clause), appointed real estate unequally among his children, and provided that if any of his children should die in his lifetime leaving issue living at his death, then no child taking under the appointment should be entitled to any share "so lapsing," without bringing his or her appointed share into hotchpot; one of the daughters died in the testator's lifetime, and it was held by Kekewich, J., that the hotchpot clause was operative, and that her heir at law was entitled to a share.

Satisfaction.

Where a person has a power of appointment by deed or will, and he makes one appointment by deed and another by will to the same person, the question may arise whether either of the appointments revokes the other (*z*). Another question which also sometimes arises is whether the appointments are cumulative or substitutionary, or whether one operates as a satisfaction or

Double portions.

(*s*) *Brocklehurst* v. *Flint*, 16 Bea. 100.

(*t*) *Re Jack*, [1899] 1 Ch. 374; *Langslow* v. *Langslow*, 21 Bea. 552. As to the time for valuing the appointed share, see *Re Kelly's S. T.*, [1910] 1 Ch. 78.

(*u*) *Wilson* v. *Piggott*, 2 Ves. jun. 351; *Wombwell* v. *Hanrott*, 14 Bea. 143. See *Walmsley* v. *Vaughan*, 1 De G. & J. 114.

(*x*) *Alloway* v. *Alloway*, 4 Dr. & War. 380, where *Fortescue* v. *Gregor*, 5 Ves. 553, is referred to. See *Foster* v. *Cautley*, 6 D. M. & G. 55; *Clune* v. *Apjohn*, 17 Ir. Ch. 25; *Armstrong* v. *Lynn*, Ir. R. 9 Eq. 186.

(*y*) [1893] W. N. 95.

(*z*) *Re Wells' Trusts*, 12 Ch. D. 646, *ante*, p. 813.

ademption of the other (*a*). Where the testator is the father of or stands *in loco parentis* towards the appointee, it seems that the rule against double portions applies (*b*) : in other cases it is a question of intention (*c*). In *Re Ashton* (*d*), the donee of a special power made a will by which she directed the trustees to divide the fund equally between her three children; by irrevocable deeds-poll executed after the will she appointed a third to one of the children : it was held by Stirling, J., that the child to whom the appointment was made by deed was entitled to share equally with the other children under the will. On appeal, evidence was adduced to show that the child in question (a married woman) had in the lifetime of the testatrix accepted the third appointed to her by the deed-poll in prepayment or anticipation of the third appointed to her by the will, and the Court of Appeal held that she had done so (*e*).

Re Ashton.

Interest on appointed sum.

A sum appointed by will out of a trust fund under a general power of appointment, is looked upon as the same thing as an ordinary legacy, and only carries interest from the expiration of a year from the testator's death (*f*), unless it is payable at a time fixed by the will, in which case it carries interest from that time (*g*); or unless it is directed to be severed from the rest of the fund immediately after the death of the testator, in which case it carries interest from that time (*h*); or unless it is payable out of a reversionary fund, in which case it carries interest from the time when the fund falls into possession (*k*). And where a testatrix, having a general power of appointment over a sum of £5,000, and certain stocks, appointed to A and B the £5,000 and such portion of the stocks as would make up £9,000 : it was held that both appointments, that of the £5,000 and that of the stocks to be appropriated to make up the £9,000, were specific, and that consequently the whole £9,000 carried the income from the death of the testatrix (*l*).

Re Marten.

(*a*) As to the distinction between ademption and satisfaction, see *post*, p. 1121.

(*b*) *Montague* v. *Montague*, 15 Bea. 565; *Re Peel's Settlement*, [1911] 2 Ch. 165.

(*c*) *Re Tancred's Settlement*, [1903] 1 Ch. 715, explaining *England* v. *Lavers*, L. R. 3 Eq. 63.

(*d*) [1897] 2 Ch. 574; [1898] 1 Ch. 142.

(*e*) *Re Ashton* is discussed in *Re Eardley's Will*, [1920] 1 Ch. 397. Compare the rule where part of the fund is unappointed, *ante*, p. 828.

(*f*) *Tatham* v. *Drummond*, 2 H. & M. 262.

(*g*) *Gibbon* v. *Chaytor* (*Re Gyles*), [1907] 1 Ir. R. 65.

(*h*) *Dundas* v. *Wolfe Murray*, 1 H. & M. 425.

(*k*) *Re Ludlam*, 63 L. T. 330. Compare *Lord* v. *Lord*, L. R. 2 Ch. 782, where the appointed sums were not payable until certain litigation should terminate.

(*l*) *Re Marten*, [1901] 1 Ch. 370; *Davies* v. *Fowler*, L. R. 16 Eq. 308.

Contingent appointment under special power does not carry interest.

A contingent appointment of a sum of money under a special power does not, as a general rule, carry interest. Consequently, where a fund is given subject to a special power of appointment in favour of the donee's children, and in default in trust for all the children who attain twenty-one, and the donee appoints part of the fund to a child under age contingently on its attaining twenty-one, the income of that part, during the minority of the child, goes to the children who have attained twenty-one (*m*).

Intermediate income.

In *Long* v. *Ovenden* (*n*), the testatrix had a special power of appointment among her children; she appointed a share to her son A for life, and "from and after" his death to her grandson B (not an object of the power) as and when he should attain the age of twenty-one years, and if he should die under that age then to the testatrix's daughter C. The son survived the testatrix, and died before B attained twenty-one. It was held by Jessel, M.R., both on principle and by reason of the words "from and after," that if the appointment to B had been valid he would have been entitled to the intermediate income on attaining twenty-one, and that consequently, in the event of his dying under that age, C would be entitled to it.

Special power exercised by appointment to trustees.

Where a person having a special power over property vested in trustees, appoints it to other trustees for the objects of the power, the question whether the original trustees ought to transfer the property to the trustees appointed by the donee of the power, depends to a great extent on the terms of the instrument creating the power: if it shows an intention that the original trustees should execute the trust, they are bound to do so (*o*).

If the donee of a special power of appointment over real estate appoints it to trustees upon trust to sell and hold the proceeds upon trust for the objects of the power, this vests the legal estate in them, and they will be the proper persons to sell, although the trustees of the instrument creating the power may have an express power of sale (*p*). The same principle applies where the limitations are equitable (*q*).

(*m*) *Gotch* v. *Foster*, L. R. 5 Eq. 311. As to interest on contingent legacies, see *post*, p. 1077.

(*n*) 16 Ch. D. 691. See *Re Clements*, [1894] 1 Ch. 665.

(*o*) *Busk* v. *Aldam*, L. R. 19 Eq. 16; *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172; *Scotney* v. *Lomer*, 31 Ch. D. 380; *Re Tyssen*, [1894] 1 Ch. 56; *Re Mackenzie*, [1916] 1 Ch. 125; *Re Mackenzie*, [1917] 2 Ch. 58.

(*p*) *Re Paget*, [1898] 1 Ch. 290, following *Kenworthy* v. *Bate*, 6 Ves. 793, and *Cowx* v. *Foster*, 1 J. & H. 30; *Re Ainsworth*, 125 L. T. 755 (where the trustees were given powers of management).

(*q*) *Re Redgate*, [1903] 1 Ch. 356; *Re Adams' Trustees and Frost*, [1907] 1 Ch. 695.

Costs and expenses.

Where appointments of specific sums, parts of a trust fund, are made, and the residue of the fund is then appointed, the probate or estate duty, and the expenses of administering the fund, ought, as a general rule, to be borne rateably by all the appointees (*r*). But, of course, if an appointment is made of a "clear" sum, or a sum to be paid "without any deduction," the expenses must be paid out of the other part of the fund (*s*).

The same rule applies, in general, to the appointed and unappointed parts of a fund (*t*).

Law of domicil.

VIII.—Construction of Appointments.—The general principle, that a will is construed in accordance with the law of the testator's domicil, cannot always be strictly applied to testamentary appointments, because many foreign systems of law do not recognise powers as distinct from ownership. If possible, therefore, the will of a domiciled foreigner, who has a testamentary power of appointment over a trust fund, subject to the jurisdiction of the English courts, will be construed according to English law (*u*).

General rules of construction.

As a general rule, the same canons of construction apply to an appointment under a power as if it were a direct gift (*x*), so that (for example) such questions as whether the property subject to the power is described with sufficient accuracy in the appointment (*y*); or whether an appointee takes a vested or a contingent interest (*z*); or whether a contingent remainder created by appointment is a legal limitation and therefore bad for want of an estate of freehold to support it (*a*); or how a class should be

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(*r*) *Re Chisholm*, [1902] 1 Ch. 457; *Re Saunders*, [1898] 1 Ch. 17; *Re Coxwell's Trusts*, [1910] 1 Ch. 63; *Warren* v. *Postlethwaite*, 2 Coll. 108; *Re Shaw*, [1895] 1 Ch. 343.

(*s*) *Ibid.* See also *Re Currie*, 36 W. R. 752, and *Davies* v. *Fowler*, L. R. 16 Eq. 308, where the words of the will were treated as special.

(*t*) *Trollope* v. *Routledge*, 1 De G. & Sm. 662; *Moore* v. *Dixon*, 15 Ch. D. 566; *Re Lambert*, 39 Ch. D. 626.

(*u*) See *Re Harman*, [1894] 3 Ch. 607; *Re Price*, [1900] 1 Ch. 442, *ante*, p. 775.

(*x*) *Oke* v. *Heath*, 1 Ves. sen. 135; *Easum* v. *Appleford*, 5 My. & Cr. 56; *Freme* v. *Clement*, 18 Ch. D., at p. 504.

(*y*) The question often arises whether an appointment of real estate by a generic or specific description, passes real estate subject to a trust for sale, the testator having a power of appointment over the proceeds; and conversely, whether a gift of personal property passes money which is subject to a trust for investment in land; see *Adams* v. *Austen*, 3 Russ. 461; *Stead* v. *Newdigate*, 2 Mer. 521; *Gillies* v. *Longlands*, 4 De G. & S. 372, and other cases cited in *ante*, p. 727; *Re Lowman*, [1895] 2 Ch. 348; *Cooper* v. *Martin*, L. R. 3 Ch. 47, and other cases cited, *post*, p. 1240.

(*z*) *Doe* d. *Vessey* v. *Wilkinson*, 2 T. R. 209; *Re Shuckburgh's Settlement*, [1901] 2 Ch. 794.

(*a*) *Cunliffe* v. *Brancker*, 3 Ch. D. 393; *post*, p. 1417. *Whitby* v. *Mitchell* (*ante*, p. 257) was the case of an appointment by deed.

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ascertained (*b*); or whether appointees take *per capita* or *per stirpes* (*c*), are governed by the ordinary rules of construction. And the question whether an appointment in fee is defeated by an executory limitation which fails to take effect, is decided in the same way as if the limitations were created by direct devise (*d*). The doctrine of *cy-près* applies to appointments of land by will (*e*). And the presumption in favour of the vesting of portions applies to appointments of settled funds to children (*f*).

But there is a difference between a direct gift and an appointment under a special power in this respect, that if a particular interest is appointed to a stranger, the interests in remainder are not accelerated, unless the testator shows an intention to that effect (*g*).

"Capable of taking effect."

And where an appointment under a special power is made by reference to such of the provisions of an existing settlement as are "capable of taking effect," this shows an intention to conform to the rules of law applying to appointments under special powers (*h*).

"Specific" and "demonstrative" appointments.

The question whether a gift of money or stock by will is a general legacy, or is payable out of a fund over which the testator has a power of appointment, so as to have the nature of a specific or demonstrative legacy, has been already referred to (*i*).

Whether intention to appoint can be implied.

There seems, moreover, to be a difference between an appointment and a direct gift in this respect, that where a testator has a power of appointment, with a gift over in default, an intention to exercise the power will not be implied in cases where a gift would be implied if the property were the testator's own. Thus in *Henderson* v. *Constable* (*k*), a testatrix, who had a special power of appointment over a fund of £2,500, appointed several sums amounting to £1,630 to certain persons, and a further sum of £670 to A, and then directed that the said sums should be paid at the decease of A, except the sum appointed to him, which was to be paid at the testatrix's decease : it was held that A was not entitled to a life interest in the £1,630 by implication, but that the income of it during his life went as in default of appointment. Lord Langdale remarked : "There is a gift to persons

Henderson v. *Constable.*

(*b*) *Harvey* v. *Stracey*, 1 Drew. 73; *post*, p. 833.
(*c*) *Baker* v. *Baker*, 6 Ha. 269.
(*d*) *Doe* v. *Eyre*, 5 C. B. 713. See *post*, p. 1409.
(*e*) *Line* v. *Hall*, 43 L. J. Ch. 107.
(*f*) *Re Crofton's Trusts*, 7 L. R. Ir. 279.
(*g*) *Crozier* v. *Crozier*, 3 Dr. & W. 353; *Craven* v. *Brady*, L. R. 4 Eq. 209.
(*h*) *Re Finch and Chew's Contract*, [1903] 2 Ch. 486.
(*i*) *Ante*, p. 784.
(*k*) 5 Bea. 297.

in default of appointment, and there must be a distinct appointment to defeat the gift over."

Construction of appointment not affected by terms of power.

In *Re Adams* (*l*), a person had power to appoint real estate to his sons for an estate not exceeding a life estate with remainder to their issue in tail; by a codicil referring to the power he appointed to "E. R. A. and his issue," E. R. A. being one of his sons: it was held that the appointment could not be construed so as to take effect in accordance with the power, and that it failed except so far as it gave E. R. A. a life estate.

If property is settled upon trust for A for life, and after his death upon trust for such of his children living at the death of B as B shall appoint, and B by will appoints to the children of A generally, the Court is bound to construe the appointment in the same manner as if it were a bequest of the testator's own property; it cannot put a different construction on the words in order to make them fit the terms of the power (*m*).

Construction affected by instrument creating power.

But where the testator's language is ambiguous, it seems that the construction of an appointment may be effected by the terms of the instrument creating the power. Thus in *Re Crofton's Trusts* (*n*) the testator had a power of appointment among his issue, and in default of appointment the fund was to go to issue who attained twenty-one or (being daughters) married; he appointed the fund to his daughters, with a gift over "in case any of them die": this was construed as meaning "if any of them die under twenty-one or without having been married." So if A has power to appoint so much of certain trust funds as he may be "entitled or presumptively entitled to," an appointment by him of his "share" may, it seems, carry a share which accrues after his death (*o*).

Alteration in law.

A will exercising a special or general power of appointment must be construed according to the rules of law applicable to wills at the time of its execution, although the power may have been created before, but exercised after, an alteration in the law as to the construction of wills (*p*).

"Clear" or "net" sum.

An appointment of a "clear" or "net" sum, whether under a general or a special power, entitles the appointee to have the legacy or succession duty and other expenses paid out of the balance of the fund (*q*).

(*l*) 94 L. T. 720 (C. A., reversing Buckley, J., 54 W. R. 42).

(*m*) *Harvey* v. *Stracey*, 1 Dr., p. 126. As to the effect of the appointment in that case, see *ante*, p. 800.

(*n*) 7 L. R. Ir. 279.

(*o*) *Re Denton*, 63 L. T. 105. The decision is not conclusive, because the accrued share would in any case have passed under the residuary bequest.

(*p*) *Freme* v. *Clement*, 18 Ch. D. 499.

(*q*) See *post*, p. 1796 *seq.*

Where "sum" means an aliquot share.

If a person having a power of appointing a fund of £30,000, appoints "the sum of £6,000, part of the said sum of £30,000," to A, and various other sums, exhausting the whole amount, to other persons, the last being described as "the remainder of the said sum of £30,000," this is equivalent to appointing the fund in aliquot shares, so that if the investments representing it are worth more than £30,000, each appointee takes proportionally more than the nominal amount allotted to him (*r*).

Specific and residuary appointments, etc.

If a testator has a power of appointment over three settled estates, A, B, and C, and appoints the A estate to X, and "all other the hereditaments comprised in the settlement" to Y, the latter appointment is specific and not residuary, so that if the appointment of the A estate to X fails, it goes as unappointed (*s*). So if a testator has a power of appointing a specific fund, say £1,000, and appoints £200 to A and £200 to B, and the "residue," or "rest," or "remainder," or "balance," or "surplus" to C, this is *prima facie* an appointment to C of the specific sum of £600 (*t*). If, therefore, the appointment to A fails, C cannot claim the £200 (*u*).

Use of "residue," etc., in technical sense.

But it may appear from the context that the testator uses "residue" in the technical sense, so as to include specific appointments which fail (*x*), or he may appoint the residue of the fund "after payment of," or "subject to," the appointments of specific sums, and then any of these which fail will, as a general rule, pass to the residuary appointee (*y*), unless the Court can find some indication of a contrary intention (*z*).

Re Jeaffreson's Trusts.

The case of *Re Jeaffreson's Trusts* (*a*) illustrates the distinction. There the donee of a special power appointed £100, part of the fund, to a stranger, and other sums to objects of the power, and appointed the balance, amounting to £260, to pay her own debts,

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(*r*) *Re Cruddas*, [1900] 1 Ch. 730. See *Butler* v. *Blackall*, [1907] 1 Ir. R. 405.

(*s*) *Re Brown*, 1 K. & J. 522. See *Re Mason*, [1901] 1 Ch. 619; *Mason* v. *Ogden*, [1903] A. C. 1, and other cases cited *post*, p. 915, Chap. XXV.

(*t*) *Per* Kindersley, V.-C., in *Harley* v. *Moon*, 1 Dr. & Sm., p. 626; approved by Wood, L.J., in *Baker* v. *Farmer*, L. R. 3 Ch., p. 540. Compare the cases on bequests of specific parts of a fund *post*, p. 1029.

(*u*) *Easum* v. *Appleford*, 10 Sim. 274; 5 Myl. & Cr. 56; *Re Jeaffreson's Trusts*, L. R. 2 Eq. 283; *Ratcliffe* v. *Hampson*, 1 Jur. (N.S.) 1104; *Bagge* v. *Bagge*, [1921] 1 Ir. R. 213. *Lakin* v. *Lakin*, 11 Jur. (N.S.) 522, was an appointment by deed. In *Champney* v. *Davy*, 11 Ch. D. 958, Hall, V.-C., said that in his opinion the construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift.

(*x*) *Carter* v. *Taggart*, 16 Sim. 423; *Re Meredith's Trusts*, 3 Ch. D. 757.

(*y*) *Re Harries' Trust*, Johns. 199. In that case the construction was aided by the fact that the fund was not definite. *Re Burke Irwin's Trusts*, [1918] 1 Ir. R. 350 (balance of fund).

(*z*) See *Miller* v. *Huddlestone*, L. R. 6 Eq. 65, decided by Malins, V.-C., on the assumption of what the testatrix would have intended if she had known that the fund would prove insufficient.

(*a*) L. R. 2 Eq. 276; followed in *Dowglass* v. *Waddell*, 17 L. R. Ir. 384.

and "should any surplus remain" she gave it to E., one of the objects of the power: it was held that the £100 was unappointed and did not pass to E., but that the balance of £260 was well appointed to E., free from the charge of debts (*b*). So if a testator gives all his residue, including property over which he has any power of disposal, to persons who are objects of a special power, this will include such part of the property subject to the power as is comprised in an appointment which has failed (*c*).

Effect of gift of fund of unascertained amount.

Again, the general rule of construction above stated does not apply if the fund is of unascertained amount, or is so treated by the testator. Thus, in *Falkner* v. *Butler* (*d*), where a testatrix, having under her deceased husband's will special power to appoint the residue of his personal estate, appointed several legacies, including one to a stranger, and then appointed "the residue of her husband's estate after payment of the legacies": it was held that the residue carried the ill-appointed legacy. It is to be observed that here, although when the testatrix made her will her husband's estate may have consisted of an ascertained sum, she did not so refer to it. The material circumstance was, therefore, wanting to show that she was parcelling out a fixed sum in definite proportions.

Where ascertained fund is subject to unascertained charges.

And in *Petre* v. *Petre* (*e*), where a testator, having a general power over a sum of £7,100 stock, gave certain money legacies thereout, and the residue, after deducting the legacies, to his son; the fund having by the appointment become subject to debts, and the amount it would produce by a sale being uncertain till it was sold, Sir J. Romilly held the gift of the residue to be not specific, but merely residuary, and subject to all the incidents of a common residue. After adverting to the rule in *Page* v. *Leapingwell*, he continued: "In this case, so far from knowing the amount of the fund, the testator could have no conception of it; for it was impossible to ascertain the amount until the fund had been realised by a sale, and the charges on it known. If, in this case, the testator thought he was dealing with £7,100

(*b*) In *Re Bringloe*, 26 L. T. 58, a testator had settled part of a fund upon trust for A for life, then for such persons as the testator should appoint, and in default for his next-of-kin; by his will he confirmed the settlement, and gave the residue of the fund to X: it was held that this did not exercise the power of appointment over the settled fund.

(*c*) *Re Hunt's Trusts*, 31 Ch. D. 308, referred to *ante*, p. 800, n. (*s*). *Oke* v. *Heath*, 1 Ves. sen. 135, is usually cited on this point, but on examination of R. L. 1748 B., fo. 215, it appears not to be in point, inasmuch as the will contained a general residuary bequest, under which, and not under any gift of particular residue, the lapsed fund passed. Compare *Wright* v. *Weston*, 26 Bea. 429.

(*d*) Amb. 514. See the remarks of Wood, V.-C., on this case in *Re Harries' Trusts*, Johns., p. 206.

(*e*) 14 Bea. 197.

sterling, and he had divided it into different proportions, the loss would then fall on all the persons interested in proportion to their shares, although the last portion was called 'the residue,' but that is not the case here" (*f*).

Charge of debts.

An express charge of debts on the fund shows that the testator does not mean the legatee of "residue" to take a definite proportion of the fund, the debts being of altogether uncertain amount (*g*). But it does not appear that the charge of debts which, by a rule of law only, and not by express provision, attached to the fund in *Petre* v. *Petre*, was essential to the decision in that case, even if it could properly be permitted to weigh. In the case put by the M.R. at the close of the remarks cited above from his judgment, the debts would still have been a charge on the fund; yet, he said, in that case the residue would have borne only a proportion of the loss. Hence it would seem that wherever there is a gift of money legacies to be raised and paid out of a specified sum of stock, followed by a gift of the "residue," this will be a true residue, the amount of it being necessarily uncertain until the stock is actually sold (*h*). The intention is placed beyond doubt if, to a proper description of the fund, the testator adds "or other the stocks or securities in which the same may hereafter be invested" (*i*).

The rules above stated apply both to general and to special powers (*k*). In the case of general powers it will be remembered that if a specific appointment out of a fund fails, and does not pass by an appointment of the "residue" of the fund under the rule stated by Kindersley, V.-C., in *Harley* v. *Moon* (*supra*), it will pass by the general residuary bequest, if any, contained in the will.

Where there is no appointment of the residue.

In *Booth* v. *Alington* (*l*), a person had a power of appointing a sum of £120,000; she appointed £30,000, "part of the said sum of £120,000," to A, and made no appointment of the residue; the estate of the donor of the power was insufficient to provide the whole of the £120,000, and it was contended that A's £30,000 ought to abate rateably with the £90,000 which

(*f*) See *Page* v. *Leapingwell*, and the other cases on gifts of a particular residue, *post*, p. 1011. Compare *Re Currie*, 36 W. R. 752.

(*g*) *Harley* v. *Moon*, 1 Dr. & Sm. 623; *Baker* v. *Farmer*, L. R. 3 Ch. 537; *Champney* v. *Davy*, 11 Ch. D. 949.

(*h*) See *Vivian* v. *Mortlock*, 21 Bea. 252; *Carter* v. *Taggart*, 16 Sim. 423; *Re Currie*, 36 W. R. 752.

(*i*) *De Lisle* v. *Hodges*, L. R. 17 Eq. 440.

(*k*) See *per* Hall, V.-C., in *Champney* v. *Davy*, 11 Ch. D., at p. 958; *per* Rigby, L.J., in *Re Mason*, [1901] 1 Ch., at p. 625. In Farwell on Powers (3rd ed.), p. 277, a doubt is expressed whether special powers resemble general powers in this respect.

(*l*) 6 D. M. & G. 613, where *Chambers* v. *Chambers*, Mose. 333, is commented on. Compare the cases on specific legacies out of a fund, *post*, p. 1034.

went in default of appointment : it was held that this was not so, and that the words " part of the said sum " were merely meant to designate the fund out of which the £30,000 was to be paid; they indicated a definite sum, and not an aliquot share of the fund.

In *Barry* v. *Barry* (*m*) a different construction prevailed. There the testator had a non-exclusive power of appointing among his children a sum of money secured by a policy; he made a will by which he recited the power and the amount payable under the policy, and appointed portions of it to all the objects of the power except one child, X, leaving a small part unappointed. At the date of the will he had wrongfully pledged the policy to secure a debt due by him, and in the result the amount recovered under the policy was insufficient to satisfy the appointments. It was held that the appointments were good, apparently on the ground that the residue left unappointed was to be treated as if the testator had specifically appointed it to X, so that it abated rateably with the sums expressly appointed. The decision seems correct (*n*).

(*m*) Ir. R. 10 Eq. 397.
(*n*) Compare *Walpole* v. *Apthorp*, L. R. 4 Eq. 37.

CHAPTER XXIV.

TRUSTS AND TRUSTEES (*a*).

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Conditional appointment.

I.—Appointment of Trustee.—A person may be appointed trustee contingently, or subject to a condition; as, for example, "if and when he" (being abroad) "shall return to England": it was held in a case of this kind, that residence in England for six months fulfilled the condition (*b*).

Trustees of another trust.

It sometimes happens that a testator appoints as his trustees "the persons who shall at my death" be the trustees of some other trust: in such a case it seems that the persons who are acting as trustees of that trust answer the description, although not formally so appointed (*c*).

Corporation.

A corporation can be a trustee, if its powers authorise it to accept the office; and it can be one of several trustees (*d*).

Judicial trustee.

It may be noted that under the Judicial Trustees Act, 1896, the Court has power to appoint a person (called a judicial trustee) to be trustee jointly with any other person, or as sole trustee, either in addition to or in substitution for any existing trustees, and that the executor of a deceased person is a trustee within the meaning of the Act.

There are various kinds of public or official trustees.

(*a*) This chapter was written by Mr. C. Sweet for the last edition, except so far as it incorporated part of the chapter on "Gifts void for Uncertainty," which in earlier editions included the subject of precatory trusts. Resulting trusts are treated of in Chap. XXI.

(*b*) *Re Arbib and Class*, [1891] 1 Ch. 601.

(*c*) *Re Waidenis*, 77 L. J. Ch. 12. As to this case, see *post*, p. 912 n. (*c*).

(*d*) Bodies Corporate (Joint Tenancy) Act, 1899.

Official Trustee of Charity Lands, etc.

Under the Charitable Trusts Acts, 1855 and 1887, the secretary of the Board of Charity Commissioners is a corporation sole, under the name of the "Official Trustee of Charity Lands," for the purpose of holding lands directed to be vested in him by an order of the Court or of the Board, in accordance with the provisions of the Acts. There are also "Official Trustees of Charitable Funds," who are a corporation aggregate for the purpose of holding stocks, shares, etc., belonging to charities. The Official Trustees deal with the property vested in them in such manner as the Board direct.

Under section 45 of the Education Act, 1918, there is a power, by Order in Council, to constitute Official Trustees of Educational Trust Property, but no Order appears to have been made.

Public Trustee.

The office of Public Trustee was established by the Public Trustee Act, 1906. The Public Trustee may be appointed by a testator to be an ordinary trustee, or to be a "custodian trustee." In the latter case the trust property is vested in him, but the management of the trust remains vested in the other trustees (the "managing trustees"). The Public Trustee is also authorised to accept probates of wills (*e*), but not any trust exclusively for religious or charitable purposes.

The Charitable Trusts Acts expressly declare that the Official Trustee of Charity Lands has power to take and hold land, but the Public Trustee Act contains no such provision. A licence in mortmain has, however, been granted to him (*f*).

Trust corporation.

Under the new legislation it is in cases of trusts for sale and trustees for the purpose of the Settled Land Act, 1925, necessary to have two trustees unless the sole trustee is a "Trust Corporation" as defined in section 205, sub-section 1, of the Law of Property Act, 1925, and section 3 of the Law of Property (Amendment) Act, 1926.

Restriction on the number of trustees.

In the case of a trust for sale or a settlement of land there may not be more than four trustees (Trustee Act, 1925, s. 34). This restriction does not apply to trustees for charitable, ecclesiastical, or public purposes, or to trustees of a term under a settlement for raising money.

Uncertainty.

II.—What Words will create a Trust.—(1) *Preliminary.*—A trust, like any other testamentary disposition, may be void for uncertainty (*g*).

(*e*) Public Trustee Rules, 1912.

(*f*) This licence is dated January 1, 1908, the day on which the Act came into operation, but it appears that the actual grant was not made until about six months later, and the question has been raised whether land devised or conveyed to him in the interval has not been forfeited to the Crown: Law Quart. Review, xxv, 125.

(*g*) See Chap. XIV, *ante*, p. 456.

Unfulfilled intention to declare trusts.

Although a testator can create a trust without setting out the terms of it in his will (*h*), yet if he gives property to A upon the trusts "declared by my will" or "to be declared by a codicil," and no trusts are, in fact, so declared, the gift fails (*i*); so if he gives property to A upon such trusts as he (the testator) may declare by some existing or future document, the gift fails, unless the writing is duly executed as a testamentary document or is so referred to as to be incorporated in the will (*k*).

Where intended trust is secondary purpose of gift.

On the other hand, the testator may so express himself as to show an intention to give property to a person beneficially, subject to any trust which the testator may hereafter impose, he not having made up his mind whether he will do so or not. Thus in *Fenton* v. *Hawkins* (*l*), the testator gave his residue to A, B, and C as tenants in common, subject, however, to such disposition thereof as he might by any deed or writing duly executed thereafter direct: he made no such disposition, and it was held that A, B, and C took beneficially.

Resulting trust.

Where the gift is complete on the face of the will, and it appears from it that the testator intended the property to be held on trust, the effect in any case is to prevent the devisee or legatee from taking beneficially; if therefore the trust which the testator intended to create is void *ab initio*, or fails by reason of lapse or otherwise, there is a resulting trust (*m*).

Whether gift is beneficial or fiduciary.

The question whether a gift is intended to be beneficial or fiduciary is often extremely difficult to decide, and the authorities, as might be expected, are not altogether harmonious.

The fact that property is given to a person "absolutely," or "in the most absolute manner," although it *prima facie* imports a beneficial gift (*n*), does not necessarily prevent the inference, from the context, that he was intended to be a trustee. Thus in *Bernard* v. *Minshull* (*o*) a testatrix appointed a fund to her husband "absolutely," and went on to request that after reserving out of it for himself certain specified benefits,

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(*h*) *Post*, "Undisclosed Trusts."

(*i*) *Corporation of Gloucester* v. *Wood*, 3 Ha. 131; 1 H. L. C. 272; *Aston* v. *Wood*, L. R. 6 Eq. 419.

(*k*) *Smart* v. *Prujean*, 6 Ves. 560; *University College of North Wales* v. *Taylor*, [1907] P. 228; [1908] P. 140; *Re Thistlethwaite*, 11 T. L. R. 206; *ante*, p. 123; *Re White*, [1925] 1 Ch. 179 (reference to former will). These cases must be distinguished from those in which the testator makes a complete gift, and accompanies it by the expression of an intention to impose regulations or conditions, which intention he fails to carry out: *Yates* v. *University College*, L. R. 7 H. L. 438; *ante*, pp. 215 *seq.*

(*l*) 9 W. R. 300.

(*m*) Chap. XXI, *ante*, pp. 684 *seq.*; *post*, p. 855. So if the trust fails for uncertainty; *ante*, p. 456.

(*n*) *Ante*, pp. 697, 698, where also the effect of such words as "for their own use and benefit" is discussed.

(*o*) Johns. 276; *Gray* v. *Gray*, 11 Ir. R. Ch. 218, *infra* n. (*c*). In *Bernard* v. *Minshull* the husband took the remainder of the fund as residuary legatee.

he would make such disposition of the remainder "as he may deem most desirable to carry out my wishes often expressed to him by word"; it was held that he was excluded from all benefit in the remainder of the fund.

Disposition at discretion of donee.

Where property is given to a person for such purposes as he thinks fit, or to be disposed of as he thinks right, or the like, this is a *prima facie* a beneficial gift (*p*). And even if the devisee or legatee holds a public or official position, such a gift does not necessarily give rise to the inference that he takes as a trustee (*q*).

Gift to executors.

If a testator bequeaths his residuary personal estate to persons who are his executors, the question whether they take beneficially or not is a question of construction on the whole will (*r*). And the same rule applies to devises of real estate (*s*). But if a testator gives his residuary personalty to his executors for such purposes as they think fit, they hold it as trustees for the next-of-kin (*t*).

Gift for specified purposes.

In other cases, where property is given to a person subject to the performance of certain trusts, or for purposes which do not exhaust the beneficial interest, the question whether he is a trustee, or whether he takes beneficially subject to the performance of those trusts or purposes, is one of construction (*u*).

Technical words not required.

"Technical language," as Mr. Jarman points out (*x*), "is not necessary to create a trust. It is enough that the intention is apparent." Thus, if a testator gives property to his executors, "in and for the consideration" of paying the rents and profits to his wife for life, this shows that it is given to them in trust and not beneficially (*y*). And if a testator devises land "for this intent and purpose and upon this condition," these words are sufficient to create a trust (*z*). Similarly a bequest to a married woman for her sole and separate use, and to be appropriated by her amongst her children in such shares as she

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(*p*) *O'Brien* v. *Condon*, [1905] 1 Ir. R. 51.

(*q*) *Re Harbison* (*Morris* v. *Larkin*), [1902] 1 Ir. R. 103, stated *post*, p. 873. This case is near the line. Compare the cases of charitable gifts, *ante*, pp. 212 *seq.* and *Re Barclay*, [1929] 2 Ch. 173.

(*r*) *Ante*, p. 696.

(*s*) *Ante*, p. 687.

(*t*) *Ante*, p. 698.

(*u*) *Ante*, pp. 686 *seq.*; 688 *seq.*

(*x*) First edition, p. 334.

(*y*) *Bird* v. *Harris*, L. R. 9 Eq. 204. Compare *Barrs* v. *Fewkes*, 2 H. & M. 60 (gift to executor to enable him to carry into effect the purposes of the will), and other cases cited, *ante*, p. 690

(*z*) *Merchant Taylors' Co.* v. *Att.-Gen.*, L. R. 6 Ch. 512; *Att.-Gen.* v. *Wax Chandlers' Co.*, L. R. 6 H. L. 1. As to the import of the word "purpose," see *Stubbs* v. *Sargon*, 3 My. & C. 507, and *Corporation of Gloucester* v. *Wood*, 3 Ha. 131; 1 H. L. C. 272, both stated *ante*, p. 457; and compare *Aston* v. *Wood*, L. R. 6 Eq. 419, where the language was sufficient to show that a trust of some kind was intended.

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shall think proper, creates a trust in favour of the children (*a*). So the words "who will, etc," may be inoperative and create a trust as if the words had been "who shall, etc." (*b*). So if a gift of property to A and B, "in the most absolute manner," is followed by a declaration of the testator's intention that they shall at their discretion allocate the property to certain persons, this will create a trust (*c*).

Effect of word "trust."

And as a trust can be created without the use of the word "trust," so a trust will not be created by the word "trust" if it appears from the whole will that the testator did not intend the word to have that effect. Thus, in *Hughes* v. *Evans* (*d*), a testator devised all his estates to E. E. "upon the trusts and for the uses following," but did not declare any use or trust except as to one of his estates, which he devised upon trust for O. for life; it was held, on the context of the will and a codicil thereto, that subject to the devise in favour of O., E. E. took the whole of the estates beneficially. *Williams* v. *Roberts* (*e*), and *Clarke* v. *Hilton* (*f*), are to the same effect. So if a testator gives his property to trustees upon the usual trusts for conversion and payment of debts, and directs them to hold the residue, subject to payment of pecuniary legacies, upon certain trusts, this does not make them trustees of the legacies, so as to prevent the operation of the Statute of Limitations (*g*).

Trust created by informal expressions.

In considering the question what expressions, though informal, are sufficient to manifest an intention to create a trust, it will be convenient to deal separately with the cases on precatory trusts, and those on words purporting to declare the purpose of the gift.

Precatory trusts.

(2) *Precatory Trusts.*—The doctrine of precatory trusts has undergone a gradual change since the early part of the eighteenth century. In former days the Judges held that almost any expression of wish or expectation by a testator, however vague, was sufficient to create a trust, provided the subject and object were certain. At the present day the tendency is the other way :

(*a*) *Re Haly's Trusts*, 23 L. R. Ir. 130. *Re Delahunty*, [1907] 1 Ir. R. 507 (gift to husband to be applied by him to maintenance and education of children). *Re Nolan*, [1912] 1 Ir. R. 416 (to be used for her own support and that of her children). *Re Hickey*, [1913] 1 Ir. R. 390 (to be managed for the benefit of their children). *Re Campbell*, [1918] 1 Ir. R. 429 (she to have and manage the same to the best advantage of herself and her five children).

(*b*) *Re Cammell*, 69 Sol. J. 345.

(*c*) *Gray* v. *Gray*, 11 Ir. Ch. R. 218.

(*d*) 13 Sim. 496.

(*e*) 4 Jur. (N.S.) 18.

(*f*) L. R. 2 Eq. 810. See also the cases of *Coningham* v. *Mellish*, Pr. Ch. 31; *Dawson* v. *Clarke*, 18 Ves. 247; *Mapp* v. *Elcock*, 2 Ph. 793, cited in Chap XXI.

(*g*) *Re Barker*, [1892] 2 Ch. 491.

the Courts consider every will by itself, and do not allow vague and informal words to create a trust, if they think it improbable, taking the will as a whole, that the testator intended them to have that effect.

Doctrine laid down in the older cases.

Mr. Jarman states the doctrine thus (*h*) : " It has been long settled, that words of recommendation, request, entreaty, wish or expectation, addressed to a devisee or legatee, will make him a trustee for the person or persons in whose favour such expressions are used; provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter (*i*) and the object or objects of the intended trust " (*k*).

" Not doubting."

Among the older cases one of the most important is *Massey* v. *Sherman* (*l*), where a testator devised copyholds to his wife, " not doubting but that " she would dispose of the same to and amongst his children as she should please; this was held to be a trust for the children, as the wife should appoint.

" Convinced."

So, in *Prevost* v. *Clarke* (*m*), a testatrix gave the residue of her property equally between her sons and daughter; and, after directing the share of the daughter to be invested in public securities, etc., added, " Convinced of the high sense of honour, the probity and affection of my son-in-law, E. C., I entreat him, should he not be blessed with children by my daughter, and survive, that he will leave at his decease, to my children and grandchildren the share of my property I have bestowed on her." Sir J. Leach, V.-C., was clearly of opinion that these words created a contingent trust (subject to the power of selection) in favour of the children and grandchildren.

(*h*) First ed., p. 334.

(*i*) See *Re Pinckard's Trust*, 4 Jur. (N.S.) 1041; 27 L. J. Ch. 422; *Reeves* v. *Baker*, 18 Bea. 372; *Macnab* v. *Whitbread*, 17 *ib.* 299; *Smith* v. *Smith*, 2 Jur. (N.S.) 967; *Hood* v. *Oglander*, 34 Bea. 513.

(*k*) See also the rule as laid down by Sir R. Arden in *Malim* v. *Keighley*, *post*, p. 844. This " arbitrary " rule was disapproved by the Court of Appeal in *Re Hamilton*, [1895] 2 Ch. 370, where the modern doctrine is explained. See also the passage in Lord St. Leonards's Law of Prop. 375, quoted in *Re Williams*, [1897] 2 Ch., at p. 21.

In *Willis* v. *Kymer* (7 Ch. D. 181) a testatrix bequeathed various legacies, including a legacy of £3,000 to J. K. for life, the principal to be divided at his death between his children, J., S., and A. By a codicil she gave to her sister, E. K., " all I possess, requesting at her death she will leave the sums as I have directed heretofore." E. K. made a will by which she confirmed the bequests made by her sister's will, and gave various legacies out of her own property, and declared that all legacies to married women should be for their separate use. It was held by Jessel, M.R., that E. K. had power to bequeath a share of the £3,000 to J. K.'s married daughter S. for her separate use. It is submitted that the decision is not in accordance with principle : it implies that a precatory trust differs in its effect from a direct trust.

(*l*) Amb. 520; *S. C. nom. Macey* v. *Shurmer*, 1 Atk. 389. See also *Wynne* v. *Hawkins*, 1 Br. C. C. 179; *Parsons* v. *Baker*, 18 Ves. 476; *Malone* v. *O'Connor*, 2 Ll. & Go. 465.

(*m*) 2 Mad. 458.

"Recommending."

Again, in *Malim* v. *Keighley* (*n*), where a testator in certain events and subject to certain trusts, bequeathed the residue of his personal estate to his surviving daughter, and such bequest was followed by these words: "hereby recommending to such daughter to dispose of the same after her own death, and the determination of the several trusts aforesaid, unto and among the children of my daughter A and my nephew I, desiring that his reputed daughter C may be considered as one of his children." The surviving daughter died without exercising the power, and Sir R. P. Arden, M.R., and Lord Loughborough held, that a trust was created in favour of the children of the daughter and nephew.

"Wish and request."

In *Foley* v. *Parry* (*o*), the testator gave property to his wife for life, with remainder to his nephew for life, and then stated it to be his particular wish and request, that his wife, and another person who took nothing under the will, should superintend and take care of the education of the nephew, so as to fit him for any respectable employment; and it was decided by Lord Brougham, affirming the decision of Sir L. Shadwell, that the nephew was entitled to be educated and maintained out of the income of the property given to the widow till he attained the age of twenty-one: the duty was to be performed by means of the fund given.

Other cases of doubtful words creating a trust.

Trusts, or powers in the nature of trusts, have also been held to be created by the following expressions: "I desire him to give" (*p*); "I hereby request" (*q*); "I beg" (*r*); "it is my dying request" (*s*); "empower and authorise her to settle and dispose of the estate to such persons as she shall think fit by her will, confiding in her not to alienate the estate from my nearest

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(*n*) 2 Ves. Jun. 333, 529; see also *Paul* v. *Compton*, 8 Ves. 380; *Ford* v. *Fowler*, 3 Bea. 146; *Knott* v. *Cottee*, 2 Phil. 192; *Cholmondeley* v. *Cholmondeley*, 14 Sim. 590. Under the circumstances in *Meggison* v. *Moore*, 2 Ves. jun. 630, "recommend" was held not to create a trust; and as to the proper meaning of the word see *Johnston* v. *Rowlands*, 2 De G. & S. 356.

(*o*) 5 Sim. 138; 2 My. & K. 138. See *Broad* v. *Bevan*, 1 Russ. 511, n. See also *Wilson* v. *Bell*, L. R. 4 Ch. 581, where the devise was to the son for life, with a direction that his sister should reside with and be maintained by him.

(*p*) *Mason* v. *Limbury*, cited in *Vernon* v. *Vernon*, Amb. 4; *Harding* v. *Glyn*, 1 Atk. 469. See *Medlicot* v. *Bowes*, 1 Ves. Sen. 207; *Re Jevons*, 56 Sol. J. 72 ("I desire to be divided by her on her death amongst") but "earnest wish and desire" has been held not to create a trust: *In b. Hanmer*, 55 Sol. J. 537; so "I express the wish": *Re Humphrey's Estate*, [1916] 1 Ir. R. 21.

(*q*) *Nowlan* v. *Nelligan*, 1 Br. C. C. 489; *Eade* v. *Eade*, 5 Madd. 118; *Shelley* v. *Shelley*, L. R. 6 Eq. 540.

(*r*) *Corbet* v. *Corbet*, Ir. R. 7 Eq. 456.

(*s*) *Pierson* v. *Garnet*, 2 Br. C. C. 38, 226; and see *Re O'Bierne*, 1 J. & Lat. 352.

family" (*t*); "in the full belief" (*u*); "advise him to settle" (*x*); "this is my last wish" (*y*); "my dying wish" (*z*); "require and entreat" (*a*); "trusting" (*b*); "recommend" (*c*); "trusting that he will preserve the same, so that after his decease it may go and be equally divided, etc." (*d*); "well knowing" (*e*); "under the conviction that she will dispose, etc." (*f*); "to be at her disposal to apply the same" (*g*); and by a direction to trustees to convey to the eldest son at twenty-one, "but so that the settlor's wish and desire may be observed which is hereby declared, that the other children may be allowed to participate" (*h*).

Owing to the change in the principles of construction applicable to precatory trusts, many of the cases above referred to would probably not be followed at the present day. But before dealing with the recent cases it may be convenient to refer to some rules, restricting the creation of precatory trusts, which are to be found even in the older decisions.

Mere expressions of kindness not sufficient.

For example, if the testator's language amounts merely to a general expression of goodwill towards the objects in question, and does not intimate any definite disposing intention in their favour, as where he adds, "I have no doubt but A. B. (the legatee) will be kind to my children," such words are inoperative to qualify the legatee's interest (*i*).

Certainty in the object.

Another rule is that a precatory trust will not be created unless its objects are pointed out by the testator with sufficient certainty. "Vagueness in the object is regarded as evidence that no trust was intended to be created" (*k*). In cases of this

(*t*) *Griffiths* v. *Evan*, 5 Bea. 241. The devise to the donee of the power was in tail; if it had been in fee, a trust would scarcely have been created without the word "confiding"; see *Brook* v. *Brook*, 3 Sm. & Gif. 280; *Alexander* v. *Alexander*, 2 Jur. (N.S.) 898.

(*u*) *Fordham* v. *Speight*, 23 W. R. 782.

(*x*) *Parker* v. *Bolton*, 5 L. J. (N.S.) Ch. 98. But in *Teasdale* v. *Braithwaite* (5 Ch. D. 630) a declaration by the testator of a wish that his daughter should settle property on herself was held not to be binding on her; and compare *Re Crawshay*, 43 Ch. D. 615.

(*y*) *Hinxman* v. *Poynder*, 5 Sim. 546.

(*z*) *Godfrey* v. *Godfrey*, 11 W. R. 554.

(*a*) *Taylor* v. *George*, 2 V. & B. 378.

(*b*) *Pilkington* v. *Boughey*, 12 Sim. 114.

(*c*) *Tibbits* v. *Tibbits*, 19 Ves. 656; Jac. 317.

(*d*) *Baker* v. *Mosley*, 12 Jur. 740.

(*e*) *Briggs* v. *Penny*, 3 De G. & S. 539; 3 M. & Gord. 546; *per* Wood, V.-C., Johns, 289. *Briggs* v. *Penny* was dissented from in *Stead* v. *Mellor* 5 Ch. D. 225 and *Clancarty* v. *Clancarty*, 31 L. R. Ir. 530.

(*f*) *Barnes* v. *Grant*, 26 L. J. Ch. 92. But see *post*, p. 848.

(*g*) *Salusbury* v. *Denton*, 3 K. & J. 529.

(*h*) *Liddard* v. *Liddard*, 28 Bea. 266.

(*i*) *Buggens* v. *Yeates*, 8 Vin. Abr. 72, pl. 27; *Pope* v. *Pope*, 10 Sim. 1; *Greene* v. *Greene*, Ir. R. 3 Eq. 629 ("deal justly and properly"); *Ellis* v. *Ellis*, 23 W. R. 382 ("do justice to").

(*k*) *Per* Lord Truro in *Briggs* v. *Penny*, 3 Mac. & G., at p. 555. See also *Bernard* v. *Minshull*, John. 276; *Harland* v. *Trigg*, 1 Br. C. C. 142 ("hoping he will continue them in the family").

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kind the question sometimes arises whether property which is given to A is intended (i) to be held by A for his absolute benefit, unfettered by any trust (*l*); or (ii) to be held upon trust for other persons, exclusive of A (*m*); or (iii) upon trust for A and other persons. The last question generally arises where the testator states the motive or purpose of the gift; as where property is given to A in order to maintain or provide for some other person or persons. The cases are discussed in a subsequent part of this chapter (*n*). Reference is also made to the important difference between those cases in which uncertainty in the object prevents a precatory trust from being created, and those in which a trust is created, but cannot take effect in the way intended by the testator by reason of the objects not being defined with sufficient certainty (*o*).

On the principle above stated, namely, that vagueness in the object is an indication that no trust was intended to be created, a suggestion that the legatee's family or relations should benefit by the gift, is not sufficient to create a trust (*p*).

Wright v. *Atkyns.*

The question was much discussed in the case of *Wright* v. *Atkyns* (*q*), where the testator devised freehold and leasehold property to his mother and her heirs for ever, "in the fullest confidence" that after her decease she would devise the property to his family, but owing to the form which the litigation took, the question whether these words created a trust, and if so in whose favour, was never decided.

Wishes of testator not clearly expressed.

On the same principle, where a testator gives property to A "having confidence" that he will dispose of it in accordance with his wishes, and the testator does not communicate any wishes of a definite nature, no trust is created (*r*).

Certainty in the subject. *Re Moore.*

There must also be a definite subject. Thus, in *Re Moore* (*s*) a testator gave a fund in trust for his three sisters, adding: "They are hereby enjoined to take care of my nephew J. as may seem best in the future": it was held by Kay, J., that these words were too indefinite to create a trust in favour of the nephew; if there had been a direction to maintain him, the case might have been different (*t*). So if a testator gives property to

(*l*) *Post*, p. 871.
(*m*) As in *Massey* v. *Sherman*, Amb. 520, *ante*, p. 843.
(*n*) *Post*, p. 868.
(*o*) *Post*, p. 856.
(*p*) *Harland* v. *Trigg*, 1 Br. C. C. 142, and cases cited in note (*k*) *infra*.
(*q*) 17 Ves. 255; 19 Ves. 299; T. & R. 143; Sugden's Law of Prop., 376. The case was referred to in detail in *Re Williams*, [1897] 2 Ch. 12.
(*r*) *Reid* v. *Atkinson*, Ir. R. 5 Eq. 373; *Creagh* v. *Murphy*, Ir .R. 7 Eq. 182. As to the creation of a power to carry out the wishes of a testator, see *Re Hetley*, [1902] 2 Ch. 866, cited in Chap. XXIII, *ante*, p. 769.
(*s*) 55 L. J. Ch. 418.
(*t*) See *Broad* v. *Bevan*, 1 Russ. 511 n., *post*, p. 851, n. (*e*).

A absolutely, with a direction that he will at his death leave the "bulk" or "remainder" of it to B: this direction is too vague to create a precatory trust (*u*). Other instances of trusts being void for uncertainty in the subject are referred to elsewhere (*x*). The doctrine was recognised in *Horwood* v. *West* (*y*), where a testator recommended his wife to give by her will what she should die possessed of under his will in a certain manner; Sir J. Leach, V.-C., assumed that if these words had been uncontrolled by the context, the trust must have been void for uncertainty; but he thought that it was evident, from a direction in the will to the wife to secure to herself, on a second marriage, whatever she should possess by virtue of his will, that the testator intended the trust in question to be co-extensive with such direction, *i.e.*, to extend to all the property the wife derived from the testator.

Horwood v. *West.*

Expressions sufficient *per se* to create a trust may be deprived of their effect by a context expressly declaring (*z*), or by implication showing, that no trust was intended. Thus, where a testator gave his property to A and declared express trusts of part of it, and requested that the residue should be applied in a certain way, it was held that this expression of wish did not create a trust (*a*). So if a testator, after settling a fund on his daughters and their children, by codicil revokes that bequest on account of the inconvenience of having the money tied up, and leaves the property "to be disposed of by the husbands for the good of their families": no trust will be created in favour of the wives and children; otherwise the inconvenience complained of would continue (*b*).

Doubtful expressions explained by context.

Again, the idea of a trust may be excluded if the donee is given a wide discretion as to the disposition of the property (*c*).

Discretion.

(*u*) *Lechmere* v. *Lavie*, 2 My. & K. 197, referred to *post*, p. 851; *Eade* v. *Eade*, 5 Madd. 118; *Palmer* v. *Simmonds*, 2 Dr. 221; *Parnall* v. *Parnall*, 9 Ch. D. 96; *Mussoorie Bank* v. *Raynor*, 7 A. C. 321.

(*x*) *Hudson* v. *Bryant*, 1 Coll. 681; *Flint* v. *Hughes*, 6 Bea. 342; *Cowman* v. *Harrison*, 22 L. J. Ch. 993; *Bland* v. *Bland*, 2 Cox, 349, and other cases cited, *ante*, p. 437.

(*y*) 1 Sim. & St. 387.

(*z*) *Young* v. *Martin*, 2 Y. & C. C. C. 582.

(*a*) *House* v. *House*, 23 W. R. 22; *Shepherd* v. *Nottidge*, 2 J. & H. 766.

(*b*) *Alexander* v. *Alexander*, 2 Jur. (N.S.) 898, not appealed on this point, 6 D. M. & G. 593.

(*c*) As in *Curtis* v. *Rippon*, 5 Madd. 434 ("remembering always the Church of God and the poor"); *Hoy* v. *Master*, 6 Sim. 568; *White* v. *Briggs*, 15 Sim. 33; *Ex p. Payne*, 2 Y. & C. 636; *Huskisson* v. *Bridge*, 15 Jur. 738 ("in any other way most agreeable to herself"); *per* Wood, V.-C., in *Bernard* v. *Minshull*, Johns., at p. 287; *Eaton* v. *Watts*, L. R. 4 Eq. 151 ("to dispose of as he thinks fit"); *Re Bond*, 4 Ch. D. 238 ("quite at liberty"); *Re Harbison*, [1902] 1 Ir. R. 103; *McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Sullivan* v. *Sullivan*, [1903] 1 Ir. R. 193 ("you may modify it if you think desirable").

Where the gift is absolute, precatory words do not create a trust. *Meredith* v. *Heneage.*

And where the words of a gift expressly point to an absolute enjoyment and power of disposition by the donee himself (*d*), the natural construction of subsequent precatory (*f*) words is that they express the testator's belief or wish without imposing a trust.

Thus, in *Meredith* v. *Heneage* (*g*), where the testator, after having given his real and personal estate in the fullest terms to his wife, declared that he had devised the whole of his real and personal estate to his wife, "unfettered and unlimited," in full confidence, and with the firmest persuasion that in her future disposition and distribution thereof she would distinguish the heirs of his late father by devising and bequeathing the whole of his said estate together and entire to such of his said father's heirs as she might think best deserved her preference; it was held in D. P. that the wife was absolutely entitled for her own benefit, Lord Eldon considering that the testator intended to impose a moral but not a legal obligation on his wife; for which he relied much (as did also Lord Redesdale) on the words "unfettered and unlimited." Lord Eldon also adverted to the great difficulty of reconciling the testator's direction that the estate should go "entire" with his direction respecting its "distribution" (*h*).

A similar construction has been placed on a gift to the testator's wife "for her own use and benefit," coupled with a suggestion that she should dispose of it amongst her children or family (*k*); and on a gift to the testator's wife to be disposed of "by her will in such way as she shall think proper," with a recommendation to her to dispose of one moiety among her own relations, and the other among such of his own as she should think proper (*l*); and on a gift to the testator's wife for her

(*d*) "Absolute" property means not only unlimited in estate, but unfettered by trust or condition: *per* James, V.-C., *Irvine* v. *Sullivan*, L. R. 8 Eq. 673; and *per* Wood, V.-C., *Godfrey* v. *Godfrey*, 2 N. R. 16.

(*f*) *Secus*, if the words are imperative, *Bonser* v. *Kinnear*, 2 Giff. 195; *Evans* v. *Evans*, 12 W. R. 508; *Curtis* v. *Graham*, *ib.* 993.

(*g*) 1 Sim. 542; 10 Pri. 306.

(*h*) See also *Lefroy* v. *Flood*, 4 Ir. Ch. R. 1; *Re Bond*, 4 Ch. D. 238.

(*k*) *Williams* v. *Williams*, 1 Sim. (N.S.) 358. See also *Webb* v. *Wools*, 2 Sim. (N.S.) 267; *White* v. *Briggs*, 15 Sim. 33; *Re Bond*, 4 Ch. D. 238; *Parnall* v. *Parnall*, 9 Ch. D. 96; and the following cases bearing on the subject, *Winch* v. *Brutton*, 14 Sim. 379; *Bardswell* v. *Bardswell*, 9 Sim. 319; *Huskisson* v. *Bridge*, 15 Jur. 738; *Fox* v. *Fox*, 27 Bea. 301; *Green* v. *Marsden*, 1 Drew. 646; *M'Culloch* v. *M'Culloch*, 11 W. R. 504.

(*l*) *Johnston* v. *Rowlands*, 2 De G. & S. 356. See also *Pope* v. *Pope*, 10 Sim. 1; *M'Alinden* v. *M'Alinden*, Ir. R. 11 Eq. 219; *Morrin* v. *Morrin*, 19 L. R. Ir. 37. The cases of *Wood* v. *Cox* (1 Keen, 317; 2 Myl. & Cr. 684) and *Irvine* v. *Sullivan* (L. R. 8 Eq. 673) are sometimes referred to as bearing on the subject, but they seem to relate more properly to the matters treated of in the subsequent sections of this chapter (*post*, p. 871).

absolute use and benefit, "trusting that she will do justice to any children we may have" (*m*).

The subject of gifts of this nature is considered more in detail in a subsequent part of this chapter (*n*).

Ware v. *Mallard*,

It remains to notice the case of *Ware* (or *Wace*) v. *Mallard* (*o*), where the testator devised and bequeathed all his real and personal property to his wife, her heirs, executors, administrators or assigns, to and for her sole use and benefit, in full confidence that she would in every respect appropriate and apply the same unto and for the benefit of all his children. Sir J. Parker, V.-C., decided that the widow took a life estate with a power of appointment among the children. No reasons are reported. If the words "in full confidence," etc., created a trust, it is difficult to see how the widow could take any beneficial interest whatever: and if they did not, it is equally difficult to understand how she could be entitled to less than the whole.

—questioned.

The authority of the V.-C. has given some currency to this decision (*p*). But the better opinion is, that in such a case no trust is imposed on the widow. In the first place, the words "for her sole use and benefit" *prima facie* exclude the notion of a trust (*q*), and in the second place, the tendency at the present day is not to imply a trust from such words as "in full confidence." Thus, in *Re Hutchinson and Tenant* (*r*), where a testator gave all his real and personal estates to his "dear wife absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," it was held by Sir G. Jessel, M.R., that the wife took absolutely. He considered the case undistinguishable from *Lambe* v. *Eames* (*s*), where a testator gave his estate to his widow "to be at her disposal in any way she may think best for the benefit of herself and family," upon which a strong

Lambe v. *Eames*.

(*m*) *Ellis* v. *Ellis*, 23 W. R. 382.

(*n*) *Post*, p. 871.

(*o*) 21 L. J. Ch. 355; 16 Jur. 492.

(*p*) *Gully* v. *Cregoe*, 24 Bea. 185; *Shovelton* v. *Shovelton*, 32 Bea. 143; *Curnick* v. *Tucker*, L. R. 17 Eq. 320; *Le Marchant* v. *Le Marchant*, L. R. 18 Eq. 414. *Curnick* v. *Tucker* and *Le Marchant* v. *Le Marchant* were not followed by Jessel, M.R., in *Re Hutchinson and Tenant*, 8 Ch. D. 540, cited *post*. In *Godfrey* v. *Godfrey*, 11 W. R. 554, Wood, V.-C., refused to decide what interests the widow and children took. It seems doubtful whether in *Curnick* v. *Tucker* a *dictum* of Kindersley, V.-C., in *Palmer* v. *Simmonds*, 2 Drew. 221, was correctly interpreted as a surrender by him of the principle which he enforced in *Webb* v. *Wools*.

(*q*) See *Williams* v. *Williams*, 1 Sim. (N.S.) 358, and other cases cited *ante*, note (*k*).

(*r*) 8 Ch. D. 540.

(*s*) L. R. 6 Ch. 597. See also *Mackett* v. *Mackett*, L. R. 14 Eq. 49; *Re Adams and Kensington Vestry*, 27 Ch. D. 394; *Mussoorie Bank* v. *Raynor*, 7 A. C. 321. These cases are referred to again, *post*, p. 853.

opinion was expressed by the L.JJ. that no trust was created; but assuming that there was, it could not be extended to mean a trust for the widow for life, with remainder for the children in such shares as she might think fit to direct (*t*).

It should be observed that in some of the cases where Sir J. Parker's construction has prevailed, there has been a reference to the donee's death as the time when the recommended disposition was to take effect (*u*); and this may have been taken as marking the point of time when the interest of the other beneficiaries was to commence, as well as negativing the widow's right to dispose of the corpus in her lifetime (*v*). But the distinction is discountenanced by *Meredith* v. *Heneage*, and *Johnston* v. *Rowlands*, and in expressing his dissent from the construction in question, Sir G. Jessel drew no distinction between the cases where such a reference existed and where it did not (*w*).

Re Byrne's Estate.

In *Re Byrne's Estate* (*x*) the testator gave property to his wife "to be held by her for her own and all my children's use and benefit. But I leave it entirely in her power to fix the portion that each of my children is to get out of my property." It was held that this did not impose a precatory trust on the wife, but that she was a trustee for herself and the children, with a large discretionary power of determining the children's portions. The case somewhat resembled *Crockett* v. *Crockett* (*y*).

Where donee has a discretion.

Another important restriction on the doctrine of precatory trusts was laid down by Sir R. P. Arden in *Malim* v. *Keighley* (*z*), in stating the general principle with regard to precatory trusts: "Wherever any person gives property, and points out the object, the property, and the way in which it

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(*t*) See *Re Haly's Trusts*, 23 L. R. Ir. 130, where the legatee (a married woman) predeceased the testator, and it was held that the children were entitled: the question whether the mother took a life interest therefore did not arise. In that case the trust was imperative.

(*u*) *Gully* v. *Cregoe*, 24 Bea. 185; *Le Marchant* v. *Le Marchant*, L. R. 18 Eq. 414; *Cholmondeley* v. *Cholmondeley*, 14 Sim. 590 (but here the words were only "to be hers independent of her husband"—as to which see also *Stubbs* v. *Sargon*, 3 My. & Cr. 513).

(*v*) In *Hart* v. *Tribe*, 18 Bea. 215; 1 D. J. & S. 418, there was an express "recommendation" not to do so.

(*w*) It should be noticed that in *Fordham* v. *Speight* (23 W. R. 782) there was a gift of property to the testator's wife absolutely, in the full belief that she would so dispose of it by deed, will or otherwise that at her decease the whole might be equally divided between his children, and Jessel, M.R., held that this created a trust for the children.

(*x*) 29 L. R. Ir. 250. In *Re Berryman*, [1913] 1 Ir. R. 21, "to be disposed of as she may think best for the good of our children" was held not to create a trust.

(*y*) 2 Ph. 553; *post*, p. 869.

(*z*) 2 Ves. jun. 333.

shall go, that does create a trust (*a*), unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." This qualification was approved by the House of Lords in *Knight* v. *Boughton* (*b*), and the decisions in several other cases have turned, wholly or partially, on it (*c*).

Limits of the doctrine of precatory trusts.

With regard to the general doctrine of precatory trusts, doubts began to arise, even in Mr. Jarman's day, whether it had not been carried too far; he remarks (*d*), with reference to the words which in *Broad* v. *Bevan* (*e*) were held to create a trust: "Recent cases suggest a doubt whether such words would now receive a similar construction, for the Courts seem to be sensible that they have gone far enough in investing with the efficacy of a trust loose expressions of this nature, which, it is probable, are rarely intended to have such an operation. Accordingly we find, of late, a more strict and uniform requisition of definiteness in regard to both the subject-matter and objects of the intended trust, than can be traced in some of the earlier adjudications." The cases referred to by Mr. Jarman are *Curtis* v. *Rippon* (*f*), *Abraham* v. *Alman* (*g*), *Sale* v. *Moore* (*h*), *Meredith* v. *Heneage* (*i*), *Benson* v. *Whittam* (*j*), *Hoy* v. *Master* (*k*), *Lechmere* v. *Lavie* (*l*), *Horwood* v. *West* (*m*), and *Ex p. Payne* (*n*).

Instances of words being too indefinite to create a trust.

(*a*) "Everything in that passage, to my mind, turns upon the emphasis which is to be attributed to this expression, 'the way in which it shall go.' If it means 'the way in which it *shall* go'—imperatively—I do not quarrel with it": *per* Lindley, L.J., in *Re Hamilton*, [1895] 2 Ch., at p. 372.

(*b*) 11 Cl. & F. 513.

(*c*) *Ex p. Payne*, 2 Y. & C. 636; *Curtis* v. *Rippon*, 5 Madd. 434; *House* v. *House*, 31 L. T. 427; *Greene* v. *Greene*, Ir. R. 3 Eq. 629; *Lefroy* v. *Flood*, 4 Ir. Ch. R. 1; *Re Harbison*, [1902] 1 Ir. R. 103.

(*d*) First ed., p. 338.

(*e*) 1 Russ. 511, n. In that case the testator bequeathed to his daughter Ann a small annuity, and proceeded: "I also order and direct my son Joseph to take care of and provide for my said daughter Ann during her life"; he bequeathed all his property to Joseph, and appointed him sole executor: Plumer, M.R., held that the daughter was entitled to have a provision made for her out of the residue in addition to the annuity. Compare the case of *Re Moore*, 55 L. J. Ch. 418, *ante*, p. 846, in which Kay, J., referred to and distinguished *Broad* v. *Bevan*.

(*f*) 5 Madd. 434.

(*g*) 1 Russ. 509.

(*h*) 1 Sim. 534. See also *Reeves* v. *Baker*, 18 Bea. 372.

(*i*) 1 Sim. 542.

(*j*) 5 Sim. 22.

(*k*) 6 Sim. 568.

(*l*) 2 My. & K. 197. Mr. Jarman points out (first ed., p. 341) that the language of the will in this case brought it within the principle of *Wynne* v. *Hawkins*, 1 B. C. C. 179, and the other cases referred to *ante*, p. 843.

(*m*) 1 Sim. & St. 387. This case is referred to above, p. 847.

(*n*) 2 Y. & C. 636. See also *Knight* v. *Knight*, 3 Bea. 148; S. C. nom. *Knight* v. *Boughton*, 11 Cl. & Fin. 513; *Lefroy* v. *Flood*, 4 Ir. Ch. Rep. 1, in which great reliance was placed on the fact that the approbation of the

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Some of these cases proceeded on the principle that even where the words used by the testator to express his wishes would, on the authority of the decisions above referred to (*o*), be sufficient to create a trust, they will not have this effect if the subject-matter of the trust is not defined with certainty. There are other cases to the same effect (*p*). Indeed, the rule is expressly recognised in all statements of the general doctrine of precatory trusts (*q*).

Mr. Jarman's remarks upon the older cases.

After discussing the cases above referred to, Mr. Jarman makes the following remarks (*r*): "Such, then, is the long train of decisions arising from the neglect of testators clearly to distinguish between expressions which are meant to impose a trust or obligation, and those which are intended merely to inculcate the discharge of a moral duty. At one period the Courts seem to have been so astute in detecting an intention to create a trust when wrapped in the disguise of vague and ambiguous expressions, as almost to take from a testator the power of intimating a wish without creating an obligation, unless, indeed, by the use of words distinctly negativing the contrary construction. But though a sounder principle now prevails, the practitioner will perceive, in the state of the authorities, the strongest incentive to caution in the employment of words which may give rise to a question of this nature. If a trust is intended to be created, this should be done in clear and explicit terms; and if not, any request or exhortation which the testator may choose to introduce, should be accompanied by a declaration, that no trust or legal obligation is intended to be imposed."

Modern decisions on the general doctrine.

Since Mr. Jarman wrote, the reluctance of the Courts to construe vague expressions of wish or advice as creating precatory trusts has increased. In *Lambe* v. *Eames* (*s*), James, L.J., said: "In hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts, where in many cases the father of the family never meant to create trusts, must have been a very cruel

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devisee was required to the conduct of the persons claiming as *cestuis que trustent*; the force of which requisition must, however, depend on circumstances: *Bonser* v. *Kinnear*, 2 Gif. 195; *Quayle* v. *Davidson*, 12 Moo. P. C. C. 268; *Maud* v. *Maud*, 27 Bea. 615; *Scott* v. *Key*, 35 Bea. 291 (as to one-third); but see *Malone* v. *O'Connor*, 2 Ll. & Go. 465.

(*o*) *Ante*, p. 843.

(*p*) *Eade* v. *Eade*, 5 Madd. 118; *Palmer* v. *Simmonds*, 2 Dr. 221. See also *Williams* v. *Williams*, 1 Sim. (N.S.) 358.

(*q*) *Ante*, p. 846.

(*r*) First ed., p. 344.

(*s*) L. R. 6 Ch. 597; *ante*, p. 849. Of course, the doctrine laid down in *Lambe* v. *Eames* does not apply if the language of the will is imperative: see *Re Haly's Trusts*, 23 L. R. Ir. 130, *ante*, p. 850.

kindness indeed." The doctrine thus enunciated was followed by Jessel, M.R., in *Stead* v. *Mellor* (*t*) and *Re Hutchinson and Tennant* (*u*), and approved by the Judicial Committee in *Mussoorie Bank* v. *Raynor* (*v*); in that case the testator gave to his widow the whole of his property "feeling confident that she will act justly to our children in dividing the same when no longer required by her": and it was held that she took absolutely.

Re Adams.

In *Re Adams and the Kensington Vestry* (*w*), a testator gave all his real and personal estate and effects to his wife, "in full confidence" that she would do what was right as to the disposal thereof between his children either in her lifetime, or by will after her decease. It was held by the Court of Appeal (affirming the decision of Pearson, J.), that these words gave to the widow an absolute interest unfettered by any trust. Cotton, L.J., said: "I have no hesitation in saying myself, that I think some of the other authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly confidence, if the rest of the context shows that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe."

Re Diggles.

In *Re Diggles* (*x*), where a testatrix gave all her property to her daughter, adding "and it is my desire that she allows to A. G. an annuity of £25 during her life," it was held by the Court of Appeal that the will created no trust or charge as to the annuity, but only a request to the daughter making it merely her moral duty to pay reasonable attention to the wishes of the testatrix. Bowen, L.J. (*y*), said: "Just as uncertainty of the property and object are reasons for not construing the will as creating a trust, so also the fact that a trust would cause embarrassment and difficulty is a reason for coming to the same conclusion." And Fry, L.J. (*z*), said: "The later cases have established the reasonable rule that the Court is to consider in each particular case what was the testator's intention."

Re Hamilton.

In *Re Hamilton* (*a*) a testatrix gave legacies to her two nieces for their separate use, and added: "I wish them to bequeath the same equally between the families of O. and P." and it was

(*t*) 5 Ch. D. 225. See *Clancarty* v. *Clancarty*, 31 L. R. Ir. 530.
(*u*) 8 Ch. D. 540, *ante*, p. 849.
(*v*) 7 A. C. 321. As to the use of the word "justice" in gifts of this kind, see *Ellis* v. *Ellis*, 23 W. R. 382.
(*w*) 24 Ch. D. 199; 27 Ch. D. 394. See also *Re Moore*, 55 L. J. Ch. 418, *ante*, p. 846; *Cochrane* v. *Dundonald*, 10 T. L. R. 262.
(*x*) 39 Ch. D. 253.
(*y*) *Ibid.* at p. 257.
(*z*) *Ibid.* at p. 258.
(*a*) [1895] 2 Ch. 370; *Re Conolly*, [1910] 1 Ch. 219.

held by the Court of Appeal (Lindley, Lopes and Kay, L.JJ.) that no precatory trust was created. The principle laid down in *Re Hamilton* was approved by the Court of Appeal (Esher, M.R., and Lopes and Chitty, L.JJ.) in *Hill* v. *Hill* (*b*).

Re Williams.

The whole doctrine of precatory trusts was discussed in *Re Williams* (*c*). In that case a testator gave his residuary estate to his wife, "her heirs, executors, administrators and assigns absolutely, in the fullest confidence that she will carry out my wishes in the following particulars," namely, that she would pay the premiums on a policy of insurance on her life (which was her own property), and that she would by her will leave the moneys payable under the policy and also the moneys payable at the testator's death in respect of a policy on his life (which was the testator's property) to his daughter Lucy, and he appointed his wife and another person executors and trustees of his will: it was held by Lindley and A. L. Smith, L.JJ., affirming the decision of Romer, J., that the wife was not put to her election as to her policy, and that she took the testator's residuary estate absolutely, unfettered by any condition or trust. Rigby, L.J., dissented (*d*).

In considering whether a precatory trust is attached to any legacy, the Court will be guided by the intention of the testator apparent in the will and not by any particular words in which the wishes of the testator are expressed (*e*).

Present state of the law.

The present state of the authorities on the subject is not altogether satisfactory. "It would," as Lindley L.J., remarked in the case last cited, "be an entire mistake to suppose that the old doctrine of precatory trusts is abolished. Trusts—*i.e.*, equitable obligations to deal with property in a particular way—can be imposed by any language which is clear enough to show an intention to impose them." The difficulty is to say how far the old decisions are binding authorities in cases where the language used is practically identical. It cannot be questioned that the leaning of the Courts at the present day is against the implication of a trust from precatory words; nor can it be questioned that this tendency is a sound one. A will

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(*b*) [1897] 1 Q. B. 483.

(*c*) [1897] 2 Ch. 12.

(*d*) *Re Williams* was followed in *Re Oldfield*, [1904] 1 Ch. 549, where a testatrix gave her property to her two daughters for their absolute use and benefit, and added an expression of her "desire" that they should during the lifetime of their brother pay him a certain part of their income.

(*e*) *Per* Romer, J., in *Re Williams*, *supra*, quoted by Joyce, J., in *Re Burley*, [1910] 1 Ch. 215 (where "I wish" created a trust): in *Re Conolly*, [1910] 1 Ch. 219, "I specially desire" did not create a trust; and in *In b. Hanmer*, 80 L. J. P. 119, "It is my earnest will and desire" did not create a trust. See *ante*, p. 844.

is a business document, in which the use of diplomatic or courteous language is unnecessary, and it is, as Lopes, L.J., remarked (*f*), "inconceivable that a testator who really meant his hope, recommendation, confidence or request to be imperative, should not express his intention in a mandatory form."

But such cases do occasionally happen. Thus in *Willis* v. *Kymer* (*g*), a testatrix "requested" her sister to perform her wishes expressed in her will, and gave various directions as to the disposition of her property: it was held by Jessel, M.R., that this created a precatory trust.

Comiskey v. *Bowring-Hanbury*.

In *Comiskey* v. *Bowring-Hanbury* (*h*), the testator gave to his wife "the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be divided among the surviving said nieces." It was held by Kekewich, J., and by the Court of Appeal (Vaughan Williams and Stirling, L.JJ., Cozens-Hardy, L.J., dissenting (*i*), that the widow took absolutely for her own benefit. But this decision was reversed by the House of Lords, and it was held that there was an absolute gift of the testator's property to his wife, subject to an executory gift of the same at her death to such of his nieces as should survive her, equally, if more than one, so far as his wife should not dispose by will of the property in favour of the surviving niece or nieces, or any one or more of them. This construction (which was founded on the whole will, and not on the testator's use of any particular words) was strengthened by the bequest to one of the executors of "such sum not exceeding £150 as my dear wife may decide upon": if the testator intended her to be absolute owner of the property this gift was senseless. The question of precatory trust did not, in the view taken by the House of Lords, arise at all.

In *Re Atkinson* (*k*), Cozens-Hardy, M.R., said: "The leaning of the Courts is now undoubtedly not to extend the doctrine of precatory trusts. And I think I may go further and say that the leaning of the Court is not now to construe words used in a will, not being words of a strictly definite legal

(*f*) *Hill* v. *Hill*, [1897] 1 Q. B. p. 488.
(*g*) 7 Ch. D. 181; *ante*, p. 843, note (*k*); *Re Burley*, [1910] 1 Ch. 215.
(*h*) [1905] A. C. 84. See *post*, p. 1154.
(*i*) *Re Hanbury*, [1904] 1 Ch. 415.
(*k*) 103 L. T., at p. 862.

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character beyond all doubt—equivalent words in short—as creating a trust."

Where no trust created donee takes absolutely.

Whenever it is a question whether a trust has been created or not, the consequence of holding the expressions to be too vague for the creation of a trust is that the devisee or legatee retains the property for his own benefit; and in this respect such cases stand distinguished from those (*l*) in which there is considered to be sufficient indication of the testator's intention to create a trust, though the objects of it are uncertain: a state of things which, of course, lets in the claim of the residuary devisee or legatee, or of the heir or next-of-kin (as the case may be), to the beneficial ownership (*m*). In the latter class of cases there is no uncertainty as to the intention to create a trust, but merely as to the objects; in the other class of cases it is uncertain whether any trust is intended to be created. But inasmuch as uncertainty in the object furnishes a strong argument that a testator did not intend to create a trust, it is obvious that the two classes of cases are intimately connected with each other.

Meaning of the rule requiring certainty of object and subject for a precatory trust.

For the rule that a certain subject and a certain object are necessary to constitute a trust, where the words used are precatory only, does not mean that the subject or object must be so defined that it can in fact be ascertained by the Court. A precatory trust "for the benefit of ——," or of "the person named in such a paper," where no such paper is found, or "for such objects as I have communicated to" the donee, where no such communication has been made (*n*), would completely exclude the donee from all beneficial interest, although it leaves the object wholly unascertained (*o*). But what is meant by the rule is this: in ascertaining whether the precatory words import merely a recommendation, or whether they import a definite imperative direction to the donee as to his mode of dealing with the property, the Court will be guided by the consideration whether the amount he is requested to give is certain or uncertain, and whether the objects to be selected are certain or uncertain, and if there is a total absence of explicit direction as to the quantum to be given, or as to

(*l*) *Stubbs* v. *Sargon*, 2 Keen, 255; *Fowler* v. *Garlike*, 1 R. & My. 232; *Corporation of Gloucester* v. *Wood*, 3 Hare, 131, *ante*, p. 457; *Briggs* v. *Penny*, 3 De G. & S. 525; 3 Mac. & G. 546.

(*m*) Chap. XXI.

(*n*) *Bernard* v. *Minshull*, Johns. 276, see *Re Boyes*, 26 Ch. D. 531. But where the gift was subject to such disposition thereof or of any part thereof as the testator might by deed or writing thereafter direct, it was held there was no trust, the testator not having made up his mind whether he would make any such disposition or not: *Fenton* v. *Hawkins*, 9 W. R. 300, *ante*, p. 840.

(*o*) See n. (*l*).

the objects to be selected by the donee of the property, then the Court will infer from the circumstance of the testator having used precatory words, expressive only of hope, desire or request, instead of the formal words usual for the creation of a trust, that those words are used, not for the purpose of creating an imperative trust, but simply as suggestions on the part of the testator, for the guidance of the donee in the distribution of the property : the testator placing implicit reliance upon his discretion and leaving him the sole judge whether he will adopt those suggestions or not, and whether he will dispose of the property in the manner indicated by the testator, or in any other manner at his absolute discretion. The question is not whether the object is so defined that it can be distinctly ascertained by the Court, but whether the object is purposely left to be selected by the donee (*p*); as, for instance, where the testator expresses a desire that the donees shall " distribute the fund as they think will be most agreeable to his wishes " (*q*).

Gifts for a specified purpose.

(3) *Gifts for a Specified Purpose.*—We are now to consider whether, in cases where words are added expressing a purpose for which the gift is made, such purpose is to be considered obligatory.

Where the purpose is the benefit of donee alone, the gift is absolute.

Where the purpose of the gift is the benefit solely of the donee himself, he can claim the gift without applying it to the purpose, and that, it is conceived, whether the purpose be in terms obligatory or not. Thus, if a sum of money be bequeathed to purchase for any person a ring (*r*), or a life annuity (*s*), or a house (*t*), or to set him up in business (*u*), or towards the printing of a book, the profits on which are to be for his benefit (*x*), the legatee may claim the money without applying it, or binding himself to apply it, to the specified purpose; and even in spite of an express declaration by the testator, that he shall not be permitted to receive the money (*y*).

(*p*) See the judgment of Wood, V.-C., *Bernard* v. *Minshull*, Johns. 287, 290, quoted *ante*, p. 459.

(*q*) *Stead* v. *Mellor*, 5 Ch. D. 225; *Reid* v. *Atkinson*, Ir. R. 5 Eq. 373, and *Creagh* v. *Murphy*, Ir. R. 7 Eq. 182, seem to have been decided on this principle.

(*r*) *Apreece* v. *Apreece*, 1 V. & B. 364.

(*s*) *Dawson* v. *Hearn*, 1 R. & My. 606; *Ford* v. *Batley*, 17 Bea. 303; *Re Browne's Will*, 27 Bea. 324. It makes no difference whether it be a bequest of a specified sum to purchase an annuity, or a direction to purchase an annuity of a specified amount : *Dawson* v. *Hearn*, *supra*.

(*t*) *Knox* v. *Hotham*, 15 Sim. 82; *Dowling* v. *Dowling*, [1902] 1 Ir. R. 79.

(*u*) This seems to follow from the decision in *Gough* v. *Bult*, 16 Sim. 45, though there the exact point did not arise : see *post*, p. 862.

(*x*) *Re Skinner's Trusts*, 1 J. & H. 102, in which it was a question of some difficulty whether the principal object of the bequest was the benefit of the person named, or the publication of the testator's opinions.

(*y*) *Stokes* v. *Cheek*, 28 Bea. 620.

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Principle of the cases.

These cases rest on the principle that the Court will not compel that to be done which the legatee may undo the next moment, as by selling the thing to be purchased or giving up the business; the same principle (as we have already seen (*z*)) applies where the property is directed to be converted, for the donee may claim it in its original state. But, of course, if there be more than one donee interested in the gift, the deviation from the testator's directions cannot be made without the consent of all: as if the house when purchased is to be conveyed to, or settled on, two or more persons (*a*).

Where purpose would benefit others.

Where a testator, in bequeathing a legacy, states the purpose for which he gives it, the mere fact that if the legacy were applied for that purpose it would benefit other persons besides the legatee, does not impose on him any trust in their favour (*b*). But if the testator bequeaths a legacy to trustees to be applied for the benefit of a number of persons, they can, if they are all ascertained and *sui juris*, elect to have the money paid to them in lieu of having it applied in the manner directed by the testator. Thus, a bequest of money to trustees to be laid out in planting trees on an estate of which the testator was tenant for life, is a gift for the benefit of the persons entitled to the estate, and belongs to them absolutely (*c*).

Gift over.

As a general rule, a bequest of a capital sum for the maintenance and education of a person is equivalent to a bequest of it for his benefit, and entitles him to the whole (*d*), but if a legacy is directed to be applied by the testator's executors or trustees in a certain way for the benefit of A, with a gift over of any surplus remaining after the purpose is fulfilled, this only entitles A to so much of the legacy as is necessary for the purpose (*e*).

Distinction where gift conditional.

The principle above stated does not apply in cases where the motive is so stated as to create a condition. Thus, in *Re Unite* (*f*), a testatrix gave a sum of £20,000 "towards the new building and equipment to the satisfaction and under the direction of my executors, of the B. Hospital." Between the date of the will and the death of the testatrix, the hospital was almost totally rebuilt, but not painted, furnished or equipped.

(*z*) Chap. XXII, *ante*, p. 740 *seq.*

(*a*) As to the case of *Re Cameron*, 26 Ch. D. 19, where a testator directed his executors to carry on his business for a certain time, but did not dispose of the profits during that time: see *post*, p. 876.

(*b*) *Adams* v. *Lopdell*, 25 L. R. Ir. 311; *Mexborough* v. *Savile*, 88 L. T. 131, stated *post*, p. 873.

(*c*) *Re Bowes*, [1896] 1 Ch. 507, and cases there cited.

(*d*) See *post*, p. 860.

(*e*) *Re Lee's Trusts*, Ir. R. 10 Eq. 157; *Falls* v. *Alford* (*Re Black*), [1907] 1 Ir. R. 486.

(*f*) [1906] W. N. 26.

It was held by Kekewich, J., that the object specified by the testatrix could not be treated as merely the motive of the gift (*g*), so as to entitle the hospital to the legacy in any event. The question whether, if any balance of the legacy remained, after the expenditure of such part of it as could be properly applied in rebuilding or equipment, it might be treated as charitable and applied *cy-près*, was reserved.

Death of legatee.

Where the principle applies and the gift is immediate, the legatee's interest vests on the death of the testator, and if he dies before the money is paid or laid out, his personal representatives are entitled to it (*h*).

Future and contingent gifts.

The rule is applied where the gift is to take effect at a future time. For example, if a testator directs a sum of money or share of residue to be laid out at a future time (*e.g.*, on the death of a tenant for life) in the purchase of an annuity, and the annuitant dies before the time arrives, his representatives will be entitled to the money (*i*). If an annuity is directed to be purchased for a person on the happening of a contingent event, and he dies before the event happens, his representatives have no claim; but if he dies after the event has happened and before the annuity is purchased, his representatives are entitled to the money (*k*).

Provision against alienation.

If an annuity is directed to be purchased in the name of the annuitant, a gift over in the event of his alienating it is inoperative, and he takes absolutely (*l*). But if the annuity is directed to be held by trustees for the annuitant, with a gift over in case he should alienate it or become bankrupt, his right to receive the fund is taken away (*m*). Where such a trust is not to take effect immediately, but is postponed until the death of a tenant for life, and the annuitant dies before the tenant for life without alienating or becoming bankrupt, the question arises whether the personal representatives of the annuitant are entitled to the fund,

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(*g*) As in the class of cases referred to by Wood, V.-C., in *Re Sanderson's Trust*, 3 K. & J. 497: the passage is quoted *post*, p. 864.

(*h*) *Yates* v. *Compton*, 2 P. W. 308; *Barnes* v. *Rowley*, 3 Ves. 305; *Palmer* v. *Craufurd*, 3 Swanst. 482. Compare *Gough* v. *Bult*, 16 Sim. 45, stated *post*, p. 862.

(*i*) *Bayley* v. *Bishop*, 9 Ves. 6; *Day* v. *Day*, 22 L. J. Ch. 878; *Palmer* v. *Craufurd*, 3 Swanst. 482.

(*k*) *Re Mabbett*, [1891] 1 Ch. 707. In *Re Ross*, [1900] 1 Ch. 162, an arrangement was made between the beneficiaries under a will that a sum should be set aside to purchase an annuity, and the annuitant died before the purchase was made: it was held that her representatives were entitled to the money. The annuitant was a married woman restrained from anticipation, but this was held not to affect the question.

(*l*) *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285.

(*m*) *Hatton* v. *May*, 3 Ch. D. 148; *per* Kindersley, V.-C., in *Day* v. *Day*, 22 L. J. Ch. 881.

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or whether the bequest of the annuity fails altogether. The authorities are conflicting (*n*).

Direction to accumulate income, when void.

On the same principle, if a testator gives property to A absolutely, but directs his trustees to retain possession and accumulate the income for a certain number of years and then transfer the property and accumulations to A, the trust for accumulation is nugatory, and A is entitled to have the property transferred to him at once. Of course if the gift is contingent or defeasible, or if any other person may, by possibility, be interested in the trust, the principle does not apply (*o*). Nor does it apply where the trust for accumulation is illegal, so that the income is undisposed of (*p*).

Trust, when ineffective.

Again, if a testator gives property for the benefit of A absolutely (that is, without settling it on him for life, or providing for a gift over, or the like) (*q*), and gives his trustees a discretion, or specific directions, as to the manner in which the property shall be held and applied for A's benefit, A takes it absolutely (*r*). And the same rule applies even where the testator shows that his object was to secure the property for the benefit of A's children (*s*). So if the testator expressly directs that the property shall not be delivered over to him until he attains twenty-five, or the like, he is nevertheless entitled to immediate delivery, if he has attained twenty-one (*t*). So if the whole of a certain fund or income is given for the maintenance, or the maintenance and education, of a person, he is absolutely entitled to the fund or income, as the case may be, and if he dies before it has been paid or expended, his personal representatives are entitled to it, or if he becomes bankrupt, his interest passes to the trustee for his creditors (*u*). But if the money is given for the maintenance of several persons in such manner as

Trusts for maintenance.

(*n*) *Day* v. *Day*, 22 L. J. Ch. 878; *Power* v. *Hayne*, L. R. 8 Eq. 262; *Re Draper's Trusts*, 57 L. J. Ch. 942. They are discussed *post*, p. 1110.

(*o*) *Saunders* v. *Vautier*, 4 Bea. 115; Cr. & Ph. 240; *Gosling* v. *Gosling*, Johns. 265; *Coventry* v. *Coventry*, 2 Dr. & Sm. 470; *Gott* v. *Nairne*, 3 Ch. D. 278; *Wharton* v. *Masterman*, [1895] A. C. 186. In the last case the gift was charitable: see *Re Swain*, [1905] 1 Ch. 669.

(*p*) *Talbot* v. *Jevers*, L. R. 20 Eq. 255; *Weatherall* v. *Thornburgh*, 8 Ch. D. 261; *Re Parry*, 60 L. T. 489; *Re Travis*, [1900] 2 Ch. 541.

(*q*) *Re Eagles*, [1890] W. N. 74.

(*r*) *Richards* v. *Richards*, 9 Price, 219; *Re Jacob's Will*, 29 Bea. 402, and other cases cited *ante*, p. 536; *Re Johnston*, [1894] 3 Ch. 204; *Re Miller*, [1897] 1 Ir. R. 290: see also *Re Smith*, [1928] Ch. 915.

(*s*) *Dowling* v. *Dowling*, [1902] 1 Ir. R. 79.

(*t*) *Rocke* v. *Rocke*, 9 Bea. 66; *Re Couturier*, [1907] 1 Ch. 470.

(*u*) *Hanson* v. *Graham*, 6 Ves. 239; *Webb* v. *Kelly*, 9 Sim. 469; *Beevor* v. *Partridge*, 11 Sim. 229; *Green* v. *Spicer*, 1 Russ. & My. 395; *Younghusband* v. *Gisborne*, 1 Coll. 400; *Presant* v. *Goodwin*, 1 Sw. & Tr. 544; *Lewes* v. *Lewes*, 16 Sim. 266; *Noel* v. *Jones*, *ib.* 309; *Soames* v. *Martin*, 10 Sim. 287; *Wilkins* v. *Jodrell*, 13 Ch. D. 564; *Williams* v. *Papworth*, [1900] A. C. 563. See also *Re Howard*, [1901] 1 Ch. 412.

the trustees think proper, no one beneficiary is entitled to any specific share (*v*).

Discretionary trust with gift over.

So where property was given to trustees upon trust to apply it in the maintenance or advancement of the testator's son A, "it being my wish that my said son (if living) should have the whole benefit of such moneys if he should conduct himself steadily and to the satisfaction of" the trustees, with a gift over of any unapplied part, it was held that this was equivalent to a gift of the fund in trust for the son, subject to a power in the trustees to deprive him of it if he should not conduct himself steadily and to their satisfaction (*x*).

Where time is left to discretion of trustees.

There are also cases in which a sum of money is directed to be applied for the benefit of a person in a certain way (as to bind him apprentice), but the time within which it is to be expended is left to the discretion of the testator's executors or trustees: here the beneficiary cannot, so long as the trustees exercise their discretion properly, demand payment of the money, but if he dies before it is applied, his personal representatives are entitled to the money (*y*).

Where performance of trust becomes unnecessary.

On a somewhat similar principle, if a legacy is given to be applied for the benefit of a person in a particular way, and the prescribed mode of application becomes impossible or unnecessary, the legatee is entitled to the legacy absolutely (*z*). As in *Lockhart* v. *Hardy* (*a*), where a legacy was given to a person to enable him to pay off a mortgage debt on the estate devised to him, and he was held entitled to it although the mortgage was foreclosed in the testator's lifetime. There are numerous other authorities to this effect (*b*).

In *Re Howard* (*c*) a testator directed his trustees to set aside £200 and thereout to pay to his wife £3 monthly "so long as she remains unmarried, or until the said sum of £200 becomes exhausted, the said payment of £3 monthly to cease on my said wife marrying again." She died without having

(*v*) *Re Coleman*, 39 Ch. D. 443; *Re Booth*, [1894] 2 Ch. 282.

(*x*) *Re Coe's Trust*, 4 K. & J. 199. See the reference to this case *post*, p. 1480.

(*y*) *Barlow* v. *Grant*, 1 Vern. 255; *Woolridge* v. *Stone*, 4 L. J. (o.s.) 56; *Barton* v. *Cooke*, 5 Ves. 461. The beneficiary's creditors have not, during his lifetime, any higher right than he has: *Chambers* v. *Smith*, 3 A. C. 795. See the cases cited with reference to provisions against involuntary alienation, *post*, p. 1475 *seq.*

(*z*) *Leche* v. *Lord Kilmorey*, T. & R. 207; *Att.-Gen.* v. *Haberdashers' Company*, 1 M. & K. 420. See *Palmer* v. *Flower*, L. R. 13 Eq. 250. In *Nevill* v. *Nevill*, 2 Vern. 431, a sum of money directed to be applied for the benefit of a child was ordered to be paid to him, apparently because the mode of application had become impossible: see *Cowper* v. *Mantell*, 22 Bea. 231.

(*a*) 9 Bea. 379. See also *Parsons* v. *Coke*, 27 L. J. Ch. 828.

(*b*) *Earl of Lonsdale* v. *Berchtoldt*, 3 K. & J. 185; *Re Colson's Trusts*, Kay, 133; *Re Bowes*, [1896] 1 Ch. 507. As to this last case, see *post*, p. 878.

(*c*) [1901] 1 Ch. 412.

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married again, and it was held that her executrix was entitled to the unexpended balance.

Where part only need be applied.

In the preceding cases the trust applied to the whole fund, but where the trust is to expend a sum "not exceeding" a certain amount, or such a sum as the trustees think fit, for a specific purpose, a different principle applies, and the true rule seems to be that the beneficiary is not entitled to the whole fund, or the maximum amount, unless it is required to satisfy the specified purpose (*d*). There are, indeed, some early cases in which the contrary rule was applied, but it is doubtful whether they are now binding authorities.

Thus, in *Cope* v. *Wilmot* (*e*), the testator directed that his trustees "should and might" raise any sums they should think proper, not exceeding in the whole £3,000, for the advancement of the plaintiff in any business, art or profession, or in any civil or military employment; they laid out over £1,000 in purchasing a commission in the army, etc., but declined to expend any more: it was held that the plaintiff was entitled to be paid the balance of the £3,000. *Gough* v. *Bult* (*f*) is commonly cited as an authority to the same effect. In that case the testator "ordered and empowered" his trustees at their free will and pleasure to sell part of the trust property, and to pay and apply such part of the proceeds not exceeding £2,000 to each of his sons for setting them up in business, or for such other purposes as his wife should think proper and most beneficial for them, and to apply the residue in manner therein mentioned. One of the sons survived the testator and died nine years afterwards, without any part of the £2,000 having been raised; his personal representative filed a bill to have the £2,000 raised, and a demurrer to it was overruled. Shadwell, V.-C., held that the whole £2,000 ought to be raised: Cottenham, L.C., agreed that the testator's direction to sell was imperative, and that the mode of applying the money alone was discretionary, but he did not decide that the plaintiff was entitled to the whole £2,000. *Palmer* v. *Flower* (*g*) seems to have been decided on the same principle, and it is supported by the *dicta* of Wood, V.-C., in *Joel* v. *Mills* (*h*).

Gough v. *Bult.*

(*d*) A direction to apply the income of a fund, "or so much as may be necessary," for the maintenance of a person, does not give the trustees a discretion how much shall be applied; if the whole income is required it must be applied: *Rudland* v. *Crozier*, 2 De G. & J. 143.

(*e*) (1771), 1 Coll. 396, n. See the observations of Wood, V.-C., on this case in *Re Sanderson's Trust*, 3 K. & J. 497, *post*, p. 864.

(*f*) 16 Sim. 45.

(*g*) L. R. 13 Eq. 250; *Maud* v. *Maud*, 27 Bea. 615.

(*h*) 3 K. & J. 458.

Gude v. *Worthington*.

Gude v. *Worthington* (*i*) is commonly cited as carrying the rule even farther. There the testatrix gave a fund to trustees upon trust to apply the principal or interest for the benefit of A B in such way as they might in their discretion think fit during her life, with power to dispose of the principal and interest or any part thereof, or to withhold the whole and let the interest accumulate, without being accountable to A B or anyone else, and there was a gift over of any undisposed-of part of the fund. The trustees paid the interest and part of the principal to A B, and died without any other exercise of their powers: Knight-Bruce, V.-C., held that A B was absolutely entitled to the whole fund, but directed a reference to the Master to approve of a settlement (*j*), from which it would appear that the Court undertook to exercise the discretion given to the trustees. If A B had died before the trustees, it seems clear that her representatives would have had no claim to the fund.

True principle.

The true principle is laid down in *Lewis* v. *Lewis* (*k*), where power was given to trustees to raise a sum not exceeding £600, and to apply it for the preferment or advancement in life or other the occasions of A B before he attained twenty-six, as the trustees should think proper. Lord Thurlow said: "This is not the case of a gift by the testator, but a power to others to give, and that seems confined to answer some particular purpose. The proper question to be made in this case is whether the present situation and circumstances of the petitioner are such as the testator intended this legacy for. I shall therefore refer it to the Master to inquire whether the present situation of the petitioner requires any, and what part of this money to be advanced before his age of twenty-six, and to report the grounds of his determination." So in *Cowper* v. *Mantell* (*l*), the testator authorised his trustees to apply any sum not exceeding £600 in the purchase of a church preferment for the benefit of A: Romilly, M.R., said that the trustees had a discretion as to the propriety of exercising the power at all, and that the legatee could not during his lifetime have claimed payment of it, and that as he died before the money was expended, his representatives had no claim to it. *Re Stanger* (*m*) seems to have been decided on the same principle.

(*i*) 3 De G. & S. 389.
(*j*) The wife was married and had an equity to a settlement.
(*k*) 1 Cox, 162, followed in *Robinson* v. *Cleator*, 15 Ves. 526. See also *Bull* v. *Vardy*, 1 Ves. jun. 270; *Brown* v. *Higgs*, *ante*, pp. 629 *seq.*
(*l*) 22 Bea. 231.
(*m*) 64 L. T. 693. See *Re Ward's Trusts*, L. R. 7 Ch. 727.

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Sanderson's Trust.

The principle has also been laid down by Wood, V.-C. (*n*): "In reference to gifts of this description, there are two classes of cases between which the general distinction is sufficiently clear, although the precise line of demarcation is occasionally somewhat difficult to ascertain. If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be. Thus, where there is the gift of a sum to apprentice a child or to buy a commission for a son, the Court gives effect to the entire gift; and whether the sum can or cannot be applied for the purpose of buying the commission or apprenticing the child, the Court holds that the child is entitled to the whole of it. So again with regard to maintenance, as to which the distinction between the two classes of cases is very clearly put by Sir William Grant in *Hanson* v. *Graham* (*o*), where he says that if an entire fund is given for the maintenance of children or the like, they take the whole fund absolutely, and the maintenance is treated in effect as simply the motive in making the gift; while on the other hand, if a portion only of the fund is given for maintenance, then they are entitled to draw out so much only as may be necessary for the purpose specified."

Maintenance of spendthrift.

It is on this principle that a discretionary trust to apply the whole or part of the income of a fund for the maintenance of a person is effective, notwithstanding assignment or bankruptcy (*p*).

Unlimited discretionary trust.

Even where maintenance is not referred to, and the direction is to pay to the beneficiary the whole or only a portion of the income, subject to any conditions or restrictions, as the trustees in their sole and absolute discretion think fit, this gives the beneficiary or his assigns no right to any part of the income, unless the trustees fail to exercise their discretion properly (*q*).

Exercise of discretion.

If trustees in the exercise of their discretion expend money in making a purchase for the object of their power, it seems that the thing purchased becomes his absolute property (*r*). In *Messeena* v. *Carr* (*s*), Romilly, M.R., held that a discretionary

(*n*) *Re Sanderson's Trust*, 3 K. & J., at p. 503. The principle was followed in *Re Andrew*, [1905] W. N. 86, where the trust was created *inter vivos*.

(*o*) 6 Ves. 239.

(*p*) *Re Coleman*, 39 Ch. D. 443; *Re Bullock*, 60 L. J. Ch. 341. In *Twopeny* v. *Peyton*, 10 Sim. 487, Shadwell, V.-C., practically overruled his own decision in *Snowdon* v. *Dales*, 6 Sim. 524.

(*q*) *Train* v. *Clapperton*, [1908] A. C. 342.

(*r*) *Lawrie* v. *Bankes*, 4 K. & J. 142; *Re Coleman*, 39 Ch. D. 443.

(*s*) L. R. 9 Eq. 260.

power to purchase an annuity authorised the trustees to make payments out of capital to the beneficiary : *sed quære*.

Death of object.

If the object of a discretionary trust dies before the fund is expended, his personal representatives have no claim to it (*t*).

On the other hand, it seems that the trustees may, if they think fit, renounce their discretion, and pay over the whole fund to the *cestui que trust* (*u*).

Failure of trustee to exercise discretion.

If a trustee in whom a discretion is vested dies without exercising it, or refuses to exercise it, the question may arise whether it can be exercised by other trustees, or by the Court. If the discretion is a mere power and it is not executed, the Court cannot execute it (*v*). But if property is given to trustees upon trust to apply it according to some principle indicated by the testator, the manner being left to the discretion of the trustees, then the Court will, as a general rule, exercise the discretion if the trustees fail to do so; as if property is given upon trust to apply so much as may be required for the maintenance of one or more persons (*w*) or upon trust to divide it among the testator's relations according to their necessities (*x*). These cases, however, must be distinguished from *Doyley* v. *Att.-Gen.* (*y*) and *Brown* v. *Higgs* (*z*) and similar cases, where a power of selection or distribution among a number of objects gives rise to an implied gift in their favour, and if the power is not exercised the Court divides the property among them equally (*a*).

Re Yates.

In *Re Yates* (*b*) the testator directed his trustees to pay an annuity to his wife during widowhood, and to pay to her a further annuity until his daughter should attain twenty-one, to be applied by his wife for the maintenance and education of the daughter; subject to the payment of this and other annuities, the trustees were directed to accumulate the income until his daughter attained twenty-one. The widow died while the daughter was an infant : it was held that the further annuity continued to be payable during her minority.

(*t*) *Cowper* v. *Mantell*, 22 Bea. 231; *Messeena* v. *Carr*, L. R. 9 Eq. 260; *Re Stanger*, 64 L. T. 693.

(*u*) *Re Coe's Trust*, 4 K. & J. 199, stated *post*, p. 1480.

(*v*) See *Bull* v. *Vardy*, 1 Ves. jun. 270; *Cowper* v. *Mantell*, 22 Bea. 231.

(*w*) *Re Sanderson's Trust*, 3 K. & J. 497.

(*x*) *Gower* v. *Mainwaring*, 2 Ves. sen. 87; Lewin on Trusts (13th ed.), p. 862.

(*y*) 2 Eq. Ca. Ab. 195. *Down* v. *Worrall* (1 Myl. & K. 561) would probably not now be followed, the use of the word "or" not being sufficient to exclude the general rule.

(*z*) *Ante*, p. 629.

(*a*) See *Longmore* v. *Broom*, 7 Ves. 124; *Salusbury* v. *Denton*, 3 K. & J. 536; *Re Douglas*, 35 Ch. D., at p. 485.

(*b*) [1901] 2 Ch. 438. Compare *Ryan* v. *Keogh*, Ir. R. 4 Eq. 357.

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Farr v. *Hennis*.

Farr v. *Hennis* (*c*) was the converse case. There the testator gave an annuity to his niece of 8s. a week "towards the support and maintenance of her two children until they shall attain the age of twenty-one years." By a codicil the testator gave certain leasehold property to the niece "to enable her to provide for her children," and referred to his will as "my said will in her favour." One of the children of the niece died, and the other attained twenty-one. It was held that the words in the gift of the annuity referring to the support and maintenance of the children were merely descriptive of the testator's motive in making the gift, and that they did not cut down the life estate of the niece.

Where the purpose not for benefit of donee alone: three constructions.

Where the motive or purpose of the gift is the benefit of other persons as well as the primary donee, three constructions obtain, according to the language used. The purpose may be so peremptorily expressed as to constitute a perfect trust; or may be such as to leave entirely in the discretion of the primary donee the quantum of benefit to be communicated to the other persons, provided that such discretion is honestly exercised; or lastly, the expression of motive or purpose may be merely nugatory, and not operate to abridge the previous absolute gift to the primary donee. In the following cases, illustrating these distinctions, the decisions will be found on examination of the reports to turn in many instances on minute distinctions, which it would require too much space to particularise, and some cases will be found almost irreconcileable with others; the preponderance, however, seems to lean in favour of giving the primary donee a discretion which he must honestly exercise, or in default, subject himself to the control of the Court, with a tendency, however, rather to narrow than to extend the effect heretofore ascribed to words expressing the purpose or motive of the gift.

(a) Cases of complete trust.

(a) As to the cases in which a complete trust is created. A gift to A, to dispose of among his children (*d*), or for bringing up his children, or to be applied for their maintenance and education (*e*), gives A no interest, but creates a complete trust for the children (*f*). And in *Taylor* v. *Bacon* (*g*), where the

(*c*) 44 L. T. 202.

(*d*) *Blakeney* v. *Blakeney*, 6 Sim. 52; *Barnes* v. *Grant*, 26 L. J. Ch. 92. See *Re Haly's Trusts*, 23 L. R. Ir. 130, where the primary legatee predeceased the testator.

(*e*) *Pilcher* v. *Randall*, 9 W. R. 251; *Re Delahunty*, [1907] 1 Ir. R. 507, distinguishing *Mackett* v. *Mackett*, L. R. 14 Eq. 49, *post*, p. 870.

(*f*) See *Talbot* v. *O'Sullivan*, 6 L. R. Ir. 302, where the mother died *ante litem motam*, and it was therefore unnecessary to decide whether she took any interest.

(*g*) 8 Sim. 100; see also *Chambers* v. *Atkins*, 1 S. & St. 382; *Fowler* v. *Hunter*, 3 Y. & J. 506; *Re Camac's Trust*, 12 Jur. 470; *Barnes* v. *Grant*, 26 L. J. Ch. 92; *Bibby* v. *Thompson*, 32 Bea. 646.

testator bequeathed the dividends of stock to R., the wife of his son G., for the benefit of his son G., of herself and of their children, and after the decease of G., the stock to remain in trust for the benefit of R. and her children during her lifetime, if she should remain a widow; it was held that the wife was a trustee of the interest for herself, her husband and children.

In *Jubber* v. *Jubber* (*h*), the bequest was to the testator's wife "for the benefit of herself and unmarried children, that they may be comfortably provided for as long as my wife may remain in this life," with a bequest over upon her death. The widow and unmarried daughters were held to be entitled in equal shares to the income during the widow's life, whether as joint tenants or tenants in common was not decided. In *Wetherell* v. *Wilson* (*i*), the testatrix, under a general power, bequeathed a sum of stock in trust for her children at twenty-one or marriage, and directed the trustees, in the meantime, to pay the interest of the fund to her husband, in order the better to enable him to maintain the children of the marriage, until their shares should become assignable to them. Lord Langdale decided that the husband took nothing beneficially, but was bound to apply the income for the benefit of the children. In *Wilson* v. *Maddison* (*k*), the testator bequeathed "to A. W., with her little girl and two little boys, for their joint maintenance,—their mother to have the care of bringing them up to the best of her power, till they are able to do for themselves,—£30 a year, to be paid to the said mother, as above, half-yearly, as may best suit"; and it was held that the four persons were constituted joint tenants, and that while three were minors, the fourth, being an adult, should receive the annuity for their maintenance (*l*).

A trust for the maintenance of children is *prima facie* for the benefit of adults as well as infants, and, if necessary, the Court will direct an inquiry what provision should be made (*m*).

Interest coupled with trust.

Where the donee has a beneficial interest coupled with a trust, the extent of his interest is sometimes difficult to define. In *Evans* v. *Evans* (*n*) the testator gave all his property to his wife absolutely, and to be by her willed to any or either of his children in any manner suitable to her wishes: the wife died *ante litem motam*, so that it was unnecessary to decide the exact nature of her interest, but the result seems to have been

(*h*) 9 Sim. 503.
(*i*) 1 Kee. 80.
(*k*) 2 Y. & C. C. C. 372.
(*l*) See also *Re Harris*, 7 Exch. 344; *Re Yates*, [1901] 2 Ch. 438, *ante*, p. 865.
(*m*) *Re Booth*, [1894] 2 Ch. 282.
(*n*) 33 L. J. Ch. 662.

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that she took a life interest, with a power of appointment by will among the children.

(b) Cases in which there is a discretion liable to be controlled.

(b) As to the cases in which the Court has considered the primary donee to have a discretion liable to be controlled, if not honestly exercised (*o*). In *Hamley* v. *Gilbert* (*p*), the residue was given to E. G. H., to be laid out and expended by her at her discretion, for or towards the education of her son F. G. H., and that she should not at any time thereafter be liable and subject to account to her said son or to any other person whatever for the disposal or application of such residue or any part thereof. It was held that E. G. H. was absolutely entitled to the residue, subject to a trust to apply a part to the education of her son during his minority (*q*), and it was referred to the Master to inquire what would be a sufficient sum to be appropriated for that purpose. In *Gilbert* v. *Bennett* (*r*), the testator bequeathed all his property to his wife and two other persons in trust, to pay the income to his wife for the education and support of his children by her; but none of his property was to be disposed of, but the income arising therefrom to be applied as above, to their maintenance and support, and advancement in life and support of his children; and after her death, he gave the property to be divided among his children. The V.-C. said the natural construction of the will was, that the testator intended the whole of the income to be paid to his wife for her life, and to impose on her the burden of maintaining and educating the children out of it. In *Hadow* v. *Hadow* (*s*), *Leach* v. *Leach* (*t*), *Browne* v. *Paull* (*u*), and *Longmore* v. *Elcum* (*x*), words nearly similar received the same construction (*y*). It appears, as the result of these authorities, that where the interest of the children's legacies is given to a parent to be applied for or towards their maintenance and education,

Result of the authorities.

(*o*) As to the circumstances and manner in which the Court will control the discretion of the donee, see *Castle* v. *Castle*, 1 De G. & J. 352; *Re Roper's Trusts*, 11 Ch. D. 272; *Re G.*, [1899] 1 Ch. 719; *Re O'Flanagan and Ryan*, [1905] 1 Ir. R. 280.

(*p*) Jac. 354.

(*q*) As to this, see *post*, p. 903. *Compare Re Robertson's Trusts*, 6 W. R. 405, where the bequest was to A for the maintenance and support of himself and his family: Kindersley, V.-C., said that no trust was created, and ordered the money to be paid to A, but added that if the children were not maintained they could apply to the Court: this implies that a trust was created.

(*r*) 10 Sim. 371.

(*s*) 9 Sim. 438.

(*t*) 13 Sim. 304.

(*u*) 1 Sim. (N.S.) 92; see also *Bowden* v. *Laing*, 14 Sim. 113.

(*x*) 2 Y. & C. C. C. 363.

(*y*) See also *Re Booth*, [1894] 2 Ch. 282; *Farr* v. *Hennis*, 44 L. T. 202; *Berkeley* v. *Swinburne*, 6 Sim. 613.

there, in the absence of anything indicating a contrary intention, the parent takes the interest subject to no account, provided only that he discharges the duty imposed upon him of maintaining and educating the children (*z*); and that a contrary intention is not indicated by a direction, that in case of the parent's death, other trustees should make the application of the fund, in which case, however, such trustees would take nothing beneficially (*a*).

Duration of trust for maintenance.

The question how long a trust for maintenance lasts is discussed in a later part of this chapter (*b*).

Crockett v. *Crockett*.

In *Crockett* v. *Crockett* (*c*) where the testator directed that all his property should be at the disposal of his wife for herself and children, the only point decided was that the wife and children were not joint tenants; but Lord Cottenham was of opinion that the wife had a personal interest in the fund, and that as between herself and her children she was either a trustee with a large discretion as to the application of it, or had a power in favour of the children, subject to a life estate in herself. The former construction would have been the more consistent with the previous authorities. The latter would not only have introduced a limitation of the wife's interest not expressed in the will, but would have left that diminished interest still subject to the charge of maintaining the children. A "recommendation" not to diminish the principal but to vest it in government or freehold securities, has been held to require this construction (*d*).

Raikes v. *Ward*.

In *Raikes* v. *Ward* (*e*), the gift was to the testator's wife, "to the intent she may dispose of the same for the benefit of herself and our children in such manner as she may deem most advantageous." The Court, in deciding against the claim of the children to an absolute interest, said, it could not deprive the widow of the honest exercise of the discretion which the testator had vested in her, or refuse its assistance to inquire into or sanction any reasonable arrangements which she might desire to make. Expressions somewhat similar to those found in the last two cases have received the same construction in the cases of

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(*z*) *Per* Lord Cranworth, 1 Sim. (N.S.) 103. See *Farr* v. *Hennis*, 44 L. T. 202; *Re Moore*, 55 L. J. Ch. 418.

(*a*) 1 Sim. (N.S.), at p. 105.

(*b*) *Post*, p. 903.

(*c*) 2 Phil. 553, reversing the decision, 5 Hare, 326 (which seems to have proceeded on some misapprehension of the decree, 1 Hare, 451). As to *Crockett* v. *Crockett*, see *Lambe* v. *Eames*, L. R. 6 Ch. 597, *post*, p. 870. See also *Scott* v. *Key*, 35 Bea. 291; *Armstrong* v. *Armstrong*, L. R. 7 Eq. 518, which is discussed in *Re Hill*, [1923] 2 Ch. 259.

(*d*) *Hart* v. *Tribe*, 18 Bea. 215; but see *per* Turner, L.J., 1 D. J. & S. 418.

(*e*) 1 Hare, 445.

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Other cases.

Conolly v. *Farrel* (*f*), *Woods* v. *Woods* (*g*), and *Costabadie* v. *Costabadie* (*h*).

Donee allowed to receive legacy without his interest being declared.

In several cases (*i*), the Court has held the donee entitled to receive the legacy or dispose of the property devised or bequeathed and receive the proceeds, without saying whether he was absolutely entitled or bound honestly to exercise a discretionary trust. In such cases it was merely decided that there was no absolute trust.

Distinction where given in first instance absolutely.

But here, as in the case of precatory trusts, if the property is given in the first instance for the absolute benefit, or to be at the disposal, of the donee, especially if such donee be the parent, no trust will be created by subsequent words showing that the maintenance of the children was a motive of the gift. And, although it is not directly denied that the Court may control the execution of a trust where the shares of the beneficiaries are left to the discretion of the donee (for the Court is in the constant habit of ascertaining the amount required for maintenance of children), yet increased weight is given to that indefiniteness as showing that no trust whatever was intended. Thus, in *Lambe* v. *Eames* (*k*), a testator gave his estate to his widow "to be at her disposal in any way she may think best for the benefit of herself and family"; the widow made a will disposing of part of her husband's estate, and giving an interest therein to a natural son of one of his children; and the questions were whether there was a trust, and if there was, whether it had been duly executed. *Crockett* v. *Crockett*, and other cases cited above, were pressed on the Court; but with reference to them Sir W. James, L.J., expressed a strong disapproval of the "officious kindness" of the Court in interposing trusts where none were intended, and said, "If the case stood alone, I should say that no sufficient trust was declared by the will; but if there be any such obligation, I think it has been fairly discharged by the way in which she (the widow) has made her will" (*l*).

Lambe v. *Eames*.

(*f*) 8 Bea. 347.

(*g*) 1 My. & Cr. 401 ("towards her support and her family").

(*h*) 6 Hare, 410; and see *Cowman* v. *Harrison*, 10 Hare, 234; *Smith* v. *Smith*, 2 Jur. (N.S.) 967; *Godfrey* v. *Godfrey*, 2 N. R. 16; *Dixon* v. *Dixon*, [1876] W. N. 225; *Ryan* v. *Keogh*, Ir. R. 4 Eq. 357; *Bond* v. *Dickinson*, 33 L. T. 221; *Re Robertson's Trust*, 6 W. R. 405.

(*i*) *Cooper* v. *Thornton*, 3 Br. C. C. 96; *Robinson* v. *Tickell*, 8 Ves. 142; *Woods* v. *Woods*, 1 My. & Cr. 401; *Wood* v. *Richardson*, 4 Bea. 174; *Pratt* v. *Church*, *ib.* 177; *Briggs* v. *Sharp*, L. R. 20 Eq. 317. As to *Re Robertson's Trust*, 6 W. R. 405, see *ante*, p. 868, n. (*q*).

(*k*) L. R. 6 Ch. 597. See also *Mackett* v. *Mackett*, L. R. 14 Eq. 49; *Re Adams and Kensington Vestry*, 24 Ch. D. 199. But see *Scott* v. *Key*, 35 Bea. 291.

(*l*) *Re Hill*, [1923] 2 Ch. 259 (for the benefit of themselves and their respective families). As to *Willis* v. *Kymer*, 7 Ch. D. 181, see *ante*, p. 843, note (*k*).

(c) Lastly, as to cases where the primary donee is held to be absolutely entitled.

(c) Where primary donee held absolutely entitled.

In *Brown* v. *Casamajor* (*m*), a legacy was given to a father, the better to enable him to provide for his younger children. The father consented to secure the principal for the benefit of his younger children, but the Court, on his petition, held him entitled to the past arrears of interest. The report suggests no reason for this decision, but that which appears to be the reasonable one, *viz.*, that the legacy was originally absolute to the father, and remained so except so far as his consent to settle it had deprived him of his interest.

Brown v. *Casamajor.*

Again, in *Hammond* v. *Neame* (*n*), there was a gift to a trustee of a sum of stock, upon trust to pay the income to the testator's niece, "for and towards the maintenance, education and bringing up of all and every her children, until he, she, or they shall attain twenty-one"; and then the stock was given equally among them. The niece having no children at the testator's death, it was held that she was entitled to the interest of the stock.

Hammond v. *Neame.*

In *Wood* v. *Cox* (*o*) the testatrix gave property to A for his own use and benefit, "trusting and wholly confiding in his honour that he will act in strict conformity to my wishes": it was held that A took absolutely, subject to the payment of certain legacies which were admitted to be validly bequeathed.

Wood v. *Cox.*

In *Thorp* v. *Owen* (*p*), the testator desired that everything should remain in its present position during the lifetime of his wife, and after her decease gave his real and personal property to other persons, and then added, "I give the above devise to my wife, that she may support herself and her children according to her discretion and for that purpose." Sir J. Wigram, V.-C., decided that the widow took absolutely for her life. He said, "The cases should be considered under two heads: first, those in which the Court has read the will as giving an absolute interest to the legatees, and as expressing also the testator's motive for the gift; and, secondly, those cases in which the Court has read the will as declaring a trust upon the fund, or part of the fund, in the hands of the legatee. A legacy to A the better to enable him to pay his debts, expresses the motive for the testator's bounty, but certainly creates no trust which the creditors of A could enforce in this Court; and again, a legacy to

Thorp v. *Owen.*

(*m*) 4 Ves. 498.

(*n*) 1 Sw. 35. See also *Benson* v. *Whittam*, 5 Sim. 22.

(*o*) 1 Kee. 317; 2 My. & Cr. 684. See *Irvine* v. *Sullivan*, L. R. 8 Eq. 673, a similar case. See *ante*, p. 840.

(*p*) 2 Hare, 607. See *M'Alinden* v. *M'Alinden*, Ir. R. 11 Eq. 219; *Morrin* v. *Morrin*, 19 L. R. Ir. 37.

A the better to enable him to maintain, or educate and provide for, his family must, in the abstract, be subject to a like construction : it is a legacy to the individual, with the motive only pointed out. This is very clearly, and, in my opinion, very correctly, laid down by the V.-C. in *Benson* v. *Whittam*; and the cases of *Andrews* v. *Partington* (*q*), *Brown* v. *Casamajor*, and *Hammond* v. *Neame*, illustrate the same principle. At the same time, a legacy to a parent upon trust to be by him applied, or in trust, for the maintenance and education of his children, will certainly give the children a right, in a Court of Equity, to enforce their natural claims against the parent in respect of the fund on which the trust is declared" (*r*). And the V.-C. added (*s*) : "If you give property to persons to accomplish an object, increasing their funds so that they might be the better able to do it—that is, in point of fact, a gift to them, and there is no trust which others can enforce." This is an important distinction, clear in principle, but often difficult of application.

Bequest to A to maintain B.

In *Biddles* v. *Biddles* (*t*), under a gift to A, to bring up and maintain B, A was held to be absolutely entitled, principally on the ground that the testatrix directed the income of one-fourth of her residuary estate to be applied for the maintenance and education of B during his infancy, and the capital to be paid to him on attaining twenty-one. And in *Byne* v. *Blackburn* (*u*), where the testator bequeathed a sum of money to trustees, in trust after the death of his daughter M., to pay the dividends to her husband during his life, "nevertheless to be by him applied for or towards the maintenance, education or benefit of the children of M.," it was held that no trust was created in favour of the children, and that A was entitled absolutely for his life; on the ground that if the testator had intended A to be merely a trustee, he would not have made the bequest in the first instance to other trustees; and that where there is a gift to a parent, coupled with a direction that he shall perform certain parental duties (which are legal obligations as regards a father, but are merely moral obligations in the case of a mother), it is a gift to and a beneficial interest in the person to whom it is made. Yet nothing is more common in trusts for the maintenance of children, than to direct the trustees to

(*q*) 2 Cox, 223. Compare *Barrs* v. *Fewkes*, 2 H. & M. 60.
(*r*) See *Re Robertson's Trusts*, 6 W. R. 405, *ante*, p. 868, n. (*q*).
(*s*) 2 Hare, 614.
(*t*) 16 Sim. 1; see also *Berkeley* v. *Swinburne*, 6 Sim. 613 (where the income was payable to the guardians of the children after the death of their parent); *Oakes* v. *Strachey*, 13 Sim. 414; *Leigh* v. *Leigh*, 12 Jur. 907; *Jones* v. *Greatwood*, 16 Bea. 527; *Hart* v. *Tribe*, 18 Bea. 215 (as to the £100); *Wheeler* v. *Smith*, 1 Gif. 300; *Howorth* v. *Dewell*, 29 Bea. 18.
(*u*) 26 Bea. 41. See also the judgment in *Lambe* v. *Eames*, L. R. 6 Ch. 597.

pay the money over to the children's guardian, to be by him applied for their benefit; and with regard to the second reason, it is difficult to reconcile it with Sir J. Wigram's remarks cited above.

In *Dowling* v. *Dowling* (*x*) a testator gave a fund to be equally divided among his four sons, and then provided that his executors should invest the share of his son J. in the purchase of a residence "where my said son and family may enjoy apartments free of rent, and that he may have . . . some income towards support of himself and family." It was held that the gift to J. was absolute, and that the trust was repugnant and void.

Vagueness of purpose.

In *Re Harbison* (*y*), property was given to "the Rev. T. L., parish priest, for a Roman Catholic school, or for whatever other purpose he pleases": it was held that he took beneficially.

Legacy to pay estate duty.

In *Earl of Mexborough* v. *Savile* (*z*) a testator bequeathed to his eldest son, to whom certain settled estates would pass on the testator's death, "a sum of money sufficient to pay and discharge all the estate duty which may be payable by" him: it was held that this was a gift to the son for his own absolute benefit, and that it did not impose upon him a trust to pay the duty for the benefit of the persons interested in the settled estates in succession to him.

In *Adams* v. *Lopdell* (*a*) a testator devised lands to A charged with an annuity to B, and bequeathed a sum of money to A to assist him in paying off a mortgage on the demised lands. It was held that B could not compel A to apply the money in discharge of the mortgage.

Intention to create a trust.

But, of course, a testator may use language showing that he intends to create a trust: as in *Cary* v. *Cary* (*b*), where the testator gave leaseholds to A in order to exonerate his estates from certain debts and incumbrances, and charged the leaseholds with the payment thereof.

Directions as to tenancies, employment of particular persons, etc.

(4) *Directions as to Employment in Office, etc.*—Sometimes a testator's recommendation in favour of a third person is not of a nature to create a simple absolute trust for his benefit, but has for its object the placing or continuance of such person in some office or capacity connected with the property that is the subject of disposition, involving the performance of a certain

(*x*) [1902] 1 Ir. R. 79.
(*y*) *Re Harbison* (*Morris* v. *Larkin*), [1902] 1 Ir. R. 103.
(*z*) 88 L. T. 131, overruling C. A. *Re Mexborough*, 86 L. T. 331.
(*a*) 25 L. R. Ir. 311.
(*b*) 2 Sch. & L. 173, explained in *Barrs* v. *Fewkes*, 2 H. & M. 60, cited *ante*, p. 689.

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duty. As where a testator directs that the tenants of the devised property shall be allowed to continue in its occupation, either with or without a condition or restriction as to rent, cultivation, etc.

Direction to permit tenants to continue in occupation,

In *Tibbits* v. *Tibbits* (*c*), where a testator made a devise to his son, recommending him to continue his cousins A and B "in the occupation of their respective farms in the county of W as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay their rents," it was held to be a trust for the cousins, who had been tenants at will. Whether such words would be given this effect at the present day may, perhaps, be doubted.

to employ a particular steward, etc.

It has been much discussed whether a direction or injunction to employ a particular agent or steward, imposes on the devisee an obligation in the nature of a trust in favour of the person so named, subject, of course, to the implied condition faithfully to discharge the duties of the office. In *Hibbert* v. *Hibbert* (*d*), the testator, whose only real estates were in Jamaica, directed that his friend H. should be appointed receiver of his real and personal estates, adding that he made this appointment for the sake of benefiting H. in a pecuniary point of view. Sir W. Grant, M.R., gave effect to the testator's direction by appointing H. to be receiver, agent and consignee for the Jamaica estates, upon his personal recognisance, without (as would have been required if he had not been appointed by the testator) giving the usual security. But the Court obviously had a discretion in the matter.

Hibbert v. *Hibbert.*

Williams v. *Corbet.*

In *Williams* v. *Corbet* (*e*), where a testator devised his estates to trustees upon trust to let the same, and apply the rents in paying off certain incumbrances, and appointed A to be auditor of the accounts during the execution of the trusts, and directed the trustees to pay him the usual annual remuneration; Sir L. Shadwell, V.-C., held that the trustees were not justified in removing A from the office, there being no imputation on his conduct, for that he had as much right to be the auditor as any one of the devisees had to the estates.

True principle.

The application of this rule, however, would in many cases cause serious embarrassment to trustees in the management of the trust, and it is submitted that the true principle was laid down in *Lawless* v. *Shaw* (*f*), where a testator, after devising his

(*c*) 19 Ves. 656. Compare *Quayle* v. *Davidson*, 12 Moo. P. C. C. 268.
(*d*) 3 Mer. 681. See also *Saunders* v. *Rotherham*, 3 Gif. 556 (direction to continue testator's trade and employ A as manager).
(*e*) 8 Sim. 349.
(*f*) Ll. & Go. 154.

estates, charged with certain annuities, to his friend William Shaw for life, with remainders over in strict settlement, and after bequeathing to his friend and agent B. E. Lawless £100 as a token of the testator's esteem for him, declared it to be his particular desire that Shaw should continue Lawless in the receipt and management of the devised estates, and likewise should employ and retain him in the agency and management of lands to be purchased in pursuance of the will, at the usual fees allowed to agents, he having acted for the testator since he became possessed of the estate fully to his satisfaction. Soon after the testator's decease, Shaw dismissed Lawless from his office as land-agent, but without impeaching his character or capacity. Lawless filed a bill against Shaw, claiming to be reinstated, which was dismissed by Lord Plunket. This decision, after being reversed by Sir E. Sugden, was restored by the House of Lords (*g*), on the ground that a gift of an estate to one person is inconsistent with a direction that another should have the management of it.

Finden v. *Stephens.*

The same principle was followed in *Finden* v. *Stephens* (*h*), where the testator expressed the wish and desire that the plaintiff be appointed as agent, receiver, or manager, whenever the trustees should have occasion for the services of a person in that capacity. Lord Cottenham said : " The testator gives his property to trustees who, until the death of the survivor of the wife and her nieces, were to act in the management of the estate. . . . Is it consistent with this purpose, that he should give to the plaintiff an irrevocable office of agent, receiver or manager?" So, a direction in a will that a particular person " shall be the solicitor to my estate and to my said trustees in the management and carrying out the provisions of this my will," has been held not to impose any trust or duty on the trustees to continue such person as their solicitor (*i*).

Solicitor trustee.

A testator sometimes appoints a solicitor, surveyor, stock-broker, or other professional person to be one of the trustees of his will, and authorises him to charge for his professional services (*k*). Such a provision confers a beneficial interest under the will within section 15 of the Wills Act, which is forfeited if the person to whom it is given attests the execution of the

(*g*) *Shaw* v. *Lawless*, 5 Cl. & Fin. 129.
(*h*) 2 Ph. 142; *Belaney* v. *Kelly*, 24 L. T. 738.
(*i*) *Foster* v. *Elsley*, 19 Ch. D. 518.
(*k*) See *Re Ames*, 25 Ch. D. 72; *Re Chapple*, 27 Ch. D. 584; *Re Wertheimer*, 106 L. T. 590 (art expert).

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will (*l*). It cannot be claimed as against creditors (*m*), appears to be liable to legacy duty (*n*), and has no priority over other legacies (*o*).

Trust must have object.

III.—Trusts without a Definite Object.—The general rule is that "every trust must have a definite object. There must be somebody in whose favour the Court can decree performance" (*p*). Charitable gifts are no exception to the rule, because they can be enforced at the suit of the Attorney-General, representing the Crown; but in a charitable trust, as in any other trust, there must be a *cestui que trust*, namely the public or a section of the public (*q*). And an intention to create a trust of a charitable nature must be expressed (*r*).

Discretionary trusts.

What appears to be an exception to the rule is where property is given to a person as a trustee, with power to apply it in a certain way at his discretion, the result being that he may apply it in that way if he likes: that no one can compel him to apply it in that way: and that if he does not apply it in that way, it (or the unapplied part) belongs to the original donor or his representatives. This is called a discretionary trust. Whether it can properly be called a trust or not does not seem very material: perhaps it would be more accurate to call it a power in the nature of a trust. Common examples are the ordinary powers of applying income for the maintenance or capital for the advancement of infants (*s*); a discretionary trust for the benefit of an adult is another example (*t*). In *Gott* v. *Nairne* (*u*), trustees were allowed to carry out a trust, although there was no person who could enforce it.

Erection of monument.

On the same principle, a direction by a testator that a monument shall be erected to his memory is lawful. Such a direction is effectual to this extent, that the executors or trustees are justified in expending the money, but no one can compel

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(*l*) *Re Barber*, 31 Ch. D. 665; *Re Pooley*, 40 Ch. D. 1.

(*m*) *Re White*, [1898] 2 Ch. 217; *Re Salmen*, 107 L. T. 108.

(*n*) *Re Thorley*, [1891] 2 Ch. 613. It is difficult to understand, on principle, why this should be so. See Hanson's Death Duties (4th ed.), 419.

(*o*) *Re Brown*, 62 Sol. J. 487.

(*p*) *Per* Sir W. Grant, M.R., in *Morice* v. *Bishop of Durham*, 9 Ves. 399. Compare *Doe* d. *Toone* v. *Copestake*, 6 East, 328, where the trusts were so indefinite that the trustees might apply the property to any use they thought fit: and *Re Cameron*, 26 Ch. D. 19, where a testator directed his executors to carry on his business for a certain time without disposing of the profits, and it was held that except so far as it might be necessary to do so for the purpose of paying debts and legacies, the direction was inoperative: and see *ante*, p. 456.

(*q*) *Re Church Patronage Trust*, [1904] 2 Ch. 643.

(*r*) *Ante*, p. 215.

(*s*) See Trustee Act, 1925, ss. 31, 32.

(*t*) *Gisborne* v. *Gisborne*, 2 A. C. 300; *Re Coleman*, 39 Ch. D. 443.

(*u*) 3 Ch. D. 278.

them to do so : " it stands on the same footing as an expensive funeral " (*y*).

Trust for benefit of animals.

The rule laid down in *Morice* v. *Bishop of Durham* has been much discussed in connection with the decision of North, J., in *Re Dean* (*z*). There the testator bequeathed his horses and dogs to his trustees with an annual sum for their maintenance, payable for a term of fifty years from his death, if any of the animals should so long live : it was held that the trust was valid, although it was not a charity, and that any surplus unexpended by the trustees belonged to the testator's representatives. The decision was based partly on the analogy of a trust for the erection of a monument, and partly on the authority of *Mitford* v. *Reynolds* (*a*), where the point does not seem to have been argued. Its correctness has been doubted, on the ground that the trust was incapable of enforcement (*b*), but it is submitted that if the trust had been limited to the period allowed by the Rule against Perpetuities, it would have been good, on the ground that a discretionary trust can be created for the benefit of animals as well as for the benefit of a spendthrift or lunatic. The difficulty as to perpetuity did not arise in *Pettingall* v. *Pettingall* (*c*), where the trust was held to be valid.

How far objects must be defined.

If a testator shows an intention to create a trust, it is not always necessary that he should definitely indicate the objects of it. Thus where a testator bequeathed £5,000 to trustees upon trust to expend it in planting trees on land of which he was

(*y*) *Mellick* v. *Asylum*, Jac. 180, 184; *Adnam* v. *Cole*, 6 Bea. 353; *Trimmer* v. *Danby*, 25 L. J. Ch. 424 (where *Mitford* v. *Reynolds*, 1 Ph. 185, is referred to); *Hoare* v. *Osborne*, L. R. 1 Eq. 585; *Mussett* v. *Bingle*, [1876] W. N. 170. As to expensive funerals, see *post*, p. 1967. It has been held that a trust for the maintenance of a tomb is legal, if restricted to the period allowed by the Rule against Perpetuities. These decisions have been criticised by Mr. Gray (Perp. §§ 906-7), but I venture to contend that they are correct. No one can enforce the performance of such a trust, and therefore if the trustees do not expend the income for the purposes of it, there is a resulting trust for the persons interested in the testator's estate; it follows that their interest is contingent, being dependent on the acts of the trustees, and if the trust were of indefinite duration, it would allow contingent interests to take effect beyond the period allowed by law : it is therefore illegal, unless restricted to the period allowed by the Rule against Perpetuities. [Note by C. Sweet.]

(*z*) 41 Ch. D. 552.

(*a*) 16 Sim. 105. See also *Hicks* v. *Ross*, L. R. 14 Eq. 141.

(*b*) See an article by Professor Gray in the Harvard Law Review, xv, 509; Gray on Perp. §§ 905 *seq.*; and an article by C. Sweet in the Juridical Review for July, 1906. On the question of perpetuity, see above, p. 249. The proper way of providing for animals is to give an annuity to the custodian payable so long as any of the animals are living. *Re Howard*, Times, October 30, 1908.

(*c*) 11 L. J. Ch. 176.

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tenant for life, it was held that this was a good trust for the benefit of the owners of the land for the time being (*d*).

Discretionary gift.

If the gift be expressly "in trust," or if the donees are described as trustees, though the property is to be disposed of in such manner and for such purposes as they think fit, "it being my will that the distribution thereof shall be left entirely to their discretion," they are trustees, and the beneficial interest results to the heir or the next-of-kin (*e*). It was at one time supposed that if the property was not expressly given in trust, the donees took beneficially. Thus in *Gibbs* v. *Rumsey* (*f*), the testatrix gave the residue of her property to her "said trustees and executors" (naming them) to be disposed of unto such person and persons and in such manner and form as they in their discretion should think proper and expedient, and it was held by Grant, M.R., that this was not a trust, but the same thing as a general power of appointment, and that the executors took the residue beneficially. But this distinction has been disapproved (*g*), and in *Fenton* v. *Nevin* (*h*), where the testator bequeathed various legacies, including a legacy to each of his executors, and after directing his property to be sold, proceeded as follows: "I will my executors shall apply the overplus, if any, as they think fit": it was held that they did not take beneficially. Again, in *Re Sinclair* (*i*) the testator gave and bequeathed, "with the exception of my said house in Sunderland, the disposal of which I leave to the discretion of my trustees hereinafter mentioned," his real and personal estate to his wife and A B upon certain trusts; A B predeceased the testator: it was held that the wife took neither a beneficial interest in the house nor a beneficial power of appointment, and that the house devolved to the testator's heir.

Where no discretion is given.

But where a testator gives property to his executor or trustee, without words implying any discretion or power of selection, it may appear from the general frame of the will, and the circumstances of the testator's family, that the gift was intended to

(*d*) *Re Bowes*, [1896] 1 Ch. 507. *Cary* v. *Cary*, 2 Sch. & L. 173, may perhaps be referred to this principle; and see *Re Mexborough*, 86 L. T. 331; 88 L. T. 131, *ante*, p. 873. As to the result when it becomes impossible to carry out such a trust, see below.

(*e*) *Fowler* v. *Garlike*, 1 R. & My. 232; *Buckle* v. *Bristow*, 10 Jur. (N.S.) 1095; *Re Dean*, 41 Ch. D. 552, where an annual sum was given to trustees to be expended for certain purposes, with a direction that any part remaining unapplied should be dealt with by them at their sole discretion.

(*f*) 2 V. & B. 294.

(*g*) See *Buckle* v. *Bristow*, *supra*; *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381.

(*h*) 31 L. R. Ir. 478. On this case see *Re Howell*, [1915] 1 Ch. 241, stated *post*, p. 879.

(*i*) [1903] W. N. 113.

be beneficial (*j*); as where he provides for his immediate relatives, and gives the residue of his estate to A B, whom he has previously appointed executor and trustee (*k*). The question whether a person is to take as an executor or trustee, or is to have a beneficial interest, is a question of intention, and (as regards executors) was not affected by the Executors Act, 1830 (*l*).

"Own disposal."

In *Re Howell* (*m*) a direction that the residue of the testator's property (if any) should be at the discretion of his executrix and at his own disposal, was held to give the residue to the executor beneficially. But in *Re Chapman* (*n*) where the testatrix desired her residue to be applied for such charitable purposes as she might in writing direct or to be retained by her executor for such objects and such purposes as he might in his discretion select and to be at his own disposal, and she left no written directions, it was held that the executor took as trustee for the next-of-kin.

Charity.

The question whether the objects of a trust are sufficiently indicated often arises in gifts which are partly for charitable purposes (*o*).

Resulting trust.

It will, of course, be remembered that the question frequently arises whether property is given to a person for the purpose of conferring on him the beneficial interest, subject to a particular purpose, or whether it is given to him for a particular purpose, with no intention of conferring on him any beneficial interest; in the latter case, if there is no disposition of the beneficial interest, a resulting trust arises. This subject is discussed in Chapter XXI.

Direction to settle.

IV.—Executory Trusts.—The question whether words used by a testator in declaring a trust are complete in themselves (*p*), or whether they are intended to serve merely as an outline or minutes of the trust, the details of which are to be filled in by the trustees or some other person, arises chiefly in those cases where the testator directs property to be settled on a certain person and his or her issue (*q*).

(*j*) *Fenton* v. *Hawkins*, 9 W. R. 300.
(*k*) *Williams* v. *Arkle*, L. R. 7 H. L. 606 : *ante*, p. 697.
(*l*) *Ibid.*
(*m*) [1915] 1 Ch. 241.
(*n*) [1922] 2 Ch. 479.
(*o*) See above, pp. 217 *seq.*
(*p*) A gift of property to trustees upon trust to convey, transfer or pay it to certain persons in certain events, is not, properly speaking, an executory trust, but the construction of such a gift is sometimes different from that of a direct gift. See Chap. XXXVII, and *Abbis* v. *Burney*, 17 Ch. D. 211.
(*q*) Lord St. Leonards's definition of "executory trusts," in *Egerton* v. *Brownlow*, 4 H. L. C., at p. 210, is quoted *post*, p. 1839. A direction to executors to settle land which was not devised to them gave them a common law power : *Knocker* v. *Bunbury*, 6 Bing. N. C. 306.

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Strict settlement of land.

The nature of the estates and interests which ought to be limited in pursuance of a direction to settle land, or money to be laid out in the purchase of land, is discussed in another chapter, in connection with the rule in *Shelley's Case* (*r*).

Doctrine of *cy-près*.

The doctrine of *cy-près* was sometimes applied to executory trusts for the settlement of land on a person's issue (*s*).

Form of settlement of land.

It may here be mentioned that where land is devised or agreed to be settled upon a person and his issue in tail, the established form of limitation, in the absence of express provision to the contrary, is to the first and other sons successively, according to seniority, in tail, remainder to the daughters as tenants in common in tail, with cross remainders between them (*t*). But if there are words importing division among the issue, it seems that they all take as tenants in common in tail, with cross remainders between them (*u*). It seems that although a direction to settle land on a person and his children means that it must be settled as realty, the Court may authorise the insertion of powers of leasing, sale, and exchange, with provisions for advancement, etc. (*x*). According to the older cases, even where there was a direction to insert usual powers, neither a power to jointure (*y*), nor a power of portioning (*z*), could be inserted. But a more liberal principle of construction seems now to prevail (*a*).

Jointure.

In *Wright* v. *Wright* (*b*) a testator gave real and personal estate to his son, to be settled in strict settlement on his marriage : the son having married and died without any settlement having been made, it was held that the widow was entitled to an annuity by way of jointure.

Direction to "entail" realty or personalty.

If real or personal property is directed to be "entailed" on A and his heirs, it seems that A only takes a life interest, with

(*r*) *Post*, p. 1828 *seq.* As to the way in which a name and arms (shifting) clause should be framed, see *Trevor* v. *Trevor*, 13 Sim. 108. In *D'Eyncourt* v. *Gregory*, 34 Bea. 36, a testator directed a settlement to be made and to contain two shifting clauses in different forms; the M.R. held that the testator had not been his own conveyancer.

(*s*) *Ante*, p. 259. The argument in favour of such a settlement failed in *Seal* v. *Seal*, Prec. Ch. 421.

(*t*) See *Grier* v. *Grier*, L. R. 5 H. L. 688, *post*, Chap. XLVIII.

(*u*) *Dodson* v. *Hay*, 3 Br. C. C. 404; *Hadwen* v. *Hadwen*, 23 Bea. 551. See *Phillips* v. *James*, 3 De G. J. & S. 72; *Mason* v. *Mason*, 5 Ir. R. Eq. 288; Vaizey on Settlements, 167 *seq.*

(*x*) *Turner* v. *Sargent*, 17 Bea. 515; *Wise* v. *Piper*, 13 Ch. D. 848. Older cases are *Peake* v. *Penlington*, 2 V. & B. 311; *Hill* v. *Hill*, 6 Sim. 136; *Lindow* v. *Fleetwood*, 6 Sim. 152; *Wheate* v. *Hall*, 17 Ves. 80; *Horne* v. *Barton*, Jac. 437; *Pearse* v. *Baron*, Jac. 158; *Brewster* v. *Angell*, 1 J. & W. 625; *Duke of Bedford* v. *Marquess of Abercorn*, 1 My. & Cr. 312.

(*y*) *Duke of Bedford* v. *Marquess of Abercorn*, 1 My.& Cr. 312.

(*z*) *Higginson* v. *Barneby*, 2 S. & St. 516.

(*a*) *Viscount Holmesdale* v. *West*, L. R. 3 Eq. 474; 12 Eq. 280; *Sackville-West* v. *Holmesdale*, L. R. 4 H. L. 543; Vaizey, 180.

(*b*) [1904] 1 Ir. R. 360.

remainder to his heirs in tail or absolutely, according to the nature of the property (*c*).

Second wife.

If the trust is to settle land on marriage as a jointure to the wife, the widow of a second marriage may be entitled (*d*).

Bequest of chattels in strict settlement.

Another question which sometimes arises is whether a bequest of chattels or leaseholds (*e*) to follow the limitations of a strict settlement of realty, or to go with a title, creates an executed or executory trust. This question also is discussed in Chapter XX (*f*). The case of *Shelley* v. *Shelley* (*g*), in which a testatrix bequeathed jewels to be held as heirlooms, without reference to any real estate, is referred to in the same chapter.

Direction to settle personalty.

A somewhat narrow construction has been placed on testamentary trusts or powers to settle personalty (*h*). In *Laing* v. *Laing* (*i*) the testator gave a legacy of stock to a female infant, to be paid or transferred to or settled upon her by his trustees and executors by such deed or instrument in writing as they should think most prudent and proper, upon her attaining the age of twenty-one; she married in the testator's lifetime, and attained twenty-one after his death : Shadwell, V.-C., directed the stock to be transferred to her. In *Kennerley* v. *Kennerley* (*k*) the testator gave all his property to his wife to bring up his children, " and when they come of age to settle on them what shall be deemed by her prudent " : it was held that this merely gave her a power of appointment among the children, and not a power to settle property on them for life, with remainder to their children. In *Loch* v. *Bagley* (*l*) greater attention was paid to the obvious intention of the testator; he directed his daughters' shares in his residuary personal estate " to be settled on themselves strictly," and it was held that each daughter should have a life interest for her separate use without power of anticipation, with a power of appointment by will over the corpus if she predeceased her husband : in default of appoint-

(*c*) See *Graves* v. *Hicks*, 11 Sim. 536; *Sealy* v. *Stawell*, Ir. R. 2 Eq. 326. In *Boydell* v. *Golightly*, 14 Sim. 327, the ultimate limitation of the real and personal estate was made to the person who was the testator's heir.

(*d*) *Mason* v. *Mason*, 5 Ir. R. Eq. 288. See *Allanson* v. *Clitherow*, 1 Ves. sen. 24.

(*e*) See *Miles* v. *Harford*, 12 Ch. D. 691.

(*f*) *Ante*, pp. 672 *seq.*

(*g*) L. R. 6 Eq. 540, stated *ante*, p. 672.

(*h*) In *White* v. *Briggs* (15 Sim. 17) and *Combe* v. *Hughes* (L. R. 14 Eq. 415) a direction that property should be " secured " for the benefit of certain persons was held to be equivalent to a direction to settle it. As to the peculiar case of *Burrell* v. *Crutchley* (15 Ves. 544), see Vaizey on Settlements, 190.

(*i*) 10 Sim. 315.

(*k*) 10 Ha. 160.

(*l*) L. R. 4 Eq. 122. Compare *Munt* v. *Glynes*, 41 L. J. Ch. 639, where the legatee was judicially separated from her husband, and the legacy was ordered to be paid to her.

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ment the property to go to her next-of-kin or, if she survived her husband, to her absolutely. In *Magrath* v. *Morehead* (*m*), the narrow construction was applied. In that case the testator gave a share of his property to each of his daughters, "to be settled on themselves on their marriage": it was held by Bacon, V.-C., that on the daughters attaining twenty-one, being unmarried, they were entitled to their shares absolutely.

Where restrained from anticipation.

But if a legacy is given to a woman, with a direction that it shall be settled upon her for her life, it will be settled for her separate use with a restraint on anticipation (*n*).

Effect of gift over,

If the testator gives a legacy to his daughter, with a direction to settle it on her marriage, and a gift over in the event of her not leaving issue, this is an effective direction, and will be carried into effect by giving her a life interest for her separate use, with remainder to her children as she shall appoint, and in default to her children who attain twenty-one or, being

or contingent legacy.

daughters, marry (*o*). And if a legacy is given to a feme sole contingently on her marriage, a direction to settle it is effective (*p*). *A fortiori*, a direction to settle property on a person and his or her issue, children or family is effective (*q*). The children take as tenants in common (*r*).

Interests of children.

Where the testator directs a legacy to be settled on the legatee and his (or her) wife (or husband) and children, a power of appointment among the children will be given to the husband and wife, or the survivor, with the usual trust in default of appointment for children who attain twenty-one or marry, and

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(*m*) L. R. 12 Eq. 491.

(*n*) *Re Parrott*, 33 Ch. D. 274; *Re Dunnill's Trust*, Ir. R. 6 Eq. 322 (further proceedings [1926] Ir. R. 126). See *Turner* v. *Sargent*, 17 Bea. 515; *Symonds* v. *Wilkes*, 11 Jur. (N.S.) 659; *Eustace* v. *Robinson*, 7 L. R. Ir. 83; *Stanley* v. *Jackman*, 23 Bea. 450; *Dowd* v. *Dowd*, [1898] Ir. R. 244. It has been held that where a precatory trust has been created by will in favour of "children," the trustee may vary the trust, by limiting the shares of daughters to their separate use: *Willis* v. *Kymer*, 7 Ch. D. 181. But see *ante*, p. 843, n. (*k*).

(*o*) *Young* v. *Macintosh*, 13 Sim. 445; *Oliver* v. *Oliver*, 10 Ch. D. 765; *Harris* v. *Loftus* (*No.* 2), [1903] 1 Ir. R. 203. Compare *Stanley* v. *Jackman*, 23 Bea. 450, where the direction to settle was contained in a deed. If there are several children of the first taker, and one of them dies under age and unmarried before the settlement is executed, it seems that the survivors take the whole: *Herring-Cooper* v. *Herring-Cooper*, [1905] 1 Ir. R. 465. Compare *Harris* v. *Loftus*, *supra*. In *Findon* v. *Findon*, 1 De G. & J. 380, there was a direction to settle on testator's daughter and her issue, with a gift over "in default of such issue"; no settlement was executed, and the daughter's only child died an infant in her lifetime: it was held that the daughter's personal representative was entitled to the fund.

(*p*) *Duckett* v. *Thompson*, 11 L. R. Ir. 424.

(*q*) *Stonor* v. *Curwen*, 5 Sim. 264; *White* v. *Briggs*, 15 Sim. 17; *Combe* v. *Hughes*, L. R. 14 Eq. 415; *Re Spicer*, 84 L. T. 195; *Wright* v. *Wright*, [1904] 1 Ir. R. 360, and the cases cited *post*, p. 883. The decision of Shadwell, V.-C., in *Samuel* v. *Samuel* (14 L. J. Ch. 222) is unintelligible.

(*r*) *Taggart* v. *Taggart*, 1 Sch. & L. 84.

the usual hotchpot, maintenance and advancement clauses (*s*). But if the testator has shown an intention that the children are to take equally, the power of appointment will be omitted (*t*). The ultimate trust varies according to circumstances (*u*). In *Turner* v. *Sargent* (*x*) a trust to settle on children, with a substitutional gift to their issue, was carried out so as to exclude issue who did not survive the tenant for life. This would probably not be followed at the present day (*y*).

A covenant to settle after-acquired property is not a "usual" provision (*z*).

Wife or husband of legatee.

It seems that a direction to settle property on a person and his or her issue or "family" does not authorise a direct provision for his or her wife or husband (*a*). But in *Charlton* v. *Rendall* (*b*) the Court approved of the insertion in the settlement of a power enabling the legatee to appoint a life interest to her husband (*c*).

Future wife or husband.

Where a testator directs personalty to be settled on a person for life, with remainder to his (or her) children in such a way as to include children by any marriage, and provides for a life interest being given to the wife (or husband), this authorises a life interest being given to a second wife (or husband) (*d*).

Real and personal property in same settlement.

There are also cases in which real and personal property is directed to be settled by the same will. No general principle as to the frame of the settlement in such cases seems to be deducible from the decisions (*e*).

Failure to settle.

If a settlement on marriage is directed, and the marriage takes place, but no settlement is executed, it seems that a proper settlement will be directed at any time, even after the death of the original devisee or legatee (*f*).

(*s*) *Re Gowan*, 17 Ch. D. 778; following *Cogan* v. *Duffield*, 2 Ch. D. 44.

(*t*) *Re Parrott*, 33 Ch. D. 274. As to the practice in Ireland with regard to the hotchpot clause, see *Re Norcott's Estate*, 14 Ir. Ch. 315; *Lees* v. *Lees*, Ir. R. 5 Eq. 549; *Miller* v. *Gulson*, 13 L. R. Ir. 408.

(*u*) *Stanley* v. *Jackman*, 23 Bea. 450.

(*x*) 17 Bea. 515.

(*y*) See the result of the long conflict of authority on this point stated *post*, p. 1304.

(*z*) *Re Maddy's Estate*, [1901] 2 Ch. 820.

(*a*) *White* v. *Briggs*, 15 Sim. 17; *Young* v. *Macintosh*, 13 Sim. 445.

(*b*) 11 Ha. 296.

(*c*) Compare *Wilkinson* v. *Joughin*, 41 L. J. Ch. 234.

(*d*) *Nash* v. *Allen*, 42 Ch. D. 54. In *Re Parrott*, 33 Ch. D. 274, the terms of the will excluded a future husband. As to the case of divorce, see *Marlborough* v. *Marlborough*, [1901] 1 Ch. 165.

(*e*) See *White* v. *Briggs*, 15 Sim. 17; 2 Ph. 583; *Boydell* v. *Golightly*, 14 Sim. 327, *ante*, p. 881; *Turner* v. *Sargent*, 17 Bea. 515; Vaizey on Settlements, 189. Now that personalty can be entailed, it may be that in such a case the form of a real property settlement will be followed.

(*f*) *Mason* v. *Mason*, Ir. R. 5 Eq. 288; *Wright* v. *Wright*, [1904] 1 Ir. R. 360.

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Where legatee takes absolutely.

Where a legacy is given to a woman with a direction that it shall be settled on her for life, with remainder to her children, it may be ordered to be paid over to her if she lives to an advanced age without marrying (*g*). And if a legacy is directed to be settled on A and his (or her) children, and no settlement is made, and A dies without any children, the legacy belongs to A's representatives (*h*).

V.—Undisclosed Trusts. — Notwithstanding the statutory requirement that every will must be in writing, there are cases in which property disposed of by will can be made subject to trusts, the terms of which are not declared by the will or by any document incorporated in it.

The cases fall under two classes, one comprising those cases in which the existence of a trust appears on the face of the will, and the other comprising those cases where the trust is altogether secret.

Existence of trust disclosed by the will.

It has been decided that if property is given to A, and the will shows that the testator intends him to hold it upon trust (*i*), but does not either expressly or by reference to any existing document declare what the terms of the trust are, oral evidence is admissible to prove them, provided the trust was communicated to A prior to, or simultaneously with, the execution of the will (*k*). Thus, in *Re Huxtable* (*l*), where a testatrix bequeathed £4,000 to C "for the charitable purposes agreed upon between us," evidence was admitted to show what those purposes were.

But the wishes of the testator may, of course, be expressed in such a way that they would not, even if set forth in the will, create a trust (*m*), and in *Le Page* v. *Gardom* (*n*) the evidence

(*g*) *Lyddon* v. *Ellison*, 19 Bea. 565; *Re Jordan's Trusts*, [1903] 1 Ir. R. 119.

(*h*) *Bell* v. *Jackson*, 1 Sim. (N.S.) 547; *Norman* v. *Kynaston*, 3 D. F. & J. 29; *Eaton* v. *Barker*, 2 Coll. 124; *Olphert* v. *Olphert*, [1903] 1 Ir. R. 326. See also *Bradford* v. *Young*, 29 Ch. D. 617, and compare the cases cited in Chap. XXXVII.

(*i*) See *Re Spencer's Will*, 57 L. T. 519, referred to *post*, p. 887; *Balfe* v. *Halpenny*, [1904] 1 Ir. R. 486; *O'Brien* v. *Condon*, [1905] 1 Ir R. 51.

(*k*) *Re Fleetwood*, 15 Ch. D. 594; the following cases are cited and commented on in the judgment: *Crook* v. *Brooking*, 2 Vern. 50; *Pring* v. *Pring*, 2 Vern. 99; *Smith* v. *Attersoll*, 1 Russ. 266; *Podmore* v. *Gunning*, 7 Sim. 644; *Johnson* v. *Ball*, 5 De G. & S. 85; *Irvine* v. *Sullivan*, L. R. 8 Eq. 673; *Riordan* v. *Banon*, 10 Ir. Eq. R. 469. See also *In b. Marchant*, [1893] P. 254, and the cases cited in note (*i*), *supra*. It may be noted that *Crook* v. *Brooking* (or *Crooke* v. *Brookeing*) is not an authority on the point now under discussion: in that case the trust was declared by a letter written by one of the legatees to the other.

(*l*) [1902] 1 Ch. 214; 2 Ch. 793.

(*m*) *Sullivan* v. *Sullivan*, [1903] 1 Ir. R. 193; *Reid* v. *Atkinson*, Ir. R. 5 Eq. 373; *Creagh* v. *Murphy*, Ir. R. 7 Eq. 182; *Re Baillie*, 2 T. L. R. 660.

(*n*) 113 L. T. 475.

was held insufficient to create a trust, and *Re Fleetwood* (*o*) was doubted. In *Re Blackwell* (*p*) evidence was admitted, and the trust established.

Rule not applicable to powers.

With regard to the rule above stated, there is a difference between trusts and powers. Thus in *Re Hetley* (*q*), a testator gave his property to his wife for life, and desired and empowered her by her will or in her lifetime to dispose of his estate in accordance with his wishes verbally expressed by him to her: it was held by Joyce, J., that parol evidence could not be admitted to show what the testator's verbally expressed wishes were, and that the power of disposition given to the widow was void for uncertainty.

Trust not communicated at date of will.

There is some conflict of judicial opinion on the question whether the general rule above stated applies where the trust is not communicated to A until after the execution of the will. The cases of *Moss* v. *Cooper* (*r*) and *Norris* v. *Frazer* (*s*) are sometimes cited as establishing the affirmative of the proposition, but in each of those cases the existence of the trust did not appear on the face of the will. In *Riordan* v. *Banon* (*t*), the Vice-Chancellor thought that there was no difference in principle between the two classes of cases, but Parker, V.-C., in *Johnson* v. *Ball* (*u*), and Joyce, J., in *Re Hetley* (*x*), seem to have been of a different opinion. In *Balfe* v. *Halpenny* (*y*) it was held that an attempt to create a "secret trust" after the execution of the will was nugatory, and that the trustees held the property upon trust for the next-of-kin.

Trusts declared by unincorporated document.

Possibly the decision in *In b. Marchant* (*z*) can be supported on the principle now under discussion. In that case the testatrix had two documents of a testamentary character prepared, one appointing X as executor, and containing various dispositions of her property, and the other a bequest of her property to A "for the purposes I require him to do absolutely." The latter was duly executed as a will: the former was not executed. The Court granted probate of the second paper (apparently to X), and ordered that the executor should administer the estate according to the trusts of the first paper. But there is nothing in the report to show that the trusts were communicated to A,

(*o*) 15 Ch. D. 594.
(*p*) [1928] Ch. 614, affirmed in H. L., *Blackwell* v. *Blackwell*, [1929] A. C. 318.
(*q*) [1902] 2 Ch. 866.
(*r*) 1 J. & H. 352.
(*s*) L. R. 15 Eq. 318.
(*t*) 10 Ir. Eq. R. 469: so in *Sullivan* v. *Sullivan*, [1903] 1 Ir. R. 193.
(*u*) 5 De G. & S. 85.
(*x*) [1902] 2 Ch. 866.
(*y*) [1904] 1 Ir. R. 486.
(*z*) [1893] P. 254.

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and if they were not, the decision seems erroneous. And in any case it is difficult to see how X can have been entitled to probate: the first document was not incorporated in the second (*a*).

Reference to future written declaration of trust.

In *Johnson* v. *Ball* (*b*), a testator gave a policy of assurance to two trustees "to hold the same upon uses appointed by letter signed by them and myself." No such letter existed at the date of the will, but the testator afterwards signed and delivered to the trustees a memorandum declaring the trusts of the policy: it was held that this attempt to create a power to dispose of property by an instrument not duly executed as a will was ineffectual, and that the trustees held the policy in trust for the residuary legatees.

Trust not communicated during testator's lifetime.

It is equally clear that if the trust is not communicated to the legatee during the lifetime of the testator, it cannot be established by a paper not executed as a will (*c*).

Where trustee cannot take beneficially.

Where the fact that a gift to A is made to him merely as trustee appears on the face of the will, he cannot in any case take beneficially, and if the trust is not established, or is illegal, or fails, he holds upon trust for the residuary legatee (or devisee), or the next-of-kin (or heir-at-law) as the case may be (*d*). This is so even if it appears from the evidence that, subject to the trusts which fail, the testator intended the trustee to take the property for his own benefit (*e*).

Where trustee takes beneficially subject to trust.

And if the gift is by the terms of the will made to A, merely as trustee, without any limitation, parol evidence is not admissible to show that the trusts apply, only to a part of the property. Thus, in *Re Huxtable* (*f*) a testatrix bequeathed £4,000 to C "for the charitable purposes agreed upon between us": it was held that evidence was admissible to show what the charitable purposes were, but not to show that the trust only applied to the income of the £4,000 during C's lifetime.

But if the gift is to A "absolutely," or "for his own use and benefit," followed by a reference to the testator's wishes with regard to the disposition of the property, A takes beneficially, subject only to his carrying out the testator's wishes if and so

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(*a*) *Ante*, p. 124, n. (*q*).

(*b*) 5 De G. & S. 85.

(*c*) *Scott* v. *Brownrigg*, 9 L. R. Ir. 246. Compare *Re Boyes*, 26 Ch. D. 531, where the trust was secret.

(*d*) See *Briggs* v. *Penny*, 3 De G. & S., at p. 546; *Johnson* v. *Ball*, 5 De G. & S. 85; *Re Boyes*, 26 Ch. D. 531. As to secret trusts of land for charities, see *ante*, p. 249.

(*e*) *Re Baillie*, 2 T. L. R. 660.

(*f*) [1902] 2 Ch. 793. It is submitted that the decision in *Morrison* v. *M'Ferran*, [1901] 1 Ir. R. 360, conflicts with this principle.

far as they create a trust. Thus in *Irvine* v. *Sullivan* (*g*) the testator gave his property to D absolutely, "trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted"; the "wishes" were that D should make payments to certain persons: it was held that she took the property beneficially, subject to making the payments in question.

Secret trust.

Where property is given by will to A in terms which imply that he is to take it for his own benefit, but the testator informs A of his intention that A is to hold the property upon trust, the terms of which he communicates to him, evidence of the trust is admissible (*h*), and it will, if legal, be enforced (*i*). The theory is that A has induced the testator to leave the property to him, on his express or tacit promise to perform the trust, and that the Court ought not to allow him to commit a fraud by refusing to carry out the testator's wishes (*k*). The communication of the terms of the trust may take place before or after the execution of the will (*l*).

Communication of trust.

The wishes of the testator may be expressed in such a way as to show that he did not intend to create a trust, as where he gives the devisee or legatee an absolute discretion in the disposition of the property (*m*).

Where no trust created by expression of wish.

Where the gift is made to A and B as joint tenants, and the trust is communicated to A before the execution of the will, B is also bound by the trust, on the principle that no person can claim an interest under a fraud committed by another (*n*). But if the trust is not communicated to A until after the execution of the will, B is not bound (*o*).

(*g*) L. R. 8 Eq. 673. In *Wood* v. *Cox*, 2 Myl. & Cr. 684, the payments to be made by the residuary legatee were specified in a paper which under the old law was testamentary.

(*h*) As to the nature of the evidence required, see p. 889, n. (*y*).

(*i*) *Russell* v. *Jackson*, 10 Ha. 204; *Norris* v. *Frazer*, L. R. 15 Eq. 318; *O'Brien* v. *Condon*, [1905] 1 Ir. R. 51. In *Re Spencer's Will*, 57 L. T. 519, the testator bequeathed a legacy to A and B, "relying, but not by way of trust, upon their applying it" in a manner "privately communicated to them" by him: evidence of a secret trust was admitted.

(*k*) *Wallgrave* v. *Tebbs*, 2 K. & J. 313; *McCormick* v. *Grogan*, L. R. 4 H. L. 82, and another decision of the House of Lords in *French* v. *French*, [1902] 1 Ir. R. 172. *Re Gardner*, [1920] 2 Ch. 523; see further [1923] 2 Ch. 230. *Re Blackwell*, [1928] Ch. 614; *Blackwell* v. *Blackwell*, [1929] A. C. 318.

(*l*) See *per* Kay, J., in *Re Boyes*, 26 Ch. D., at p. 535; *Re Maddock*, [1902] 2 Ch. 220.

(*m*) *McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Re Pitt-Rivers*, [1902] 1 Ch. 403; *Sullivan* v. *Sullivan*, [1903] 1 Ir. R. 193. Compare other cases cited *ante*, p. 845.

(*n*) *Russell* v. *Jackson*, 10 Ha. 204; *Jones* v. *Badley*, L. R. 3 Eq. 635; 3 Ch. 362. The point does not seem to have been considered in *Turner* v. *Att.-Gen.*, Ir. R. 10 Eq. 386.

(*o*) *Moss* v. *Cooper*, 1 J. & H. 352; *Burney* v. *Macdonald*, 15 Sim. 6; *Re Stead*, [1900] 1 Ch. 237.

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Communication to one of two joint tenants.

If the gift is made to A and B as tenants in common, and the trust is communicated to A, whether before or after the execution of the will, but is not communicated to B, then B's share is not bound by the trust (*p*).

Tenants in common.

If no communication on the subject of the trust is made to the legatee or devisee during the testator's lifetime, he takes the property for his own benefit; no declaration made by the testator (unless executed as a will) can affect him with a trust (*q*).

Trust not communicated during lifetime.

If, however, the testator during his lifetime informs A of his intention to leave property to A upon a trust, the terms of which are not communicated to A during the testator's lifetime, A takes as trustee, but the intended trust is ineffectual, and cannot be ascertained by a written declaration of the testator not executed as a will. Thus, in *Re Boyes* (*r*), the property was given to A absolutely, but before the execution of the will he had agreed to hold it upon such trusts as should be afterwards communicated to him by the testator; no such communication was made, and the only declaration of the trusts was contained in two letters addressed to A, signed by the testator but unattested, found among his papers after his death it was held that this declaration was ineffectual, and that A was trustee for the next-of-kin.

Trust communicated, but not details.

Re Falkiner.

In *Re Falkiner* (*s*) the bequest was to trustees to dispose of the same in accordance with any memorandum or paper signed by the testatrix and deposited with her will or left among her papers at her death, and the will contained a clause (known to the trustees) that any such memorandum or paper should not have any testamentary character, and that the above expression of her wishes should not create any trust or legal obligation even if the same should be communicated to her trustees in her lifetime. It was communicated in her lifetime. It was held that no legal obligation was imposed. In *Tharp* v. *Tharp* (*t*) the testator destroyed a codicil to his will upon the faith of a promise by the donee of a power of appointment contained in a previous codicil, but omitted in the destroyed codicil that the donee would execute the power in a particular manner. It was held that the promise was binding on the donee of the power.

Tharp v. *Tharp.*

In *Re Oldham* (*u*), a husband and wife by agreement made

(*p*) *Tee* v. *Ferris*, 2 K. & J. 357; *Rowbotham* v. *Dunnett*, 8 Ch. D. 430; *Geddis* v. *Semple*, [1903] 1 Ir. R. 73.

(*q*) See *Jones* v. *Badley*, L. R. 3 Eq. 635; L. R. 3 Ch. 362; *Re Stead*, [1900] 1 Ch. 237; *Re Louis*, 32 T. L. R. 313.

(*r*) 26 Ch. D. 531.

(*s*) [1924] 1 Ch. 88. In *Re Louis*, 32 T. L. R. 313, the trust was not communicated until after the testator's death.

(*t*) [1916] 1 Ch. 142; compromised on appeal, [1916] 2 Ch. 205.

(*u*) [1925] 1 Ch. 75.

Mutual wills.

mutual wills each giving his or her property to the other with the same alternative provisions in case of lapse. The wife survived, married again, and made a fresh will. Held there was no implied trust preventing her from disposing of her property as she pleased.

Illegal trust.

If a secret trust is illegal, the devisees or legatees hold the property upon trust for the persons upon whom it would have devolved if the gift had not been contained in the will (*v*).

Personal nature of secret trust.

A secret trust is a personal obligation binding the individual devisee or legatee. If he renounces and disclaims, or dies in the lifetime of the testator, the persons intended to be benefited by the secret trust can claim nothing against the heir-at-law, next-of-kin, or residuary devisees or legatees (*w*).

Administration.

For the purpose of administering the estate of the testator, a secret trust has the same effect as if it were contained in the will (*x*).

Evidence.

Clear evidence is required to establish a secret trust (*y*).

Certainty of subject not required.

The rule which applies in cases where a precatory trust is alleged to exist—namely, that in order to create such a trust, there must be a certainty of subject—does not apply to secret trusts, for if property is devised or bequeathed to a person upon a secret trust, the onus of showing to what part of the property the trust does not extend lies on him (*z*).

Release of debt.

The principle above stated applies to the release of a debt. If a testator makes a person his residuary legatee, and informs him that he has released, or wishes to release, a debtor from the debt due by him to the testator, and the residuary legatee does not express dissent, this is tantamount to an undertaking by him to give effect to the testator's desire, and he will therefore not be allowed to enforce payment of the debt (*a*).

VI.—Trusts and Powers frequently inserted in Wills.—In addition to the clauses which determine the beneficial interests devised or bequeathed by a testator, it is usual for wills to

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(*v*) *Russell* v. *Jackson*, 10 Ha. 204. See *ante*, p. 246 as to trusts void under the Mortmain Act, etc.

(*w*) *Per* Cozens-Hardy, L.J., in *Re Maddock*, [1902] 2 Ch., at p. 231.

(*x*) *Re Maddock*, [1902] 2 Ch. 220.

(*y*) *McCormick* v. *Grogan*, L. R. 4 H. L. 82; *Jones* v. *Badley*, L. R. 3 Ch. 362; *Re Downing's Estate*, 60 L. T. 140; *Re Pitt-Rivers*, [1902] 1 Ch. 403.

(*z*) *Russell* v. *Jackson*, 10 Ha. 204. Compare *Re Huxtable*, [1902] 2 Ch. 793.

(*a*) *Re Applebee*, [1891] 3 Ch. 422, in which *Wekett* v. *Raby*, 2 Br. P. C. 386; *Byrn* v. *Godfrey*, 4 Ves. 5; *Flower* v. *Marten*, 2 My. & Cr. 459; and *Cross* v. *Sprigg*, 6 Ha. 552, are referred to. In *Re Tinline*, 56 Sol. J. 310, the evidence failed to show that the testator intended to release the debt.

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contain various trusts or powers directing or empowering the trustees to convert or manage the property in certain ways. Further, the trustees are often given power to vary or affect the beneficial interests within certain limits. The most common of the former class of trusts are those for conversion, investment, and of powers for sale, mortgaging or leasing. Of the latter, powers for maintenance and advancement are the most usual, but other discretions are frequently given to trustees (*h*). In this chapter some of the questions of construction which arise in connection with such trusts or powers are considered; the powers given by the Settled Land Act, 1925, to tenants for life, and the powers contained in the Trustee Act, 1925, and the powers vested in executors as incident to their office, are all available for the purpose of dealing with the testator's property, but do not give rise to questions of construction in the will, and are not within the scope of this work.

Power to determine questions.

Power to Determine Questions.—It frequently happens that a testator gives his executors or trustees power to determine questions arising under his will, but so far as this purports to oust the jurisdiction of the Court it is void on the ground of repugnancy and as being contrary to public policy (*i*).

Duration of power.

Trusts and Powers for Sale of Land.—Where a power of sale is given to trustees over settled property, the power (expressed to be during the continuance of the trust) does not come to an end when an undivided share of the property has vested absolutely (*k*), but it comes to an end if the purposes for which it was created have ceased to exist (*l*). A power of sale will, in general, come to an end when by reason of the expiration or cesser of the limitations the absolute interests come into possession, but such a power may be exercised within a reasonable time after that period for the purpose of dividing the property (*m*), unless the beneficiaries have elected to take the property as it stands (*n*), or it may be exercisable for the purpose of raising money to pay debts and legacies (*o*). So

(*h*) As to a power to pay for improvements out of income, see *Re Stamford and Warrington*, [1916] 1 Ch. 404.

(*i*) *Re Raven*, [1915] 1 Ch. 673; *Massey* v. *Rogers*, 11 L. R. Ir. 409.

(*k*) *Trower* v. *Knightley*, 6 Mad. 134; *Re Brown*, L. R. 10 Eq. 349 (settlement); *Taite* v. *Swinstead*, 26 Bea. 525; *Wood* v. *White*, 4 My. & Cr. 460.

(*l*) *Wheate* v. *Hall*, 17 Ves. 80; *Wolley* v. *Jenkins*, 23 Bea. 53; *Re Kaye and Hoyle's Contract*, 53 Sol. J. 520.

(*m*) *Peters* v. *Lewes and East Grinstead Ry. Co.*, 18 Ch. D. 429; *Re Lord Sudeley and Baines*, [1894] 1 Ch. 334.

(*n*) *Re Cotton's Trustees*, 19 Ch. D. 624.

(*o*) *Re Dyson and Fowke*, [1896] 2 Ch. 720.

long as the Rule against Perpetuities is not infringed, the duration of a power of sale is one of intention (*p*).

Duration of trust for sale.

A trust for sale of land, so far as regards the safety and protection of a purchaser, subsists until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale (*q*).

A trust either to retain or sell land is construed (after 1925) as a trust to sell the land with power to postpone the sale (*r*). Trustees for sale of land have power to postpone the sale, unless there is a contrary intention (*s*).

Power to postpone.

Where the trustees have a power to postpone the sale, the vesting in possession of one of the shares does not put an end to the power of postponement (*t*).

Time limited.

A direction to sell within five years, and apply the proceeds in paying debts and legacies, and then to invest, etc., does not prevent the trustees from selling after the expiration of the five years (*u*).

Remoteness.

The question whether an unlimited trust or power of sale is void within the Rule against Perpetuities is discussed elsewhere (*x*).

Doctrine of notice.

Where a trust or power of sale is given for payment of debts, although it comes to an end as soon as the debts are paid, yet if the purchaser has no notice that they have been paid, and if (in cases under the old law (*y*)), the sale is made within a reasonable time after the testator's death, the purchaser gets a good title (*z*).

Administrator.

A power of sale given by a testator to his executors or administrators can be exercised by an administrator *durante minore ætate* (*a*).

Consent.

Where a trust for sale is exercisable with the consent of a particular tenant for life, or of the tenant for life for the time being, the question may arise whether the consent can be effectually given if the tenant for life is an infant or has

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(*p*) *Re Jump*, [1903] 1 Ch. 129.

(*q*) Law of Property Act, 1925, s. 23.

(*r*) Law of Property Act, 1925, s. 25, sub-s. 4. See *Re Cripps*, 95 L. T. 865; *Re Johnson*, [1915] 1 Ch. 435.

(*s*) Law of Property Act, 1925, s. 25, sub-s. 1.

(*t*) *Re Horsnaill*, [1909] 1 Ch. 631; *Re Kipping*, [1914] 1 Ch. 62.

(*u*) *Pearce* v. *Gardner*, 10 Ha. 287; *Cuff* v. *Hall*, 1 Jur. (N.S.) 972.

(*x*) Chap. X, *ante*, pp. 278 *seq.*

(*y*) As to a sale by personal representatives, see section 36, sub-section 8 of the Administration of Estates Act, 1925.

(*z*) *Forbes* v. *Peacock*, 1 Ph. 717; *Carlyon* v. *Truscott*, L. R. 20 Eq. 348; *Stroughill* v. *Anstey*, 1 D. M. & G. 635. Compare *Re Venn and Furze* [1894] 2 Ch. 101.

(*a*) *Monsell* v. *Armstrong*, L. R. 14 Eq. 423; and see *Re Cope*, 16 Ch. D. 49.

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aliened or incumbered his interest or become bankrupt (*b*), or where one of several tenants for life (named in the will) has died (*c*). The question may also arise whether the consent of a person entitled to the income under an overriding term of years is required in addition to that of the tenant for life (*d*).

Infant.

In *Re Sutton* (*e*) it was held that an infant could consent to the exercise of a power of revocation and resettlement.

Person to sell not named.

A power in a will to sell or mortgage without naming a donee will, if a contrary intention do not appear, vest in the executor if the fund is to be distributable by him, either for the payment of debts or legacies (*f*). And where there is a general direction to sell, but it is not stated by whom the sale is to be made, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell, will be implied to the executors (*g*). But where the management of the fund produced by the sale is not given to the executors, a direction to sell does not give the executors power to sell real estate, even though it is devised to minors (*h*).

Implied power of sale.

A power of sale may be created indirectly or by implication. Thus, a direction by a testator that his executors shall sell his lands, gives them a common law power of sale, and on a sale the purchaser (under the old law) takes as if they had been devised to him (*i*).

Charge of debts and legacies.

An implied power of sale could also, under the old law, be conferred by a charge of debts or legacies on the real estate, but the law was not clearly settled, especially with reference to the question who was the proper person to sell and make a title (*k*). In *Eidsforth* v. *Armstead* (*l*), it was said by Wood,

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(*b*) *Re Neave's Trusts*, 49 L. J. Ch. 642; *Re Cardross*, 7 Ch. D. 728; *Warburton* v. *Farn*, 16 Sim. 625; *Re Bedingfeld and Herring*, [1893] 2 Ch. 332, where the earlier cases are cited.

(*c*) *Sykes* v. *Sheard*, 2 D. J. & S. 6.

(*d*) *Robertson* v. *Walker*, 44 L. J. Ch. 220.

(*e*) [1921] 1 Ch. 257.

(*f*) *Curtis* v. *Fulbrook*, 8 Hare, 278. See *Haydon* v. *Wood*, 8 Hare, 279; *Hooper* v. *Strutton*, 12 W. R. 367.

(*g*) *Tylden* v. *Hyde*, 2 S. & Stu. 238; *Forbes* v. *Peacock*, 11 Sim. 152; 11 M. & W. 630; *Bentham* v. *Wiltshire*, 4 Madd. 44; and see *Blatch* v. *Wilder*, 1 Atk. 420, and *Lockton* v. *Lockton*, 1 Ch. Ca. 179.

(*h*) *Patton* v. *Randall*, 1 J. & W. 189; *Bentham* v. *Wiltshire*, 4 Madd. 44.

(*i*) Farwell on Powers, 2, citing *Lancaster* v. *Thornton*, 2 Burr. 1027; *Doe* v. *Shotter*, 8 A. & E. 905; *Stafford* v. *Buckley*, 2 Ves. Sen. 170; *Warneford* v. *Thompson*, 3 Ves. 513; *Smith* v. *Lord Camelford*, 2 Ves. jun. 698. As to copyholds, see *R.* v. *Wilson*, 3 B. & S. 201; *R.* v. *Corbett*, 1 E. & B. 836; *Glass* v. *Richardson*, 2 D. M. & G. 658; *Sissons* v. *Chichester-Constable*, [1916] 2 Ch. 75 (copyholds).

(*k*) *Ball* v. *Harris*, 8 Sim. 485; 4 My. & Cr. 264. In this case, and in *Shaw* v. *Borrer*, 1 Kee. 559, the doctrine that a general direction to pay debts charged them on the real estate was treated as too clear for discussion, the only contest being whether such a charge conferred an implied authority to sell on the person taking the legal estate subject to certain trusts, which was

V.-C., that the testator, having charged his real estate with a sum of money, must be taken to have given an implied power of sale to some person, to raise the sum required, and that the donee of the power must be ascertained, in each case, from the whole will.

Statutory provisions.

The difficulty of knowing who was the proper person to sell real estate charged with debts or legacies was partly removed by Lord St. Leonards' Act (22 & 23 Vict. c. 35) (*m*); and in cases within Part I of the Land Transfer Act, 1897, now replaced by the Administration of Estates Act, 1925, no such question can arise, as executors now have the same power of selling real estate as they have always had in the case of chattels real (*n*).

Protection of purchaser.

Even in cases governed by the old law, the general rule is that where executors or trustees sell for payment of debts, or of debts and legacies, the purchaser is not bound to see to the application of the purchase money, and the rule seems to be the same where real estate is devised to a person beneficially charged with debts generally, or with debts and legacies (*o*). But if it is devised subject only to legacies, or subject to a particular debt or other sum of money, then the purchaser must see to the application of the purchase money (*p*).

Power of sale implied from power to vary investments.

A power of sale may also be implied from a power to vary investments, where the will authorises an investment in the purchase of land (*q*).

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decided in the affirmative. See also *Gosling* v. *Carter*, 1 Coll. 644; *Mather* v. *Norton*, 21 L. J. Ch. 15; *Sabin* v. *Heape*, 27 Bea. 553; *Hodkinson* v. *Quinn*, 1 J. & H. 303; *Doe* d. *Jones* v. *Hughes*, 6 Ex. 223. In this last case it was decided at law that a simple charge of debts did not give the executor not taking the legal estate a power of sale. *Robinson* v. *Lowater*, 17 Bea. 592; 5 D. M. & G. 272 (where, however, the legal estate was obtained by the purchaser *aliunde*), and *Wrigley* v. *Sykes*, 21 Bea. 337, are *contra*; and see *Bolton* v. *Stannard*, 4 Jur. (N.S.) 576; *Colyer* v. *Finch*, 5 H. L. Ca. 905; *Corser* v. *Cartwright*, L. R. 7 H. L. 731; Sug. V. & P. 662 n. (14th ed.); Hayes and Jarman, Conc. Wills, 564 (8th ed.), and 2 Jur. (N.S.), Part 2, 68. As to a sale for legacies only, see *Horn* v. *Horn*, 2 S. & St. 448; *Re Rebbeck*, 71 L. T. 74, and *infra*, n. (*p*). The cases of *Watkins* v. *Cheek*, 2 S. & St. 199; *Johnson* v. *Kennett*, 6 Sim. 384; *Page* v. *Adam*, 4 Bea. 269; and *Forbes* v. *Peacock*, 11 Sim. 152; 1 Ph. 717, are examined in *Stroughill* v. *Anstey*, 1 D. M. & G. 635.

(*l*) 2 K. & J. 333.

(*m*) As to the application of this Act, see *Re Clay and Tetley*, 16 Ch. D. 3; *Re Adams and Perry*, [1899] 1 Ch. 554; *Re Wilson*, 54 L. T. 600; *Re Barrow-in-Furness Corporation and Rawlinson*, [1903] 1 Ch. 339.

(*n*) See Chaps. LIII, LIV. It does not matter that the purchaser has notice that the debts and administration expenses have been paid. Administration of Estates Act, 1925, s. 36, sub-s. 8.

(*o*) Sugden, V. & P. 656, 660; *Stroughill* v. *Anstey*, 1 D. M. & G. 635; *Colyer* v. *Finch*, 5 H. L. C. 905; *Re Henson*, [1908] 2 Ch. 356. But apparently this rule would not apply where the testator has died since 1897.

(*p*) *Re Rebbeck*, 71 L. T. 74. As to a sale by executors for payment of legacies only, see *Forbes* v. *Peacock*, 1 Ph. 717, explained in *Carlyon* v. *Truscott*, L. R. 20 Eq. 348; *Re Henson*, *supra*.

(*q*) *Re Gent and Eason*, [1905] 1 Ch. 386. Compare *Tait* v. *Lathbury*,

Implied from trust for division.

The cases in which a power of sale is inferred from a direction to divide the testator's real and personal estate into shares have been already referred to (*r*).

Not implied from power to mortgage.

It seems clear that a power to mortgage does not authorise a sale by the donee of the power (*s*), although it authorises a mortgage giving the mortgagee a power of sale.

Partnership land.

An executor always had power to sell, or concur in selling, real estate belonging to a firm in which the testator was a partner (*t*).

Joint sale.

The circumstances under which trustees, having a trust for or power of sale over one property, may join with the owner of another property in selling both properties together, are considered in *Re Cooper and Allen's Contract* (*u*). If the sale of the property can be effected at a higher price by joining with somebody else, the trustees are only carrying out their trusts and performing their duty by so obtaining that higher price (*x*).

Sale by underlease.

Where several properties are held under one lease, the trustees may sell them separately upon the terms that one of the purchasers shall take an assignment of the lease and grant under-leases to the other purchasers, and that if any part of the property is not sold, the trustees shall retain the lease and grant under-leases of the sold portions (*y*).

Sale for shares of a company.

It is hardly necessary to say that trustees who hold land upon trust for sale cannot dispose of it for the shares or securities of a company, unless expressly authorised to do so. But in *West of England, etc., Bank* v. *Murch* (*z*) a transaction of this kind was upheld as a compromise, the so-called sale being made for the purpose of satisfying the debts of the firm in which the testator was a partner.

Reversion.

Trustees having a power of sale over a reversion may exercise it before the reversion falls into possession, although (if the

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L. R. 1 Eq. 174; *Re Wragg*, [1919] 2 Ch. 58; *Re Tapp and London and India Docks Co.'s Contract*, 74 L. J. Ch. 523; *Re Pope's Contract*, [1911] 2 Ch. 442 (implied power).

(*r*) *Ante*, p. 890.

(*s*) *Cook* v. *Dawson*, 29 Bea. 123; 3 D. F. & J. 127. In this case the question did not really arise, for the power to mortgage was given for a particular purpose, and the sale was made for another, namely, to pay debts. The argument was that the power to mortgage gave the executrix a power of disposition over the fee, and so enabled her to sell in order to pay the debts: see *post*, p. 1958.

(*t*) *West of England, etc., Bank* v. *Murch*, 23 Ch. D. 138.

(*u*) 4 Ch. D. 802, where *Rede* v. *Oakes*, 4 D. J. & S. 505, is considered, and *Morris* v. *Debenham*, 2 Ch. D. 540, is approved. See also *Cavendish* v. *Cavendish*, L. R. 10 Ch. 319.

(*x*) 4 Ch. D., at p. 815.

(*y*) *Re Judd and Poland*, [1906] 1 Ch. 684, overruling *Re Walker and Oakshott*, [1901] 2 Ch. 383.

(*z*) 23 Ch. D. 138. As to the conversion of a business into a company, see *Re Morrison*, [1901] 1 Ch. 701, and the other cases cited *post*, p. 898.

reversion is settled) by doing so they increase the interest of the tenant for life at the expense of the remainder-man (*a*). Thus, in one case, a testator who was entitled to an estate in remainder subject to the life estate of J. S., devised it to trustees to pay annuities, with remainder to his widow for life, with remainders over, and empowered his trustees to sell it with the consent of the tenant for life entitled in possession under his will. J. S. surrendered her life estate, and it was held that the trustees, with the consent of the widow, could sell and make a good title (*b*).

Severance of timber and minerals.

A power given to trustees to sell an estate with the consent of the tenant for life (*c*), did not authorise the trustees to sell the estate exclusive of the timber growing upon it, under an arrangement by which the tenant for life sold the timber for his own benefit (*d*). In *Buckley* v. *Howell* (*e*) it was held that a power of sale and exchange did not authorise trustees to sell the lands with a reservation of minerals.

But now trustees for sale can deal with the surface and the minerals separately (*f*). If the trustees have only a power of sale, it is the tenant for life under the Settled Land Act, 1925, who can sell. The trustees cannot sell, except where there is no person having the powers of a tenant for life.

Express or implied.

Trusts for Conversion.—It seems convenient to consider under this heading those cases in which a testator directs his residuary real and personal estate to be converted into money. A trust for conversion may be express or implied, for a testator may show an intention that his estate shall be converted without an express direction or trust to that effect. Thus, in *Mower* v. *Orr* (*g*), the testator directed his real and personal estate to be divided into twenty shares, sixteen of which he gave to his sons, and the remaining four shares he bequeathed as follows : two shares to his daughter Mary, and two shares, to be invested in the Government funds, for the use of her children : it was held that this created a trust for conversion. *Affleck* v. *James* (*h*) is to the same effect.

(*a*) *Blackwood* v. *Borrowes*, 4 Dru. & War. 441.

(*b*) *Truell* v. *Tysson*, 21 Bea. 437.

(*c*) The power should be framed to deal with the case where the tenant for life is an infant : see *Re Neave's Trusts*, 28 W. R. 976.

(*d*) *Cockerell* v. *Cholmeley*, 10 B. & Cr. 564; 1 Cl. & F. 60; *Cholmeley* v. *Paxton*, 3 Bing. 207.

(*e*) 29 Bea. 546.

(*f*) Trustee Act, 1925, s. 12, sub-s 2. As to tenants for life, see section 50 of the Settled Land Act, 1925.

(*g*) 7 Ha. 473; *Cornick* v. *Pearce*, 7 Ha. 477; *Flux* v. *Best*, 23 W. R. 228; *Carlisle* v. *Cook*, [1905] 1 Ir. R. 269; *Re Cookes' Contract*, 4 Ch. D. 454. See also *Re Hailes and Hutchinson's Contract*, [1920] 1 Ch. 233.

(*h*) 17 Sim. 121.

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In *Re Holloway* (*i*) the testator declared that it should be lawful for his trustees "to continue the whole or any part of my estate at all times and from time to time in the firm of Holloway Brothers or their successors or assigns, or to invest, re-invest and lend any part of my estate to them upon such terms as the said trustees shall at such discretion as aforesaid think proper, without any personal liability for the safety of such investment." North, J., held that the power to invest did not imply a power of selling the real estate.

Power to postpone conversion

An express trust for conversion is often followed by a discretionary power given to the trustees to postpone conversion. The Court will not generally interfere with such a discretion as long as it is honestly exercised: nor are the trustees liable for loss (*k*). But if there is a difference of opinion among the trustees whether certain investments should be retained or not, the trust for conversion prevails (*l*).

But a power to retain investments does not authorise the retention of money on deposit which is not to be treated as an investment (*m*).

Although there is no power of postponement the Court will under special circumstances authorise the retention of unauthorised investments for a period (*n*). But a beneficiary absolutely entitled to a share may require a transfer (*o*).

A direction to trustees to convert at their absolute discretion seems to be equivalent to a trust for conversion with power to postpone (*p*).

Discretionary trust for investment.

Trusts for Investment.—The general rules governing investments by trustees, whether under express or statutory powers, are beyond the scope of this treatise, but questions sometimes arise as to the effect of particular expressions used by testators. Where, for instance, a testator directs his trustees to invest the trust moneys in such modes of investment as they think fit, this does not, it seems, give them an absolute discretion, although it is difficult to say how far their discretion is restricted (*q*).

(*i*) 60 L. T. 46.

(*k*) See Lewin on Trusts. *Re Norrington*, 13 Ch. D. 654; *Re Blake*, 29 Ch. D. 913; *Re Courtier*, 34 Ch. D. 136; *Re Crowther*, [1895] 2 Ch. 56; *Re Smith*, [1896] 1 Ch. 171; *Re Horsnaill*, [1909] 1 Ch. 631; *Re Schneider*, 22 T. L. R. 223.

(*l*) *Re Hilton*, [1909] 2 Ch. 548.

(*m*) *Re Sudlow*, 59 Sol. J. 162.

(*n*) *Re Hazeldine*, [1918] 1 Ch. 433.

(*o*) *Re Marshall*, [1914] 1 Ch. 192.

(*p*) *Re Atkins*, 81 L. T. 421, *post*, p. 909.

(*q*) *Stretton* v. *Ashmall*, 3 Dr. 9; *Stewart* v. *Sanderson*, L. R. 10 Eq. 26; *Re Kavanagh* (*Murphy* v. *Doyle*), 27 L. R. Ir. 495; 29 L. R. Ir. 333; *Lewis* v. *Nobbs*, 8 Ch. D. 591; *Re Brown*, 29 Ch. D. 889; *Re Smith*, [1896] 1 Ch. 71. See *Dickonson* v. *Player*, C. P. Cooper, 178, where the executors were authorised to "employ" the residue in any manner they thought proper.

Again, a direction to invest a fund in a particular way does not in itself prohibit investment in securities authorised by law (*r*), unless other forms of investment except the ones specified are directly prohibited by the will (*s*).

A power to invest money "in his name or under his legal control" does not authorise a trustee to invest on contributory mortgage (*t*).

"Securities."

In its proper sense, "security" generally implies a charge on property, with or without a personal debt or obligation, and therefore does not include shares in companies (*u*), but in popular language "security" is often used in the sense of "investment." In *Re Rayner* (*v*) the testator declared that his estate might be invested in such securities as his trustees in their absolute discretion should think fit, and he authorised his trustees to continue or leave any moneys invested at his death in or upon the same securities: it was held by the Court of Appeal (reversing Farwell, J.) that the context showed that "securities" meant "investments."

Real securities.

A power to invest in "real securities" does not authorise an investment on contributory mortgage (*w*), or on long leaseholds (*x*), except in cases within the Trustee Act, 1925.

A power to invest "upon" ground rents does not mean "upon the security of" ground rents; such a power authorises the purchase of ground rents (*y*).

British Colony or Dependency.

A power to invest in the stocks or securities of any British Colony or Dependency does not authorise an investment in the stocks of any province of the Dominion of Canada which has not complied with the requirements of the Colonial Stock Act, 1923 (*z*).

Preference stock.

A power to invest in preference stock does not authorise an investment in fully-paid preference shares (*a*).

Companies.

It seems that a power to invest in the stocks, funds or securities of "any" company is not confined to companies

(*r*) *Re Burke*, [1908] 2 Ch. 248.

(*s*) *Re Hill*, 58 Sol. J. 399 (public stocks confined to public stocks forming part of the national debt). As to the effect of the Finance Act, 1917, s. 35, see *Re Head*, 88 L. J. Ch. 236. "Not in British Funds" does not prohibit the purchase of land in England or Ireland: *Re O'Connor*, [1913] 1 Ir. R. 69.

(*t*) *Re Dive*, [1909] 1 Ch. 328.

(*u*) See *Harris* v. *Harris*, 29 Bea. 107. As to the meaning of "real security," see *Cavendish* v. *Cavendish*, 30 Ch. D. 227 (tolls).

(*v*) [1904] 1 Ch. 176. Compare *Re Johnson*, 89 L. T. 520; *Re Gent and Eason*, [1905] 1 Ch. 386.

(*w*) *Webb* v. *Jonas*, 39 Ch. D. 660.

(*x*) *Re Boyd's Settled Estates*, 14 Ch. D. 626. As to investing on a mortgage of an underlease, see *Re D'Epinoix's Settlement*, [1914] 1 Ch. 890.

(*y*) *Re Mordan*, [1905] 1 Ch. 515.

(*z*) *Re Maryon Wilson's Estate*, [1912] 1 Ch. 55.

(*a*) *Re Willis*, [1911] 2 Ch. 563.

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formed under the law of England (*b*). "Companies in the United Kingdom" includes companies registered under the Companies Acts, although their business is carried on in foreign countries (*c*).

Sanction of the Court to change of investment.

In some cases the Court had jurisdiction to sanction an alteration in the investment of a trust estate in a manner not authorised by the will or settlement, when such a course was clearly for the benefit of persons under disability or unborn; but to give the Court jurisdiction in a case of this kind it seems that the element of compromise or unforeseen emergency must have been present (*d*). But now under section 57 of the Trustee Act, 1925, the Court has jurisdiction, if it thinks the proposed transaction expedient.

Loan to firm.

A power to lend money to a particular firm is, as a general rule, put an end to by a change in the firm (*e*).

Trust to carry on Business.—It not infrequently happens that part of a testator's estate consists of a business carried on by him, and that he directs or empowers his trustees to carry it on, either for the purpose of winding it up or realising it to advantage, or in order that it may be kept on as a going concern until some beneficiary is old enough to take it over.

Rights as against beneficiaries.

The general principle is clear, that trustees who carry on a business in this way are personally liable for all liabilities contracted in connection with the business after the death of the testator. If the testator has authorised his trustees to employ a part of the trust estate in the business (*f*), and they carry on the business properly, they are entitled, as against the beneficiaries under the will, to resort for their indemnity to that part of the trust estate. In such a case the trustees' creditors are entitled, by subrogation, to stand in the place of the trustees,

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(*b*) *Re Stanley*, [1906] 1 Ch. 131. As to what is a "public" company, see *Re Sharp*, 45 Ch. D. 286; *Re Castlehow*, [1903] 1 Ch. 352; and as to what is a company incorporated by Act of Parliament, see *Elve* v. *Boyton*, [1891] 1 Ch. 501; *Re Smith*, [1896] 2 Ch. 590. A new species of company —the "private company"—was called into being by the Companies Act, 1907 (repealed and re-enacted by the Companies (Consolidation) Act, 1908).

(*c*) *Re Hilton*, [1909] 2 Ch. 548.

(*d*) *Re Crawshay*, 60 L. T. 357; *Re Morrison*, [1901] 1 Ch. 701; *Re New*, [1901] 2 Ch. 534; *Re Smith*, [1902] 2 Ch. 667; *Re Tollemache*, [1903] 1 Ch. 457, 955; *Re Wells*, [1903] 1 Ch. 848; *Re Anson's Settlement*, [1907] 2 Ch. 424.

(*e*) *Re Tucker*, [1894] 1 Ch. 724; *Smith* v. *Patrick*, [1901] A. C. 282.

(*f*) A mere direction to carry on the business does not authorise the trustees to employ in it a greater part of the testator's estate than was employed in it by him: *Ex p. Richardson*, 3 Madd. 138; *McNeillie* v. *Acton*, 4 D. M. & G. 744. See *Moore* v. *McGlynn*, [1904] 1 Ir. R. 334; *Re Dimmock*, 52 L. T. 494.

and thus to obtain payment of their debts out of that part of the trust estate (*g*).

As against testator's creditors.

This principle, however, does not affect the testator's creditors. They have a prior claim on all the assets of the testator, and any trustee or executor who uses the assets in carrying on the testator's business (except to such an extent as is necessary to enable him to wind it up or sell it as a going concern) does so at his own risk, so far as the testator's creditors are concerned (*h*).

Effect of assent by testator's creditors.

If the business is carried on by the trustees with the assent of the testator's creditors, then the trustees are entitled to be indemnified out of the testator's estate (including any assets acquired by the trustees in carrying on the business) in priority to the testator's creditors; and the business creditors have, by subrogation, a corresponding right to resort to the testator's estate for payment of their debts (*i*). If the testator's creditors merely stand by with knowledge that the business is being carried on and do not interfere, this is not sufficient by itself to show that the testator's creditors have assented (*k*).

Order of Court.

The same rule applies if the business is carried on under an order of the Court (*l*).

But the rule does not apply unless the trustee (or executor) has continued the business in good faith, either under an authority contained in the will or conferred by the Court, or for the purpose of winding up the estate (*m*).

Implied power.

Trustees ought not to carry on their testator's business, unless they are expressly or implicitly authorised to do so (*n*). A power to carry on a business may be inferred from the fact that it is included in a gift of the testator's residuary estate to trustees upon trust for conversion, with a power to postpone conversion, and the usual provision as to interim income (*o*).

(*g*) *Re Johnson*, 15 Ch. D. 548; *Re Morgan*, 18 Ch. 93; *Strickland* v. *Symons*, 26 Ch. D. 245; *Re Frith*, [1902] 1 Ch. 342. Older cases are, *Ex p. Garland*, 10 Ves. 110; *Cutbush* v. *Cutbush*, 1 Bea. 184; *Ex p. Edmonds*, 4 D. F. & J. 488. See also *Re Kidd*, 70 L. T. 648.

(*h*) *Dowse* v. *Gorton*, [1891] A. C. 190; *Re Millard*, 72 L. T. 823; *Re East*, 111 L. T. 101.

(*i*) *Dowse* v. *Gorton*, [1891] A. C. 190; *Hodges* v. *Hodges*, [1899] 1 Ir. R. 480.

(*k*) *Re Oxley*, [1914] 1 Ch. 604, disapproving *dicta* in *Re Brooke*, [1894] 2 Ch. 600, and *Re Hodges*, [1898] 1 Ir. R. 480.

(*l*) *Re Brooke*, [1894] 2 Ch. 600; *Hodges* v. *Hodges*, [1899] 1 Ir. R. 480.

(*m*) *Re Millard*, 72 L. T. 823; *McAloon* v. *McAloon*, [1900] 1 Ir. R. 367.

(*n*) *Kirkman* v. *Booth*, 11 Bea. 273; *Travis* v. *Milne*, 9 Ha. 141; *Stainer* v. *Hodgkinson*, 73 L. J. Ch. 179. As to trustees making a personal profit by supplying goods, see *Re Sykes*, [1909] 2 Ch. 241, *post*, p. 1192.

(*o*) *Re Chancellor*, 26 Ch. D. 42; *Re Crowther*, [1895] 2 Ch. 56; *Re Smith*, [1896] 1 Ch. 171. As to the profits, see *Re Elford*, [1910] 1 Ch. 814.

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As to the so-called "sale" of a business for shares in a company, see *Re Morrison* (*p*) and other cases already cited (*q*).

Some recent Irish cases on executors carrying on business are given in the footnote (*r*).

Implied power.

Powers of Mortgaging.—It has been held that a power to lease authorises a demise by way of mortgage (*s*). A power "to make arrangements" given to a trustee-executor to whom the real estate is devised authorises a mortgage of the real estate (*t*), but a power to use real estate as capital in the testator's business does not enable the trustees to mortgage it so as to override an annuity charged by the will (*u*). A direction to carry on business authorises a mortgage of the business land (*x*) but not of other land (*y*).

Lord St. Leonards laid it down, as a general rule, that "a power of sale out and out, for a purpose or with an object beyond the raising of a particular charge, does not authorise a mortgage; but that where it is for raising a particular charge, and the estate itself is settled or devised subject to that charge, there it may be proper under the circumstances to raise the money by mortgage, and the Court will support it as a conditional sale, as something within the power, and as a proper mode of raising the money" (*z*).

Implied from power of management.

If land is devised to trustees upon trust for sale, with the usual power of postponing a sale and powers of interim management and of making outlay for improvements, repairs, etc., it seems that the trustees may raise money for these purposes by mortgage (*a*).

A power to mortgage authorises a mortgage with a power of sale (*b*).

Settled Land Acts.

Powers of Leasing.—Where property is settled by will, the tenant for life, or the person having the powers of a tenant

(*p*) [1901] 1 Ch. 701.

(*q*) *Ante*, p. 894.

(*r*) *Re Healy*, [1918] 1 Ir. R. 366; *Burke* v. *Whelan*, [1920] 1 Ir. R. 200; *Scott* v. *Scott*, [1924] 1 Ir. R. 141.

(*s*) *Mostyn* v. *Lancaster*, 23 Ch. D. 583.

(*t*) *Re Jones*, 61 L. T. 661.

(*u*) *Re Webb*, 63 L. T. 545. For a power to mortgage so as to override a legacy, see *Redman* v. *Rymer*, 65 L. T. 270.

(*x*) *Devitt* v. *Kearney*, 13 L. R. Ir. 45.

(*y*) *McNeillie* v. *Acton*, 4 D. M. & G. 744.

(*z*) *Per* Lord St. Leonards, in *Stroughill* v. *Anstey*, 1 D. M. & G., at p. 645, where *Mills* v. *Banks*, 3 P. W. 1; *Haldenby* v. *Spofforth*, 1 Bea. 390; and *Ball* v. *Harris*, 4 My. & Cr. 264, are referred to. See also *Page* v. *Cooper*, 16 B. 396 (trust for sale held not to authorise a mortgage); *Walker* v. *Southall*, 56 L. T. 882.

(*a*) *Re Bellinger*, [1898] 2 Ch. 534.

(*b*) *Re Chawner's Will*, L. R. 8 Eq. 569: following *Bridges* v. *Longman*, 24 Bea. 27, and not following *Clarke* v. *Royal Panopticon*, 4 Dr. 26.

for life, has now ample powers of leasing under the Settled Land Act, 1925, and trustees for sale have similar powers by virtue of section 28 of the Law to Property Act, 1925 (*c*). It may be mentioned that a power to trustees to lease and manage real estate did not by itself raise an implication of the testator's intention to exclude his wife from dower so as to compel her to elect (*d*). Trustees cannot grant one lease of two properties held upon different trusts (*e*). In one case where the power of leasing was wide enough to include a building lease, the Court allowed the trustees to put the property up to auction on the terms of granting a building lease to the highest bidder, and subsequently to sell the land subject to the building lease (*f*).

Whether trustees take an estate.

A direction to an executor to let real estate and apply the profits to a particular purpose, did not raise by implication an estate in him extending beyond the period required for accomplishing the purpose (*g*); but now a trustee must take the fee simple or a term of years absolute, see *post*, Chapter XLV.

Powers of Charging.—Questions do not often arise on powers of this kind, as the forms used in wills generally follow those used in carefully drawn settlements (*h*).

Implied and precatory trusts for maintenance.

Trusts for Maintenance and Education.—Effect will be given to a trust for maintenance where it is imperfectly expressed, provided the intention is clear (*i*). Thus in *Re Yates* (*k*) the testator gave to his widow a "further annuity" of £300 for the maintenance and education of his infant daughter; the widow died during the minority of the daughter, but it was held that the annuity continued to be payable for her maintenance and education. So if a legacy is given to an infant contingently on his attaining twenty-one, a power to apply it for the benefit of the legatee may have the effect of making the legacy carry interest for maintenance (*l*).

(*c*) A power to lease lands does not authorise a lease of unopened mines apart from the Settled Land Acts. *Re Daniels*, [1912] 2 Ch. 90.

(*d*) *Warbutton* v. *Warbutton*, 2 Sm. & G. 163, where *Hall* v. *Hill*, 1 Dr. & War. 94, is explained.

(*e*) *Tolson* v. *Sheard*, 5 Ch. D. 19. The power to lease was given by an order made under the Settled Estates Act, 1856.

(*f*) *Re James*, 73 L. T. 1.

(*g*) *Lambert* v. *Browne*, Ir. R. 5 C. L. 218.

(*h*) See *Re Beckett*, 93 L. T. 746, on the construction of the words "at any one time." As to the failure by lapse of a power of charging, notwithstanding section 33 of the Wills Act, see *Griggs* v. *Gibson*, 35 L. J. Ch. 458, *ante*, p. 818. As to the revocation of an instrument exercising a power of charging, see *Re Gore-Booth's Estate*, [1908] 1 Ir. R. 387.

(*i*) *Leslie* v. *Leslie*, Ll. & G. t. Sug. 1; *Lambert* v. *Parker*, Coop. t. Eldon, 143; *Acherley* v. *Wheeler* (or *Vernon*), 1 P. W. 783. But see *Crickett* v. *Dolby*, 3 Ves. 10; *Festing* v. *Allen*, 5 Hare, 573.

(*k*) [1901] 2 Ch. 438.

(*l*) *Pett* v. *Fellowes*, 1 Sw. 561 n.; *Re Churchill*, [1909] 2 Ch. 431.

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The question whether a trust for maintenance has been effectually created, generally arises in those cases where property or income is given to a person, coupled with an expression of desire or hope on the part of the testator that he will thereout maintain certain persons, or with a statement that the gift is made to him for the purpose of enabling him to maintain them (*m*). These cases have been already discussed (*n*).

Gift of capital.

It has been already mentioned that when a sum, or the capital of a fund, is given for the maintenance of A, this is considered as a simple legacy for his benefit, and he is entitled (if an adult) to have it paid to him (*p*); and a gift of residue to the testator's wife "for the support and maintenance of herself and children and for their education," has been held to be an absolute gift to the wife (*q*).

Maintenance out of capital or income.

A testator sometimes provides for the maintenance or education of an infant out of capital (*r*), and in that case a gift over of what is not expended, in the event of the infant dying under age, will have effect (*s*); but as a general rule, maintenance is given out of the income of a fund, or by means of an annuity.

Interest on legacy.

Where a testator bequeaths a legacy to an infant, and expressly or impliedly directs the interest to be applied in its maintenance the interest runs from the death of the testator (*t*). But this rule does not apply in the case of a legacy to an adult (*u*).

Gift to parent.

Where money is given to a parent for the maintenance of his children, the general rule is that he is not bound to account for its application (*x*). The cases in which property is given

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(*m*) In modern wills express powers of maintenance are generally omitted in reliance on the provisions contained in section 43 of the Conveyancing Act, 1881, now replaced and extended by section 31 of the Trustee Act, 1925. As to powers under two different wills, see *Smith* v. *Cock*, [1911] A. C. 317. As to a share in an intestacy, see *Re Bass*, [1914] W. N. 368. As to interest being allowed for maintenance in the case of legacies to the testator's infant children, see *post*, p. 1079.

(*n*) *Ante*, p. 868.

(*p*) *Noel* v. *Jones*, 16 Sim. 309, *ante*, p. 860.

(*q*) *Bond* v. *Dickinson*, 33 L. T. 221.

(*r*) See *Cusack* v. *Jellico*, 22 W. R. 344 (settlement by deed). In *Falls* v. *Alford* (*Re Black*), [1907] 1 Ir. R. 486, a legacy to A for her education was held to authorise the expenditure of the capital.

(*s*) *Ante*, p. 858.

(*t*) *Newman* v. *Bateson*, 3 Sw. 689; *Pett* v. *Fellows*, 1 Sw. 561, n.; *Re Richards*, L. R. 8 Eq. 119; *Chidgey* v. *Whitby*, 41 L. J. Ch. 699, and see Chap. XXX. The rate is *prima facie* 5 per cent. Section 31, sub-section 3 of the Trustee Act, 1925.

(*u*) *Raven* v. *Waite*, 1 Sw. 553.

(*x*) *Berkeley* v. *Swinburne*, 6 Sim. 613; *Hadow* v. *Hadow*, 9 Sim. 438; *Browne* v. *Paull*, 1 Sim (N.S.) 92. See *Hammond* v. *Neame*, 1 Sw. 35, *ante*, p. 871. As to controlling the discretion of a person charged with the duty of maintenance, see *ante*, p. 868, n. (*o*).

to a parent for the benefit or maintenance of himself or herself, and his or her children, have been already discussed (*y*).

"Maintenance" and "education."

A trust for the "maintenance and support" of children includes their education (*z*). But sometimes "maintenance" and "education" are distinguished (*a*).

Maintenance and education not necessarily confined to minority.

In *Knapp* v. *Noyes* (*b*), a case where gifts were made to infants, with a provision for their maintenance and education, Lord Camden is reported as having said that "maintenance and education are confined to minority." And in *Gardner* v. *Barber* (*c*), Wood, V.-C., avowedly basing his decision on the dictum of Lord Camden, held that a trust for maintenance and education must of itself imply that it was only to last during minority, though not in terms so confined. But in *Soames* v. *Martin* (*d*), where a testator directed a sum of money to be applied for the maintenance and education of an infant nephew, but made no disposition of the principal, Shadwell, V.-C., held that the nephew was entitled to the income of the fund during his life. And in *Wilkins* v. *Jodrell* (*e*), Hall, V.-C., approved of and followed this decision, pointing out that the decision in *Gardner* v. *Barber* was based on the mistaken assumption that the dictum of Lord Camden (which was evidently referable to the circumstances of that particular case) was intended to be of general application. There are numerous cases in which property has been given to the widow of a testator for the maintenance of herself and the children. In such a case it is clear that the widow is entitled to maintenance during the whole of her life (*f*).

Maintenance of widow and children.

Joint tenants.

If income is given for the maintenance of several persons as joint tenants, they take it for their lives and for the lives and life of the survivors and survivor, unless the joint tenancy is severed (*g*).

Effect of bankruptcy.

Where income is given to trustees upon trust to apply it for "the board, lodging, maintenance, support and benefit" of A

(*y*) *Ante*, p. 868.

(*z*) *Re Breeds' Will*, 1 Ch. D. 226.

(*a*) *Wilkins* v. *Jodrell*, 13 Ch. D. 564; *Re Booth*, [1894] 2 Ch. 282.

(*b*) Amb. 662.

(*c*) 18 Jur. 508. The decision was probably right so far as the intention of the testator went, for he directed his trustees to pay or apply a yearly sum for the maintenance and education of a child who, if she attained majority, would take a share in the capital. The same remark applies to *Foley* v. *Parry*, 2 My. & K. 138. The decision in *Ryan* v. *Keogh* (Ir. R. 4 Eq. 357), where an annuity for the maintenance of A's children was held to cease on the death of A, the children being then all of age, seems to have turned on the special words of the will.

(*d*) 10 Sim. 287.

(*e*) 13 Ch. D. 564.

(*f*) *Carr* v. *Living*, 28 Bea. 644; 33 Bea. 474; *Berry* v. *Briant*, 2 Dr. & S. 1, and the cases cited *ante*, p. 867.

(*g*) *Wilkins* v. *Jodrell*, *supra*, quoted and approved in *Williams* v. *Papworth*, [1900] A. C. 563.

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in such way as they think proper in their absolute discretion, and so that A shall not have power to alienate or anticipate the income, they cannot apply it otherwise than for A's benefit, and if he becomes bankrupt it belongs to his creditors (*h*). But this result can be avoided by giving the trustees power to apply such part of the income as they think fit, or by giving them a power of selection among several objects (*i*).

Trust for maintenance of A during life of B.

The rule that maintenance is not confined to minority applies where income is given for the maintenance, or maintenance and education, of A during the life of B; in the absence of words expressing a contrary intention, A continues to be entitled to the income after attaining majority. In *Badham* v. *Mee* (*k*), the trust was for the maintenance, education, and bringing up of the three children of A during A's life; one of the children attained twenty-one during his father's life, and he was held to be entitled to his share of the income during the rest of his father's life.

The question most frequently arises in the case of a bequest of income to the testator's wife for life, subject to a trust for the maintenance, or maintenance and education, of the testator's children; it is clear that in such a case a child does not lose his or her right to an allowance for maintenance merely by attaining majority, or in the case of a daughter, marrying : and the Court will, if necessary, ascertain what, if any, allowance ought to be made (*l*).

Postponement of distribution.

The effect of a trust for the maintenance of adult as well as infant members of a class, may be to postpone the distribution of vested shares (*m*).

Income for maintenance *prima facie* confined to life of beneficiary.

Where the income of a fund, or an annuity, is given for a person's maintenance, it would naturally be supposed that the testator intended it for the personal benefit of that person, and that the gift would cease on his death. Thus in *Wilkins* v. *Jodrell* (*n*), a testator gave to A an annuity of £100 and directed that in the event of her death it should be continued to her children for their maintenance and education; Hall, V.-C., said : " It appears to me obvious that the annuity was meant to be

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(*h*) *Green* v. *Spicer*, 1 Russ. & My. 395 : see *Re Smith*, [1928] Ch. 915.

(*i*) See *Twopeny* v. *Peyton*, 10 Sim. 487; *Re Coleman*, 39 Ch. D. 443, and *ante*, p. 864.

(*k*) 1 Russ. & My. 631.

(*l*) *Longmore* v. *Elcum*, 2 Y. & C. C. C. 363; *Scott* v. *Key*, 35 Bea. 291; *Re Booth*, [1894] 2 Ch. 282; *K'Eogh* v. *K'Eogh*, [1911] 1 Ir. R. 396. The older cases as to the effect of a daughter marrying are, *Camden* v. *Benson*, 4 L. J. Ch. 256, cited 8 Bea. at p. 350; *Bowden* v. *Laing*, 14 Sim. 113; *Carr* v. *Living*, 28 Bea. 644; 33 Bea. 474. The question what words will create a trust for maintenance is discussed *ante*, p. 866.

(*m*) *Berry* v. *Briant*, 2 Dr. & S. 1.

(*n*) 13 Ch. D. 564. See also *post*, p. 1103.

for the personal enjoyment and benefit of the annuitants, and therefore that it was not meant to be continued beyond their lives."

Decisions to the contrary.

However, there are some decisions, to the effect that where an annuity is given for the maintenance of A during the life of B, it does not cease on the death of A. Thus, in *Lewes* v. *Lewes* (*o*), a testator gave an annuity of £300 for the maintenance, clothing and education of his son's children during the life of their father; all the children attained twenty-one, and one of them died during the father's lifetime; Shadwell, V.-C., said that the gift was equivalent to a gift "for the benefit of the children," and that the personal representatives of the deceased child were entitled to one-third of the £300 a-year during the life of the father (*p*). How this could benefit the deceased child is not explained. In *Bayne* v. *Crowther* (*q*), and *Attwood* v. *Alford* (*r*), Romilly, M.R., followed the same principle. These decisions seem to be based on a misapprehension of the rule that where the capital of a fund is given for the maintenance of A, this is equivalent to a simple legacy to A, on the principle already discussed (*s*). This principle, however, is not required in the case of a gift of income (*t*). In *Re Ord* (*u*), where the testator gave property to A for life with remainder to B, and bequeathed an annuity of £40 to B during A's life, James, L.J., said: "We may make a guess that the son [B] was intended to have the £40 only for his personal maintenance, and it may be difficult to imagine why it should be continued after his death. But it is in express terms an annuity to be paid until the death or second marriage of the testator's widow, and there is nothing which justifies us in cutting it down to the life of the son." Baggallay, L.J., said: "With regard to the annuity, I felt at one time some doubt; I was disposed to think that it was intended only for the personal enjoyment of the son." It is, therefore, submitted that a bequest of income or an annuity expressly given for maintenance ought, in the absence of words showing a contrary intention, to be construed as confined to the life of the beneficiary.

Lewes v. *Lewes.*

Re Ord.

In some cases, where there is a trust for accumulation, and

(*o*) 16 Sim. 266

(*p*) The V.-C. had expressed a similar opinion in *Webb* v. *Kelly*, 9 Sim. 469. The decision in *Lewes* v. *Lewes* is cited in the judgment of the J. C. in *Williams* v. *Papworth*, [1900] A. C., at p. 567, but in that case the question was whether the income was payable to the infant and adult children as joint tenants.

(*q*) 20 Bea. 400. (*r*) L. R. 2 Eq. 479. (*s*) *Ante*, p. 860.

(*t*) See *Wilkins* v. *Jodrell*, 13 Ch. D. 564, *ante*, p. 904.

(*u*) 12 Ch. D. 22.

Maintenance contrary to terms of will.

no provision is made for the maintenance of the person entitled subject to the trust for accumulation, the Court will presume that the testator must intend that the person he wished ultimately to benefit should not starve, and should in the meantime receive such maintenance and education as would enable him to take the position intended for him, and consequently will allow maintenance contrary to the terms of the will (*x*).

Several funds for maintenance.

Where there are several funds provided by different persons for the maintenance of an infant, or a lunatic, or other person under disability, the interest of the beneficiary must alone determine which of the funds is primarily applicable (*y*).

Ability of father.

The question sometimes arises whether the income of trust funds can be applied for maintenance where the father is of ability to maintain his children. If there is only a power of maintenance, the father, in such a case, is not necessarily entitled to receive the income and apply it for maintenance, but he is so entitled if there is a trust (*z*).

Accumulations.

Where a will gives maintenance out of the interest on a legacy, accumulations of past income may be applied for this purpose (*a*).

Statutory provisions for maintenance.

Section 31 of the Trustee Act, 1925, now gives powers of maintenance which are more ample than those in section 43 of the Conveyancing Act, 1881. Section 32 of the Trustee Act, 1925, gives powers of advancement. In future it will hardly ever be necessary to insert powers of maintenance or advancement in a will (*b*). Where there is a residuary bequest to an infant, the statutory powers of maintenance apply as soon as the residue is ascertained (*c*).

(*x*) *Revel* v. *Watkinson*, 1 Ves. sen. 93; *Benett* v. *Wyndham*, 23 Bea. 521; 4 D. F. & J. 259; *Aveline* v. *Melhuish*, 10 Jur. (N.S.) 788; *Griggs* v. *Gibson*, 21 W. R. 818; *Re Collins*, 32 Ch. D. 229; *Re Walker*, [1901] 1 Ch. 879; *Havelock* v. *Havelock*, 17 Ch. D. 807; *Re Colgan*, 19 Ch. D. 305, where a provision for recoupment was made. See *Re Arbuckle*, 14 L. T. (N.S.) 538; *Re Alford*, 32 Ch. D. 383; *Re Tanner*, 53 L. J. Ch. 1108. In *Re Smeed*, 54 L. T. 929, Chitty, J., seems to have questioned the decision in *Havelock* v. *Havelock*, and it was disapproved by the Irish Court of Appeal in *Kemmis* v. *Kemmis*, 15 L. R. Ir. 90. Compare *Festing* v. *Allen*, 5 Hare, 573.

(*y*) *Foljambe* v. *Willoughby*, 2 S. & St. 165; *Bruin* v. *Knott*, 1 Ph. 572; *Methold* v. *Turner*, 4 De G. & S. 249; *Re Ashley*, 1 R. & Myl. 371. As to the rule where several sources of income are available under a will which contains no express trust for maintenance, see *post*, p. 1082, and section 31, sub-section 1 of the Trustee Act, 1925.

(*z*) *Newton* v. *Curzon*, 16 L. T. 221 (where the words "shall and may" were held to constitute a trust); *Malcolmson* v. *Malcolmson*, 17 L. R. Ir. 69. See also *Ransome* v. *Burgess*, L. R. 3 Eq. 773 (settlement); *Stocken* v. *Stocken*, 4 Sim. 152; 4 M. & Cr. 95 (settlement).

(*a*) *Edwards* v. *Grove*, 2 D. F. & J. 210.

(*b*) Income directed to be accumulated cannot be used for maintenance: *Re Reade-Revell*, [1929] W. N. 218.

(*c*) *Re Smith*, 42 Ch. D. 302.

Trusts for accumulation.

Trusts for Accumulation.—This subject has been already considered in Chapter XI, in connection with the Thellusson Act. As to the method of dealing with accumulations of income provisionally assigned to infant members of a class, see *Re King* (*d*).

Where a testator divides his residue into shares, and directs the income of each share to be accumulated, the question may arise whether the accumulations arising from each share go with it, or form part of the general residue (*e*).

In *Mole* v. *Mole* (*f*) maintenance was allowed to an infant out of the residue of the personal estate bequeathed to him by his father where the will directed the interest to accumulate till the infant attained twenty-one, and if he died before, the whole was given over.

Powers of advancement liberally construed.

Trusts for and Powers of Advancement.—Trusts of this nature usually receive a wide construction. Thus in *Re Kershaw's Trusts* (*g*) a power to apply part of a fund for the advancement of a married woman "or otherwise for her benefit," was held to justify an advance to her husband to be used as capital in his business, the husband giving his bond as security. In *Talbot* v. *Marshfield* (*h*), a power of advancement for setting up the children of the testator in business was held to enable an advance to be made to a married daughter for the purpose of a farming business, her husband covenanting that the business should be for her separate use, but not an advance for the purpose of paying the husband's debts. In *Re Brittlebank* (*i*) the will contained a power for the trustees to apply the capital of a fund for the "benefit and advancement in the world" of the person entitled to the income of the fund for life: it was held that the word "and" must be read "or," and that the trustees might apply the fund not merely for advancement in the strict sense of the term, but for any purpose for the benefit of the legatee. In *Lowther* v. *Bentinck* (*k*), a power to apply part of a fund "in or towards the preferment or advancement of L, or otherwise for his benefit," was held to authorise the payment of L's debts.

But *prima facie* an advancement "is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or legacy before the time fixed by the will

(*d*) [1928] 1 Ch. 330.
(*e*) *Fulford* v. *Hardy*, [1909] A. C 570.
(*f*) 1 Dickens, 310.
(*g*) L. R. 6 Eq. 322.
(*h*) L. R. 3 Ch. 622; *Re Mead*, 119 L. T. 724 (establishing in business held to include confirming in business in which the beneficiary was already engaged).
(*i*) 30 W. R. 99.
(*k*) L. R. 19 Eq. 166.

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for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled " (*l*), and a clause which merely says : " I give a power of advancement to my trustees," does not authorise advances out of corpus to persons who only take a life interest (*m*); but a will may authorise advances of corpus to a tenant for life (*n*).

Effect of advancement.

The proper exercise of a power of advancement takes the money expended out of settlement altogether, and the person advanced is not afterwards bound to account for it or bring it into hotchpot (*o*).

Duration of power.

A power of advancement of a portion of a person's expectant or presumptive share is not confined to minority, or (in the case of a woman) to spinsterhood (*p*); nor does it come to an end merely because the probability of such person attaining a vested interest is in fact very small. Thus, where a testator directed that in the event of his sister A marrying and having children, his property should be divided among the children of his sisters A and B upon the youngest child attaining twenty-one, and empowered his trustees to raise a portion of the expectant, presumptive, or vested share of any child of B for his or her advancement; A was a widow of fifty-four years of age, and had no child : it was held that the power continued in operation during the lifetime of A (*q*).

But the person who might become entitled to the corpus on failure of the prior trusts is not entitled to an expectant or presumptive share (*r*).

Statutory power of advancement.

In the case of wills coming into operation after 1925, section 32 of the Trustee Act, 1925 gives a power of advancement up to one half of the capital.

Spendthrift trust.

Discretionary Trusts and Powers.—The term " discretionary trust " is often used in the sense of a trust for the benefit of an improvident person. Under such a trust the trustees have a discretionary power, either to apply such part of the fund (capital or income) as they think fit for the maintenance or benefit of the *cestui que trust*, or to apply the whole of the income for the maintenance or benefit of several named persons, including the spendthrift, in such a manner as the trustees think fit. In either case the effect is that he has no right capable of

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(*l*) *Per* Cotton, L.J., 55 L. T., at p. 556.
(*m*) *Re Aldridge*, 55 L. T. 554.
(*n*) *Re Sparkes*, 56 Sol. J. 90.
(*o*) *Re Fox*, [1904] 1 Ch. 480 : following *Re Gosset's Settlement*, 19 Bea. 529; *Lawrie* v. *Bankes*, 4 K. & J. 142.
(*p*) *Pride* v. *Fooks*, 2 Bea. 430.
(*r*) *Re Winch's Settlement*, [1917] 1 Ch. 633.

voluntary or involuntary assignment (*s*). A testator who has the ordinary power of appointing settled property among his children, cannot exercise the power by appointing a share to trustees, subject to a discretionary trust for the benefit of one of his children, as this would be a delegation of the power (*t*).

When annexed to office.

A discretionary power given to trustees of dealing with the trust property, is *prima facie* given to them as an incident of their office, and passes to their successors in office (*u*).

A direction given to trustees to sell at their discretion is not equivalent to a direction that the trustees may sell or not at their absolute discretion (*x*).

As a general rule, the Court will not interfere with the exercise of a discretion so long as the trustees act honestly (*y*).

A trustee paying money into Court incapacitates himself from exercising any of the discretions he may have had (*z*), but in some cases the Court will exercise the discretion (*a*). An administration action does not put an end to the exercise of a discretion by trustees (*b*), but it is proper for them to obtain the sanction of the Court to all important steps taken by them, and after an administration judgment the Court will supervise the exercise of their discretions and powers (*c*).

It has been mentioned earlier in this chapter that where a legacy is given to a person and is expressed to be given for a particular purpose, *e.g.*, to bind him apprentice (*d*), though the purpose may fail, the legatee in some cases is entitled to the

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(*s*) See *Re Coleman*, 39 Ch. D. 443, and other cases cited *ante*, p. 904.

(*t*) Farwell on Powers (3rd. ed.), p. 500, *Chester* v. *Chadwick*, 13 Sim. 102. *Re Greenslade*, [1915] 1 Ch. 155 (maintenance) : see *Re Boulton's Settlement Trusts*, [1928] Ch. 703.

(*u*) *Re Smith*, [1904] 1 Ch. 139, where Farwell, J., expressed the opinion that the general principle laid down by Grant, M.R., in *Cole* v. *Wade*, 16 Ves. 27, is inconsistent with the principle acted on by the C. A. in *Crawford* v. *Forshaw*, [1891] 2 Ch. 261, where it was held that a discretionary power given to "my executors herein named" could not be exercised by one of them who renounced probate.

(*x*) *Re Atkins*, 81 L. T. 421. *Miller* v. *Miller*, L. R., 13 Eq. 263, so far as *contra*, seems to be wrong.

(*y*) *Gisborne* v. *Gisborne*, 2 A. C. 300; *Tabor* v. *Brooks*, 10 Ch. D. 273; *Bethell* v. *Abraham*, L. R. 17 Eq. 24; *Re Brown*, 29 Ch. D. 889; *Re Smith-Bosanquet's Trusts*, 53 Sol. J. 430, and the cases on a discretionary power to postpone conversion, *ante*, p. 896. As to discretionary trusts for maintenance, etc., see *ante*, p. 868.

(*z*) *Re Nettlefold's Trusts*, 59 L. T. 315; *Re Wright's Trusts*, 3 K. & J. 419; *Re Murphy's Trust*, [1900] 1 Ir. R. 145. *Re Landon's Trusts*, 40 L. J. Ch. 370, is opposed to the general current of authority.

(*a*) *Re Ashburnham's Trusts*, 54 L. T. 84.

(*b*) *Brophy* v. *Bellamy*, L. R. 8 Ch. 798 (application of income for maintenance).

(*c*) *Cafe* v. *Bent*, 3 Ha. 245; *Turner* v. *Turner*, 30 Bea. 414; *Re Gadd*, 23 Ch. D. 134; *Re Norris*, 27 Ch. D. 333 (appointment of new trustee); *Bethell* v. *Abraham*, L. R., 17 Eq. 24 (investments); *Re Mangell*, 54 L. J. Ch. 883 (sale).

(*d*) *Barlow* v. *Grant*, 1 Vern. 255.

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legacy. But where a discretion is given to trustees to advance or pay money for a particular purpose, and the discretion is not exercised, there is no gift to the person for whose benefit the money was to be applied. Thus, where a testator authorised his trustees to apply any sum not exceeding £600 in the purchase of church preferment for A, and A died before any sum had been so applied, it was held that the gift wholly failed (*e*).

Where a testator gives wide discretions to trustees, their exercise is not controlled by the wishes of the testator being known to the trustees (*f*), or by the fact of the person to be benefited being a lunatic (*g*).

Exercise of discretion by the Court.

Where trustees refuse to exercise a discretion, and thus affect the rights of beneficiaries, the Court will direct the necessary acts to be done (*h*).

When one trustee properly desires to exercise his discretion and his co-trustee refuses, the Court will interfere and give the necessary directions (*i*). The duty of the trustees entrusted with a discretionary power is to have regard to the interests of the estate as a whole (*k*).

The general rule with regard to the exercise of a discretionary power of conversion is referred to *ante*, p. 722. The question whether the existence of a discretionary power exercisable in favour of a particular beneficiary can have the effect of postponing the period of distribution was referred to in *Horden* v. *Horden* (*l*).

A testator may relieve his trustees from the operation of the general rule that a trustee may not make a profit out of the trust, but special words are required to have this effect (*m*).

Executors.

VII.—Devolution of Trusts and Powers—Disclaimer—Survivorship, etc.—If a testator gives a power of sale (but no estate)

(*e*) *Cowper* v. *Mantell* (No. 2), 22 Bea. 231. Other illustrations of this doctrine are: *Lewis* v. *Lewis*, 1 Cox, 162; *Robinson* v. *Cleator*, 15 Ves. 526; *Bull* v. *Vardy*, 1 Ves. jun. 270; *Down* v. *Worrall*, 1 Myl. & K. 561.

(*f*) *Re Squires's Trust*, 17 T. L. R. 724.

(*g*) *Gisborne* v. *Gisborne*, 2 A. C. 300.

(*h*) See *Prendergast* v. *Prendergast*, 3 H. L. C. 195; *Lord* v. *Godfrey*, 4 Madd. 455, and other cases cited p. 722 *seq.* *Nickisson* v. *Cockill*, 3 D. J. & S. 622; *Tempest* v. *Lord Camoys*, 21 Ch. D. 576, n. But if the discretion relates to a question of detail, the Court will not interfere with the trustees, even if there is a difference of opinion among them: *Marquis Camden* v. *Murray*, 16 Ch. D. 161; *Tempest* v. *Lord Camoys*, 21 Ch. D. 571; *Re Bryant*, [1894] 1 Ch. 324; *Re Lever*, 76 L. T. 71.

(*i*) *Klug* v. *Klug*, [1918] 2 Ch. 67.

(*k*) See *Per* Warrington, J., in *Re Charteris*, [1917] 2 Ch. 379, at p. 399, and *Re Sandys*, [1916] 1 Ch. 511, as to considering the interest of persons entitled to the estate in raising portions.

(*l*) [1909] A. C. 210.

(*m*) *Re Sykes*, [1909] 2 Ch. 241.

to " my executors hereunder named," a surviving executor can sell (*n*).

As a general rule, where a power is given to " my executors," even if it involves the exercise of a discretion (such as the selection of institutions to share in a charitable gift), it is given to them in the character of executors, and can be exercised by the executors for the time being, but not by a renouncing executor. But if it is given to " my executors A and B " or to " my executors herein named," then it is a question of the construction of the particular will whether it is given to them personally, or in the character of executors (*o*).

Sole executor.

Where a discretionary power (such as the selection of charities) is given to " A. B., my executor," and A. B. renounces, the result of holding that the power is annexed to the office is that the power is gone (*p*). In an Irish case (*q*) it was held that a power of sale given to " my executor, J. L.," was exercisable by J. L., notwithstanding his renunciation.

Trustees.

In the case of trustees, the old doctrine was (or was supposed to be) that wherever a power was of a kind which indicated personal confidence, it was *prima facie* understood to be confined to the individual to whom it was given, and would not, except by express words, pass to others to whom the same character might happen to belong (*r*). But this doctrine may be regarded as obsolete, and if a testator appoints persons to be trustees of his will, and gives to " my said trustees " various powers and discretions, they can be exercised by the trustees or trustee for the time being of the will (*s*). But a bare power given to persons by name and not annexed to an estate or office does not survive (*t*).

If a testator devises to trustees upon trust for sale, and one of them disclaims, the other trustees or trustee can sell and

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(*n*) *Houell* v. *Barnes*, Cro. Car. 382; and see *Lee* v. *Vincent*, Cro. Eliz. 26 (power to a class to sell): *Yates* v. *Compton*, 2 P. W. 308 (renouncing executor).

(*o*) *Crawford* v. *Forshaw*, [1891] 2 Ch. 261; *Re Fisher and Haslett*, 13 L. R. Ir. 546; *Keates* v. *Burton*, 14 Ves. 434; *Earl Granville* v. *McNeile*, 7 Ha. 156. As to the stat. 21 Hen. 8, c. 4, see *Peppercorn* v. *Wayman*, 5 De G. & S. 230.

(*p*) *Att.-Gen.* v. *Fletcher*, 5 L. J. Ch. 75.

(*q*) *Madden* v. *Madden*, 23 L. R. Ir. 167.

(*r*) *Cole* v. *Wade*, 16 Ves. 27.

(*s*) *Re Smith*, [1904] 1 Ch. 139, and cases there cited; *Re Perrott and King's Contract*, 90 L. T. 156. In *Re Robinson*, [1912] 1 Ir. R. 410, " my said executors " was held to mean my executors and trustees.

(*t*) *Re Harding*, [1923] 1 Ch. 182 (power to named persons to appoint new trustees).

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give a receipt for the purchase money (*u*), and if one dies the survivors can sell (*v*).

Bare powers.

But this rule did not apply to bare powers, and it is therefore provided by section 18 of the Trustee Act, 1925 (re-enacting section 38 of the Conveyancing Act, 1881, and section 22 of the Trustee Act, 1893), that where a power or trust is given to or vested in two or more trustees jointly, it may be exercised or performed by the survivors or survivor, unless a contrary intention is expressed. Sections 155 and 156 of the Law of Property Act, 1925, provide for the disclaimer and release of powers (*w*).

Disclaimer.

The law as regards lands of inheritance where the sole trustee died before 1882 is stated in the last edition; see also Chapter XXVI.

Conveyancing Act, 1881, s. 30.

In the case of a sole trustee dying after 1881, the devolution of land forming part of the trust estate was regulated by section 30 of the Conveyancing Act, 1881, now replaced by section 1 of the Administration of Estates Act, 1925, which originally applied to lands of copyhold or customary tenure, as well as to freeholds (*y*); the section has, however, been repealed as regards copyhold and customary land vested in the trustee as tenant on the Court rolls (*z*). The result is that where X, a sole trustee of freeholds, dies since 1881, having devised them to A and B upon the trusts of the original will, A and B cannot execute the trust under the doctrine of *Titley* v. *Wolstenholme* (*a*), because the land does not pass to them, but to the personal representative of X (*b*). If, however, the will of the original testator is so expressed that under the old rule the trust would have been exercisable by the heirs of X, it is now exercisable by his personal representative (*c*). And, of course, if land is given to

(*u*) *Crewe* v. *Dicken*, 4 Ves. 97; *Adams* v. *Taunton*, 5 Mad. 435; *Nicloson* v. *Wordsworth*, 2 Sw. 365, but since 1925 a sole trustee (unless a trust corporation) cannot give a receipt.

(*v*) *Lane* v. *Debenham*, 11 Ha. 188; *Brassey* v. *Chalmers*, 4 D. M. & G. 528; *Re Bacon*, [1907] 1 Ch. 475.

(*w*) As to the kind of powers which can be disclaimed or released, see *Re Eyre*, 49 L. T. 259; *Weller* v. *Ker*, L. R., 1 H. L. Sc. 11; *Re Radcliffe*, [1892] 1 Ch. 227. See also *Re Fisher and Haslett*, 13 L. R. Ir. 546; *Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228.

(*y*) *Hall* v. *Bromley*, 35 Ch. D. 642.

(*z*) Copyhold Act, 1887, s. 45; Copyhold Act, 1894, s. 88. As to the effect of this repeal as regards dealings with copyholds in the interval, see *Re Mills' Trusts*, 37 Ch. D. 312, 40 Ch. D. 14. Copyholds are now abolished.

(*a*) 7 Bea. 425.

(*b*) See further as to the section, *post*, p. 947.

(*c*) *Re Waidanis*, 77 L. J. Ch. 12. The report in the Law Reports, [1908] 1 Ch. 123, does not give the terms of the will of the original testator. This omission seems to have produced an erroneous impression as to the point decided in the case: see the dictum of Neville, J., in *Re Routledge's Trusts*, [1909] 1 Ch., at p. 283 (which appears to refer to *Re Waidanis*, and, it is submitted, goes beyond the decision in that case), and some observations in Solicitors' Journal, Vol. 52, p. 189.

trustees upon trust that they "or their executors or administrators" shall sell (or whatever the trust may be), then the personal representatives of the surviving trustee can execute the trust.

But if land was simply devised to A and B upon trust that they should sell, or upon trust that they or the survivor of them should sell (or whatever the trust may be), neither the heir nor the personal representative of the survivor could execute the trust, because there were no words indicating an intention that the trusteeship shall follow the legal estate (*d*).

No reference to successor in title.

But now, since 1911, until the appointment of new trustees, the personal representatives of the last surviving trustee can exercise the trust (*e*).

It was at one time supposed that if a sole trustee died and his representatives acted as trustees under the doctrine laid down in *Re Morton and Hallett*, or even if they accepted the trust and were willing to act, this suspended the operation of an express power to appoint new trustees. This theory (which would have produced inconvenient results) has been held to be unsound (*f*).

The better opinion seems to be that a bare power given to two or more persons by name, or as a class, without reference to any office of trust or administration, cannot be exercised by the survivors or survivor (*g*).

Power not connected with office.

It seems that a power to A and B and their heirs is exercisable after the death of A by his heir and B (*h*).

VIII.—Failure of Trust.—The question what becomes of a testator's residuary real or personal estate, when the trusts declared concerning it fail, wholly or in part, has been discussed in Chapter XXI. The question also occurs, though more rarely, in the case of a specific devise, or a specific or pecuniary legacy.

(*d*) *Mortimer* v. *Ireland*, 6 Ha. 196; *Re Ingleby and Boak*, 13 L. R. Ir. 326; *Re Crunden and Meux*, [1909] 1 Ch. 690.

(*e*) Section 18, sub-section 2 of the Trustee Act, 1925, reproducing with amendments section 8, sub-section 1 of the Conveyancing Act, 1911.

(*f*) *Re Routledge's Trusts*, [1909] 1 Ch. 280.

(*g*) Farwell on Powers, 3rd ed., p. 514 *seq*, citing *Atwaters* v. *Birt*, Cro. Eliz. 856; *Montefiore* v. *Browne*, 7 H. L. C. 241; *Vincent* v. *Lee*, Cro. Eliz. 26; *Sykes* v. *Sheard*, 2 D. J. & S. 6; *Jefferys* v. *Marshall*, 19 W. R. 94. See *Re Harding*, [1923] 1 Ch. 182 (power to named persons to appoint new trustees).

(*h*) Farwell, 3rd ed., p. 512, citing *Mansell* v. *Mansell*, Wilm. 51; *Towsend* v. *Wilson*, 1 B. & Ald. 608; *Hall* v. *Dewes*, Jac. 189.

In *Shelley* v. *Shelley* (*i*), a testatrix bequeathed jewels to A, to go and be held as heirlooms by him and by his eldest son, and to descend to the eldest son of such eldest son, and so on, as far as the rules of law or equity would permit, with a request that A would give effect to the testatrix's wish : it was held that in the event of these executory trusts failing, the jewels would belong to A absolutely.

On the other hand, in *Stubbs* v. *Sargon* (*k*), a testatrix bequeathed a specific sum of £2,000 to S., a married woman, for her sole use and benefit, "for the express purpose" of enabling her to present to or dispose of it by will in favour of "either branch of my family," as she might consider most prudent, and there was a reference to S. having "the sole use and power of the said sum"; it was held that this was a gift upon trust, and that, as the trust failed, the £2,000 fell into residue.

This principle applies whenever property is given to a person in such a way as to show that he takes as trustee and not beneficially (*l*).

(*i*) L. R. 6 Eq. 540; as to the settlement directed in pursuance of the will see *ante*, p. 672. On the general principle, see *Wood* v. *Cox*, 2 Myl. & C. 684; *Clarke* v. *Hilton*, L. R. 2 Eq. 810; and other cases cited, *ante*, pp. 698—9; also *Bernard* v. *Minshull*, John. 276, cited, *ante*, p. 856.

(*k*) 3 Myl. & Cr. 507. This case and *Corporation of Gloucester* v. *Wood*, 3 Ha. 131, are referred to in Chap. XIV, *ante*, p. 457. In *Doe* d. *Toone* v. *Copestake*, 6 East, 328, the only point decided was as to the right of the trustees to recover at law.

(*l*) *Ante*, p. 840

CHAPTER XXV.

SPECIFIC, GENERAL AND RESIDUARY DEVISES.

SPECIFIC DEVISES.

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1.—What is a Specific Devise.—Neither Mr. Jarman nor Mr. Powell attempts to define a specific devise. At the present day, "devise" is the technical term for a gift of real estate by will (*a*), and a specific devise is a gift by will of a particular part of the testator's real estate. Some of the rules for distinguishing specific bequests from general or residuary bequests (as to which see Chaps. XXIX and XXX), seem to apply to devises, so far as the physical differences between land and chattels will allow. In most cases no difficulty arises. A devise of "my house at X.," or "my farm at X.," or a devise to A "of such one of my houses at X. as he shall select," is specific. So is a devise of "all my lands in the parish of A." (*b*). But a devise of "all my freehold lands," or of "the residue of my freehold lands," is general or residuary, as the case may be (*c*). What is a specific devise.

Although a devise of all the testator's land or real estate in a particular locality (such as "the county of A.") is specific, yet, being expressed in general terms, it resembles in some respects a general or residuary devise, for *prima facie* it will Devise of all land in particular locality.

(*a*) As to what may be devised, see Chap. IV. It has been already mentioned (*ante*, p. 76) that the use of the word "devise" is not essential to pass land by will. Any words indicating an intention to confer an absolute interest are sufficient; as where a testator willed land to the discretion of his father: *Whiskon and Cleyton's Case*, 1 Leon. 156. So an absolute devise is not cut down by a superadded power of appointment (*Doe* d. *Herbert* v. *Thomas*, 3 A. & E. 123), even if it is in favour of a class (*Brook* v. *Brook*, 3 Sm. & G. 280; *Howorth* v. *Dewell*, 29 Bea. 18). Conversely "devise" may operate to pass personalty, see *ante*, p. 77, where *Banbury* v. *Doran*, Ir. R. 9 C. L. 284, is cited.

(*b*) *Springett* v. *Jenings*, L. R. 6 Ch. 333; but see *Re Davies*, [1928] 1 Ch. 24, *post*, p. 928.

(*c*) *Mason* v. *Ogden*, [1903] A. C. 1, affirming C. A. *Re Mason*, [1901] 1 Ch. 619, where *Springett* v. *Jenings* is discussed with reference to the distinction between a specific devise in general terms, and a residuary devise; see *post*, p. 927.

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pass all the land or real estate in that locality which the testator acquires after the date of the will (*d*).

Difference between specific and residuary devises.

It is often said that a general or residuary devise is specific, but this is a loose and inaccurate way of stating the law. Since the Wills Act, 1837, the essential characteristic of a residuary devise is that it includes all real estate not otherwise effectually disposed of by the will, unless a contrary intention appears; consequently lands acquired subsequently to the date of the will, or comprised in a devise which is revoked or fails or is void, will *prima facie* pass under a residuary devise (*e*). When it is said that a residuary devise is specific, all that is meant is that, for the purpose of the payment of the debts of a testator, his specific and residuary devisees ranked *pari passu* (*f*), prior to the Administration of Estates Act, 1925 (*ff*).

Description.

The question what property will pass by a particular description is discussed in Chap XXXV, and the effect of changes in the property between the date of the will and the testator's death in Chap. XII.

Sometimes a testator devises real estate by a description referring to his own title (*g*).

Whether leaseholds pass as "land," etc.

The question whether leaseholds will pass by a specific devise of "land," or "freehold land," or "real estate," either by a specific or general description, is discussed in connection with the operation of a residuary devise (*h*).

What passes by a specific devise.

II.—Operation of a Specific Devise.—As a general rule, a devise of a specific property gives the devisee all the testator's interest in it (*i*). Accordingly, where the owner of land in fee simple becomes entitled to a charge on it, a devise of the land will pass the charge, unless there are circumstances showing that it was the intention, or to the interest, of the testator, to keep the charge alive (*k*).

Charge on land.

(*d*) *Ante*, pp. 381 *seq.* and *post*, p. 920, note (*n*).

(*e*) *Post*, p. 924.

(*f*) *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136. See Mr. Jarman's note on the case of *Long* v. *Short*, *post*, Chap. LIV.

(*ff*) See Chapter LIV.

(*g*) *As in Doe* v. *Meyrick*, 1 Cr. & M. 820; *West* v. *Lawday*, 11 H. L. C. 375; *Emuss* v. *Smith*, 2 De G. & S. 722; *Re Brocket*, [1908] 1 Ch. 185, see *post*, p. 1255 *seq.*

(*h*) *Post*, pp. 936 *seq.*

(*i*) See *Vallance* v. *Vallance*, 2 N. R. 229; *Mathews* v. *Mathews*, L. R. 4 Eq. 278; *Leckey* v. *Watson*, Ir. R. 7 C. L. 157; *Re Lowman*, [1895] 2 Ch. 348; *Re Guyton and Rosenberg*, [1901] 2 Ch. 591, and other cases cited in Chap. XXXV. As to allotments, see *Hicks* v. *Sallitt*, 3 D. M. & G. 782; *Williams* v. *Phillips*, 8 Q. B. D. 437.

(*k*) See Chap. XXVI. As to a devise of mortgaged land by a mortgagee in possession passing the mortgage debt, see *post*, Chap. XXVI.

Benefit of contract of sale or purchase.

It is on this principle that where a testator who has entered into a contract by which he gives a person an option of purchasing his (the testator's) land, makes a will specifically devising the land, and the option is exercised after the testator's death, the devisee is entitled to the purchase price (*l*). But if a testator enters into a contract to purchase land, and specifically devises it, the devisee is only entitled to the property from the completion of the purchase (*m*). The effect of the Real Estate Charges Act, 1877, now replaced by section 35 of the Administration of Estates Act, 1925, see Chap. LIV, in cases where the vendor has a lien, has been already referred to (*n*).

Benefit of contract for erection of buildings.

If a testator enters into a contract for the erection of buildings on land belonging to him, and devises the land to A, and dies before the buildings are completed, A is entitled to have them completed at the cost of the testator's personal estate. But of course this principle does not apply if the contract is for the erection of buildings on land not belonging to the testator (*o*).

House agreed to be bought but no enforceable contract.

In *Re Rix* (*p*), a testator devised a freehold house described as "recently contracted to be purchased by me." There was no enforceable contract at the testator's death. It was held that the specific devisee was not entitled to require payment of the moneys which would have been laid out in completing the purchase.

Burdens.

Conversely, a specific devisee takes the property subject to its burdens, even if they have been created by the testator himself (*q*), unless the testator's personal estate is primarily liable for them (*r*).

Questions sometimes arise as to the rights of devisees where the surface and the mines are devised to different persons (*s*).

Fixtures.

A devise of a house by an owner in fee of course includes the fixtures, of whatever nature they may be, unless expressly or impliedly excluded, for the rules which govern the rights in respect of fixtures as between landlord and tenant, or tenant for life and remainderman, or heir and executor, do not apply

(*l*) *Drant* v. *Vause*, 1 Y. & C. C. C. 580, and other cases cited, *ante*, p. 713.

(*m*) *Puxley* v. *Puxley*, 1 N. R. 509, where the testator had taken a transfer of a mortgage on the property.

(*n*) *Ante*, p. 72.

(*o*) *Re Day*, [1898] 2 Ch. 510, following *Cooper* v. *Jarman*, L. R. 3 Eq. 98, and *Holt* v. *Holt*, 2 Vern. 322 (both cases of intestacy). But if the builder completed the buildings the executors would be bound to pay him out of the testator's personal estate; see *Wentworth* v. *Cock* (10 Ad. & E. 42), cited in *Cooper* v. *Jarman*.

(*p*) 125 L. T. 216.

(*q*) See *Re Tann*, L. R. 7 Eq. 434 (costs of partition).

(*r*) See Chap. LIV.

(*s*) *Re Scarth*, 10 Ch. D. 499.

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where the same person is absolutely entitled to both freehold and fixtures : the only question is whether the particular chattels are annexed to the freehold (*t*).

Decorative chattels.

And where the owner of a house devises it, the devisee may be entitled not only to the fixtures strictly so called, but also to tapestry, pictures, and similar articles fitted to the house, as part of a general scheme of decoration, although not affixed to the freehold (*u*).

Rents and profits where devise is immediate.

An immediate devise of land in fee (*x*), whether specific or residuary, to a person *in esse*, carries the rents and profits from the death of the testator (*y*). If the devisee's interest is liable to be divested on the happening of a contingency (as on his death under twenty-one), he is entitled to the rents and profits until the contingency happens (*z*). The Apportionment Act, 1870, applies to rents, and consequently, in every case within the Act, the first rents received after the testator's death must be apportioned in respect of time; that portion which accrued before the death forms part of the testator's general personal estate (*a*). The testator may, or course, by apt words, give the devisee any rents accrued but not paid (*b*).

Where devise is future before 1926.

The rule was (before 1926) different if the devise were to an unborn person, or to a person who might be *in esse* at a future time, or on the happening of a contingency; for, as Mr. Jarman points out (*c*), "where a specific devise is to take effect *in futuro*, so that, at the death of the testator, there is no person

(*t*) The principle is illustrated by the effect of a conveyance on sale or mortgage where the vendor or mortgagor is owner of both land and fixtures; see *Colegrave* v. *Dias Santos*, 2 B. & Cr. 76; *Holland* v. *Hodgson*, L. R. 7 C. P. 328, where the earlier cases are cited; *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; *Monti* v. *Barnes*, [1901] 1 K. B. 205. Most of the later cases deal chiefly with the question what amounts to annexation; *e.g.*, *Re Samuel Allen & Sons, Ltd.*, [1907] 1 Ch. 575.

(*u*) *Re Whaley*, [1908] 1 Ch. 615, where *Leigh* v. *Taylor*, [1902] A. C. 157, is commented on.

(*x*) As to specific bequests of leaseholds, see *post*, p. 1045, and as to estates for life, see Chap. XXXIV.

(*y*) Including growing crops and emblements (*Cooper* v. *Woolfitt*, 2 H. & N. 122; *Blake* v. *Gibbs*, 5 Russ. 13 n.) unless they are separately bequeathed, *e.g.*, as farming stock; see *post*, p. 1281.

(*z*) *Andrew* v. *Andrew*, 1 Ch. D. 410.

(*a*) *Capron* v. *Capron*, L. R. 17 Eq. 288; *Hasluck* v. *Pedley*, L. R. 19 Eq. 271; where Jessel, M.R., expressed the opinion that the Act applies to every will coming into operation after its passing. It does not, of course, affect the construction of a will executed before the passing of the Act and containing words sufficient in themselves to pass accrued income : *Jones* v. *Ogle*, L. R. 8 Ch. 192; see *post*, p. 1069. As to rent payable in advance, see *Ellis* v *Rowbotham*, [1900] 1 Q. B. 740.

(*b*) See *Roseingrave* v. *Burke*, Ir. R. 7 Eq. 186, and compare *Jones* v. *Ogle*, referred to *post*, p. 1069, and *Scott* v. *Best*, 6 L. R. Ir. 7, where a gift of "all my interest" in certain property was held not to include arrears of rent : the decision seems open to question. As to a gift of arrears of rent see *Re Ford*, [1911] 1 Ch. 455.

(*c*) First ed. p. 594.

actually entitled to the immediate income, the rents and profits will, until the devise vests in possession, pass under the residuary clause, if any (*d*), and, should the will contain no such clause, will descend to the testator's heir-at-law (*e*) : and it is immaterial whether the future devise in question be vested or contingent," or whether the devise be to the devisee directly or to trustees (*f*). The result is that if land is devised to the eldest son of A, and A's eldest son is *en ventre* at the testator's death, the rents accruing before his birth go to the residuary devisee or the testator's heir (*g*).

Devisee *en ventre.*

It is also immaterial that the real estate is given to trustees upon trust for a class of persons contingently on their attaining twenty-one, or the like. In such a case the first child who attains twenty-one is entitled to all the rents until another child attains twenty-one, and so on (*h*). In *Re Stevens* (*i*) the testator specifically devised real estate to trustees upon trust to permit his daughter to receive the income during her life, and after her decease then as well the income as the corpus as she should by will appoint, and in default of appointment in trust for her children who being sons should attain twenty-one, or being daughters should attain twenty-one or marry, in equal shares. The daughter died intestate in December, 1913, leaving six children, the eldest of whom attained twenty-one in December, 1914. It was held that the words " as well the income as the corpus " expressed an intention to dispose of the income together with the corpus as from the death of the tenant for life and that each of the six children would be entitled to an equal share of the rents from that date on becoming entitled to a corresponding share of the corpus.

Re Stevens.

But, of course, if the testator directs that the intermediate rents be applied in the maintenance of the contingent devisee, this prevents them from falling into residue or passing to the heir,

(*d*) " *Duffield* v. *Duffield*, 3 Bligh (N.S.) 260, though here the residue was devised upon trust for sale." (Note by Mr. Jarman.) *Re Astor*, [1922] 1 Ch. 364.

(*e*) *Stephens* v. *Stephens*, Ca. t. Talbot, 228; *Bullock* v. *Stones*, 2 Ves. sen. 521; *Hopkins* v. *Hopkins*, Ca. t. Talbot 44; 1 Atk. 581; 1 Ves. sen. 268, as corrected in Hawkins on Wills, 3rd ed., p. 57; *Duffield* v. *Duffield*, 3 Bligh. (N.S.) 260; *Hodgson* v. *Bective*, 1 H. & M. 376; *Holmes* v. *Prescott*, 33 L. J. Ch. 264; *Re Eddels' Trusts*, L. R. 11 Eq. 559; *Re Freme*, 65 L. T. 183; *Re Francis*, [1905] 2 Ch. 295; *Re Blackwell*, [1926] Ch. 223 (accumulation). Lord Westbury's decision in *Sidney* v. *Wilmer*, 4 D. J. & S. 84, may be considered overruled : *Wade-Grey* v. *Handley*, 3 Ch. D. 374.

(*f*) *Re Eddels' Trusts*, L. R. 11 Eq. 559, *supra*, dissenting from *Riley* v. *Garnett*, 3 De G. & S. 629.

(*g*) *Re Mowlem*, L. R. 18 Eq. 9. In cases of intestacy the qualified heir is entitled : *Richards* v. *Richards*, John. 754, not following *Goodale* v. *Gawthorne*, 2 Sm. & G. 375.

(*h*) *Re Averill*, [1898] 1 Ch. 523.

(*i*) [1915] 1 Ch. 429. *Re Bird*, [1927] 1 Ch. 210 (residuary real estate).

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unless the devisee is unborn at the death of the testator, in which case the heir or residuary devisee takes them until the birth of the devisee (*k*).

Devise to fluctuating class.

The rule applicable to cases where land is given to a class which is capable of increase, so that it fluctuates from time to time, is considered elsewhere (*l*).

Law of Property Act, 1925, s. 175.

New Law.—The law has been altered by section 175 of the Law of Property Act, 1925, which provides that in cases of wills coming into operation after 1925, a contingent or future specific devise or bequest of property, whether real or personal, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall, subject to the statutory provisions for the accumulation of income (*m*), carry the intermediate income from the death of the testator except so far as such income may be otherwise expressly disposed of.

After-acquired property may pass by a specific devise.

As a general rule, when a testator makes a specific devise, he has in his mind a particular property, and does not contemplate the possibility of his making additions to it after the date of the will. But if the words used by him are sufficient, the after-acquired property will pass: as where a testator devises "my cottage and all my land at S.," and afterwards buys an adjoining field and throws it into the land belonging to the cottage, it will pass under the devise, unless the circumstances are such as to negative this construction (*n*). It is a question which depends on the facts and the terms of the will in each case (*o*).

Devise of share in partnership land.

Where a partner in a business, the assets of which include land, by his will specifically devises his share in that land, then if the other assets of the partnership are sufficient to pay the partnership debts, the devisee takes the testator's share in the

(*k*) *Bullock* v. *Stones*, 2 Ves. sen. 521. This may be the real ground for the decision in *Best* v. *Donmall*, 40 L. J. Ch. 160.

(*l*) *Post*, pp. 1663 *seq.*

(*m*) See the Trustee Act, 1925, s. 31, and the Law of Property Act, 1925, ss. 164—166.

(*n*) *Castle* v. *Fox*, L. R. 11 Eq. 542. In *Re Portal and Lamb*, 30 Ch. D. 50, the after-acquired land was of such a character as to show that the testator did not intend it to pass by the specific devise. See *ante*, pp. 380 *seq.*, where the effect of section 24 of the Wills Act is discussed. *Re Champion*, [1893] 1 Ch. 101, was decided by North, J., on the principle above stated, among other grounds, but the decision of the C. A. went entirely on the question of republication. In *Doe* v. *Walker*, 12 M. & W. 591, also a case of republication, the devise was of "all my lands in the parish of B."; and it was held that lands in B. purchased before the date of the codicil passed: see *ante*, pp. 186 *seq.*, where this and other cases are referred to.

(*o*) See *ante*, pp. 383 *seq.*

land free from liability to contribute to the partnership debts (*p*). But if the debts exceed the other assets, the devisee is not entitled to have the excess paid out of the testator's general estate (*q*).

III.—Failure of Specific Devises.—A specific devise may fail because it transgresses some rule of law, such as the rule in *Whitby* v. *Mitchell*, or the Rule against Perpetuities (*r*), or because it is uncertain (*s*).

Perpetuities, uncertainty, etc.

As a general rule, an absolute devise takes effect although it is induced by a mistake on the part of the testator. But where the language of the will is ambiguous, a devise which is apparently made under a mistaken belief that a certain state of facts exists, will, if possible, be construed as intended to be conditional on that state of facts existing (*t*).

Mistake.

In *Hounsell* v. *Dunning* (*u*), a testatrix devised to her two daughters "the share of my late husband's estate I take or to which I am entitled on his decease . . . and I make this provision for them in lieu of the various freehold and copyhold lands of my late husband which descend to my son on the intestacy of my late husband." In fact, her late husband was entitled to certain copyholds which on his death intestate passed to the testatrix, and not, as she erroneously supposed, to her son; consequently, but for the testatrix's explanatory declaration, it seems clear that they would have passed by the devise to the daughters; the point became immaterial, but Joyce, J., expressed the opinion that they did not pass, because the will showed an intention that they should not. The accuracy of this view seems doubtful. In *Re Bagot* (*x*), Lindley, L.J., correcting a statement in *Harris* v. *Harris* (*y*) as to the operation of a residuary devise where there is an "intentional exclusion" of certain property from its operation, says this: "The intention to exclude must not be founded on a mistake as to the ownership of the property: it must be an intention to exclude the property even if it is the testator's to dispose of." In *Hounsell v. Dunning*, no doubt, the devise was specific, but it was expressed

Hounsell v. *Dunning*.

(*p*) *Re Holland*, [1907] 2 Ch. 88.

(*q*) *Farquhar* v. *Hadden*, L. R. 7 Ch. 1, where the partnership was insolvent and the bequest of the testator's share in certain leaseholds belonging to the partnership consequently failed.

(*r*) *Ante*, Chap. X. As to gifts to superstitious and charitable uses, see *ante*, Chap. IX.

(*s*) Chap. XIV.

(*t*) See *Doe* v. *Evans*, 10 Ad. & El. 228; *Allen* v. *Bewsey*, 7 Ch. D. 453, and other cases cited, *ante*, pp. 175 *seq.*

(*u*) [1902] 1 Ch. 512.

(*x*) [1893] 3 Ch., at p. 358.

(*y*) Ir. R. 3 Eq., at p. 618.

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in general terms; on a question of this kind it is difficult to distinguish between a specific devise, so expressed, and a general devise: it is not a question whether such a specific devise carries a partial devise which fails (*z*). No doubt it is true, as Joyce, J., remarked, that if the testatrix in *Hounsell* v. *Dunning* had known that there was a possibility of the copyholds passing by the gift in question, she would have made a different disposition of her property; but this is not construction, it is conjecture.

Lapse.

A devise may fail by lapse (*a*).

Ademption by sale or alienation.

A specific devise necessarily fails if at the death of the testator the devised property does not belong to him, and therefore if he devises Blackacre and afterwards sells or aliens it, the devise fails (*b*). In the case of legacies, this result is called ademption; in the case of land it is sometimes called revocation by alteration of estate, apparently because in former times the doctrine was treated as a branch of the general principle that any alteration in the estate of the testator operated as a revocation of the devise, although the land was the property of the testator at the time of his death. The subject has accordingly been discussed in connection with revocation (*c*).

By contract or option.

The effect of a contract of sale or option of purchase has also been considered (*d*).

Effect of s. 24 of Wills Act.

The case has been suggested of a testator devising specific realty, and afterwards selling it and purchasing other realty answering the same description: the question whether in such a case the after-acquired realty passes by the devise has been already considered (*e*).

Involuntary conversion.

As a general rule, where conversion is caused by some act beyond the testator's control, the effect is the same as if it had been voluntarily caused by him (*f*); thus if a testator devises real property, and it is afterwards converted into money by Act of Parliament, during the testator's lifetime, the devisee has no claim to the money (*g*). So it is clear that if a testator devised a house which he had insured against fire, and it were burnt down immediately before his death, the devisee could

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(*z*) Compare *Springett* v. *Jenings*, L. R. 6 Ch. 333, explained in *Re Mason*, [1901] 1 Ch. 619.

(*a*) Chap. XIII.

(*b*) *Ante*, p. 148.

(*c*) Chap. VII, p. 148.

(*d*) Chap. XXII, *ante*, p. 711.

(*e*) *Ante*, pp. 387 *seq.*

(*f*) As to sales by mortgagees, see *ante*, p. 714, and for the case of a lease being determined so as to entitle the testator to compensation, see *Coyne* v. *Coyne*, Ir. R. 10 Eq. 496, cited in Chap. XXII, *ante*, p. 714.

(*g*) *Frewen* v. *Frewen*, L. R. 10 Ch. 610.

not claim the insurance moneys (*h*). Sales by the court, and purchases by companies under compulsory powers, are subject to special rules (*i*).

DEVISES FOR LIMITED INTERESTS.

Express or implied.

Limited interests in land may be created not only by express devise, but also by implication or inference (*k*).

Devises to trustees for limited purposes.

The question what estate was (before 1926) taken by trustees where land was devised to them without words of limitation, for purposes which did not exhaust the fee, is referred to elsewhere (*l*).

Devise during minority.

Where land is devised during the minority of a person, and he dies before attaining majority, the question arises whether the devisee is entitled to hold the land until the minor would, if living, have attained majority, or whether his interest ceases. This question is discussed in Chapter XXI (*m*).

Creation of new right by devise.

A devise may take effect by the creation *de novo* of an easement, rent-charge, condition, or the like (*n*).

(*h*) Compare *Durrant* v. *Friend*, 5 De G. & S. 343 (chattels). Assuming that section 83 of the Fires Prevention (Metropolis) Act, 1774, applies to the whole of England (*Sinnott* v. *Bowden*, [1912] 2 Ch. 414), it might be contended that, in the case above supposed, the devisee would be entitled to require the insurance moneys to be laid out in rebuilding the house. But the words of the section—"any person interested in or intitled unto any house" which may be burnt down—seem intended to apply to the interests and titles existing at the time of the fire; in the case supposed nobody could, immediately after the fire, have required the insurance moneys to be laid out in rebuilding.

(*i*) See *ante*, pp. 714 *seq.*

(*k*) *Ante*, pp. 606 *seq.*

(*l*) Chap. XLV.

(*m*) *Ante*, p. 708.

(*n*) *Ante*, p. 69, *post*, p. 1435.

GENERAL AND RESIDUARY DEVISES.

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Operation of Residuary Devise:
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Extent of general devise under Wills Act.

I.—Operation of a Residuary Devise in regard to void, lapsed, and partial Specific Devises.—After stating the law prior to the Wills Act, Mr. Jarman (*o*) says :—" The points embraced by the preceding positions can scarcely arise under wills which are subject to the new law, as the act of 1 Vict. c. 26, s. 25, expressly provides, that, unless a contrary intention shall appear by the will, real estate, or the interest in real estate, comprised in any void or lapsed devise, shall be included in the residuary devise, if any; and as such act (sect. 3) extends generally the devising power of a testator to all the real estates to which he shall be entitled at his decease; and, moreover, (sect. 24,) makes the will, with reference to the real and personal estate comprised in it, speak from that period, the result of the whole is, that any testator who dies leaving a will made or republished since 1837, containing a general or residuary devise of real estate (*p*), which takes effect, must be completely testate in regard to every portion of his real estate to which he is entitled at his decease, whensoever acquired, and whether originally intended to have been otherwise specifically disposed of or not, if such intention should, for any reason whatever, fail of effect."

Effect of disclaimer.

The construction which Mr. Jarman puts on these sections of the Wills Act goes somewhat beyond their literal meaning, for section 25 is confined to real estate comprised in any devise " which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect." Suppose that a testator devises Blackacre to A, and his residuary real estate to B, and that A disclaims the devise : is Blackacre

(*o*) First edition, p. 593.

(*p*) A will may contain a general devise and also a separate residuary devise : *West* v. *Lawday*, 11 H. L. C. 375. And see *Mason* v. *Ogden*, [1903] A. C. 1.

included in the residuary devise? (*q*). The devise to A is not, in itself, "incapable of taking effect": it fails by reason of the disclaimer. But Mr. Jarman's construction is, it is submitted, the right one, for the obvious intention of the Act was to give to residuary devises the same effect as residuary bequests have always had, and there seems no doubt that a residuary bequest includes disclaimed bequests (*r*). Moreover, the effect of disclaimer relates back to the death of the testator (*s*), so that the devise is, in the event, incapable of taking effect.

Erroneous recital.

If a testator who is really the owner of Blackacre, erroneously recites in his will that it belongs to A and makes a general devise of all his real estate to B, Blackacre passes by the devise to B (*t*).

What is a residuary devise.

A devise may of course be residuary, although it does not contain the word "residue," "remainder," or any similar word (*u*).

And if a testator includes in one devise certain lands by their specific description and all the residue of his real estate, the specifically described lands form part of the residuary devise (*v*).

Limited general devise.

A testator may except certain property from a general devise, either expressly, or by limiting the devise to real estate answering a certain description. Thus in *Simmons* v. *Rudall* (*w*) a testator gave all his residuary real and personal estate to trustees in trust for A for life with remainder in trust, as to one-fourth, as A should appoint, and upon further trust to transfer all the rest residue and remainder of the trust property to B, C, and D; A made no appointment, and it was held that there was an intestacy as to the one-fourth. Again, in *Leach* v. *Jay* (*x*) a testatrix was entitled as heir-at-law to some freehold houses of which wrongful

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(*q*) "I am indebted to my learned friend, Mr. T. Cyprian Williams, for drawing my attention to the difficulty caused by the wording of section 25: it occurred in a case in his experience." [Note by C. Sweet.] See also an article in 32 L. Q. R., p. 83.

(*r*) *Post*, p. 1008.

(*s*) *Ante*, p. 530.

(*t*) In *Re Bagot*, [1893] 3 Ch. 348, this rule was applied to a residuary bequest, but it seems clear that it applies also to a residuary devise, and that the decisions in *Circuitt* v. *Perry*, 23 Bea. 275; *Harris* v. *Harris*, Ir. R. 3 Eq. 610; *Hawks* v. *Longridge*, 29 L. T. (N.S.) 449 and *Clibborn* v. *Clibborn*, 9 Ir. Jur. 381, so far as they lay down any other principle, are erroneous. See *Hounsell* v. *Dunning*, [1902] 1 Ch. 512, where the gift was specific; *ante*, p. 921. Compare *Doe* d. *Howell* v. *Thomas*, 1 M. & Gr. 335, 344, *post*, p. 933.

(*u*) *Re Bawden*, [1894] 1 Ch. 693. Conversely a gift of "my said residuary estate" will not operate as a residuary devise if the only residue previously referred to is the residuary personalty: *Re Hudson*, [1908] W. N. 50.

(*v*) *Bray* v. *Stevens*, 12 Ch. D. 162; *Thorman* v. *Hilhouse*, 5 Jur. (N.S.) 563.

(*w*) 1 Sim. (N.S.) 115.

(*x*) 9 Ch. D. 42.

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possession was taken by another; she died without having ever been in possession, having devised " all real estate (if any) of which I may die seised " to the plaintiff; the testatrix's title had not been barred by the Statute of Limitations : it was held that " seised " was a technical word and had no secondary or popular meaning (*y*), and that consequently the houses did not pass by the devise.

Excepted property undisposed of.

In such a case, and also where the testator expressly excepts certain property from a general devise, and makes no disposition of it, the property passes as on an intestacy (*z*). But if after excepting it he gives it to A, and the gift fails by lapse or otherwise, it will, as a general rule, be presumed that the object of the testator in making the exception was simply to give the property to A, and there is therefore no reason why upon the failure of the gift, it should not be held to be included in the general devise (*a*). It follows that if a testator devises all his real estate, except Blackacre, to A, and devises Blackacre to B, and B dies in the testator's lifetime, then Blackacre passes under the general devise to A; if, however, after B's death the testator makes a codicil referring to the fact, but not altering the devise of Blackacre, the presumption above referred to does not arise, and there is an intestacy as to Blackacre (*b*).

An erroneous declaration by a testator in his will, however emphatic, that a particular piece of land does not belong to him, will not prevent it from passing by a residuary devise (*c*).

Whether exception is within sect. 24 of Wills Act.

The question whether section 24 of the Wills Act applies to an exception from a general devise, has been already considered (*d*).

(*y*) It is not very easy to follow this argument, for " seised of " is frequently used by professional lawyers in the sense of " entitled to." Thus where a person has mortgaged his land in fee simple, the effect of which is that the seisin is in the mortgagee (*Copestake* v. *Hoper*, [1908] 2 Ch. 10), the most learned conveyancer would not think it inaccurate to say that the mortgagor is " seised in fee simple " of the land, subject to the mortgage (see Key & Elph. Con., 9th ed., vol. i, p. 865).

(*z*) *Simmons* v. *Rudall*, 1 Sim. (N.S.) 115, *ante*, p. 925; *Re Fraser*, [1904] 1 Ch., at p. 734; compare *Davers* v. *Dewes*, 3 P. W. 40, cited *post*, p. 1009.

(*a*) See *Blight* v. *Hartnoll*, 23 Ch. D. 218, cited *post*, p. 1010. In *Re Sinclair*, [1903] W. N. 113, a testator devised his real estate, with the exception of a certain house, " the disposal of which I leave to the discretion of my trustees," upon certain trusts : it was held by Swinfen Eady, J., that as there was no attempt on the face of the will to dispose of the beneficial interest in the house, it was excepted from the general devise for all purposes. But was it not the testator's intention to give his trustees a power of disposing of the beneficial interest and was not this sufficient to show that he merely intended to except it from the residue for this purpose, and not for all purposes?

(*b*) In *Re Fraser*, [1904] 1 Ch. 726, the property excepted was chattels real, but the principle clearly applies to real estate.

(*c*) *Re Maber*, 12 T. L. R. 267.

(*d*) *Ante*, pp. 394 *seq.*

What will not limit a residuary devise.

A gift of "all other land" (*e*), or "all land not hereinbefore devised" (*f*), is a mere gift of residue, and shows no intention, within the Act, to exclude lapsed specific gifts. And this is so, even although the residuary devise gives an estate for life to the same person as is named specific devisee in fee (*g*).

If a will contains a residuary devise to A, and the testator at the end of his will appoints B his residuary devisee, it seems that the residuary devise to A is not revoked (*h*).

Limited devise may be residuary.

In order that a devise should be a residuary devise within section 25, so as to include lapsed specific gifts, it is not necessary that it should be a devise of the residue of all the testator's real estate. Thus in *Mason* v. *Ogden* (*i*) a testator devised a freehold house at Wimbledon to his son in fee, and "as to all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere, and all my leasehold estates whatsoever and wheresoever," he devised the same to A and B. At his death the testator owned freeholds at Wimbledon and elsewhere, and no copyholds. The specific devise of the house to the son having failed, it was held that it passed by the devise of the testator's other freeholds to A and B. It follows that there can be a residuary devise of a testator's freeholds to A and of his copyholds to B (*k*).

Particular residue.

But a devise of a particular residue is not a residuary devise within section 25. Thus in *Springett* v. *Jenings* (*l*), a testatrix gave certain lands in the parish of H. to A, B, and C as joint tenants in fee, and devised to the plaintiff "the rest of my freehold hereditaments in the parish of H., and all my freehold hereditaments" in certain other parishes. The devise to A, B, and C having failed, it was held that the lands comprised in that devise did not pass under the devise to the plaintiff of "the rest of my freehold hereditaments in the parish of H.," but were undisposed of. It was said by James, L.J., that the devise to the plaintiff was as specific as if the testatrix had given certain lands in H. to A, B, and C and certain other lands in

(*e*) *Cogswell* v. *Armstrong*, 2 K. & J. 227.

(*f*) *Green* v. *Dunn*, 20 Bea. 6. See also *Culsha* v. *Cheese*, 7 Hare, 236; *Carter* v. *Haswell*, 26 L. J. Ch. 576; *Burton* v. *Newbery*, 1 Ch. D. 234; *Johns* v. *Wilson*, [1900] 1 Ir. 342.

(*g*) *Green* v. *Dunn*, *supra*.

(*h*) *Johns* v. *Wilson*, [1900] 1 Ir. R. 342, where B was appointed residuary legatee; no question seems to have arisen as to the real estate; see *post*, p. 1004, where other cases on double residuary gifts are referred to.

(*i*) [1903] A. C. 1, affirming decision of C. A. in *Re Mason*, [1901] 1 Ch. 619.

(*k*) *Per* Rigby, L.J., [1901] 1 Ch., at p. 630.

(*l*) L. R., 6 Ch. 333, following *Re Brown's Trusts*, 1 K. & J. 522.

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H. (being all the others which she had in that place) to the plaintiff (*m*).

A particular residue may indeed, upon failure of the gift of a part include that part, if the testator has used language showing an intention to that effect (*n*). But such intention must be shown, while in the case of a proper residuary devise the Act says it shall be presumed.

Re Davies.

In *Re Davies* (*o*), the testator devised all his farms in the parish of B, and after his will bought another farm in the parish of B and devised it by a codicil to other persons. The provisions of the codicil partially failed. Held, that on such failure the farm passed under the gift of all the testator's farms in B, and not under the residuary devise in the will.

Void appointment will fall into residuary devise.

The word "devise" in section 25 of the Wills Act, as generally throughout the Act, includes a gift by will, in exercise of a general power of appointment of real estate (*p*); and consequently, where a testator, in exercise of such a power, makes a testamentary appointment of realty which fails or is void, the gift will fall into the residuary devise (if any), unless a contrary intention appears by the will (*q*).

Effect of residuary devise failing as to aliquot share.

If a general residuary devise itself fails to take complete effect, the property will, to that extent, be undisposed of. As where a testator devised land to several in certain shares, as tenants in common, and devised the residue of his real estates to the same persons in the same proportion; some of the specific devisees died in the testator's lifetime, whereupon their shares fell into the residue; but so much of the same shares as came back to them (so to speak), under the residuary devise lapsed to the heir (*r*). So if a testator devises his residuary real estate to several persons as tenants in common, and afterwards revokes the devise as to one of them, there is an intestacy as to his share (*s*).

Share directed to fall into residue.

If a testator devises his residuary real estate to several persons as tenants in common, and by codicil revokes the devise

(*m*) But a devise of a particular residue of lands in a particular place passes lands in that place acquired by the testator after the date of the will: *Doe* d. *York* v. *Walker*, 12 M. & Wel. 591; *ante*, p. 920.

(*n*) *Springett* v. *Jenings*, *ante*, p. 927. Compare the cases on the effect of a bequest of a particular residue; *post*, p. 1011 *seq.*

(*o*) [1928] 1 Ch. 24.

(*p*) See section 27 of the Act.

(*q*) See *Freme* v. *Clement*, 18 Ch. D. 499. In this case the doctrine stated in the text was extended by Jessel, M.R., to appointments in exercise of special powers; but his Lordship's decision on this point was disapproved by the Court of Appeal in *Holyland* v. *Lewin*, 26 Ch. D. at p. 272. See also *ante*, p. 783.

(*r*) *Greated* v. *Greated*, 26 Bea. 621. See further on this subject, *post*, p. 1016.

(*s*) *Per* Lord Cairns, in *Sykes* v. *Sykes*, L. R., 3 Ch. at p. 303.

as to one of them and directs that his share shall fall into residue, it is divisible between the other residuary devisees (*t*).

Immediate residuary devise.

II.—In regard to Rents and Profits.—An immediate residuary devise carries the rents and profits from the testator's death; they are, if necessary, apportioned, and those accruing before the death form part of the testator's personal estate.

Future residuary devise did not carry interim income before 1926.

Before 1926, if the residuary devise was contingent or future, *i.e.*, deferred in point of enjoyment, the income accruing in the interval from the residuary real estate did not pass by such devise, but was undisposed of and went to the heir (*u*), a residuary devise differing in this respect from a residuary bequest of personalty, which, it is well known, does (though contingent in its terms) carry the prior income (*x*). The distinction between real and personal estate has been said to flow from the very nature (under the old law) of a residuary devise; for being confined to what the testator had when he made his will, it was as specific as if the property were particularly described (*y*). It is said to be still more clearly deducible from the rule of law that the freehold cannot be in abeyance (*z*). And the profits necessarily went with the estate (*a*). These reasons, however, are purely technical, and no good reason can be given for the rule. Nevertheless, it was clearly established. "It is impossible to contend that, in the absence of any words clearly leading to what the Court considers judicially to imply a gift of the intermediate rents and profits (*b*), any such gift can be introduced into the testator's will. Neither the persons waiting until the executory devise shall take effect, nor the person who shall first come into *esse* when the executory devise has taken effect, nor all the persons who may be interested under the series of devises following that executory devise, by way of

(*t*) *Re Palmer*, [1893] 3 Ch. 369, where the head-note seems inaccurate; there was no trust for conversion of the real estate.

(*u*) *Hopkins* v. *Hopkins*, Ca. t. Talb. 44, extr. from R. L. Hawkins, 3rd ed., p. 57; *Wills* v. *Wills*, 1 Dr. & W. 439; *Hodgson* v. *Bective*, 1 H. & M. 376, 10 H. L. Ca. 656 (but not appealed on this point); *Wade-Gery* v. *Handley*, 1 Ch. D. 653; 3 Ch. D. 374. The Wills Act does not affect the question; see 1 H. & M. p. 396, and a note by Mr. Jarman in the first edition of this work, p. 596.

(*x*) *Green* v. *Ekins*, 2 Atk. 473; *Trevanion* v. *Vivian*, 2 Ves. sen. 430; *i.e.*, until accumulation is stopped by the law: thenceforth it goes to the next-of-kin; *Bective* v. *Hodgson*, 10 H. L. C. 656, 671; *Wade-Gery* v. *Handley*, *supra*; *Re Mellor*, [1922] 1 Ch. 312 (direction to settle held to include accumulations).

(*y*) By Wood, V.-C., 1 H. & M. 396.

(*z*) See acc. *per* Lord Westbury, 10 H. L. C. 665.

(*a*) 1 Atk. 424, 2 Atk. 476, Co. Lit. 55 b, n. (8).

(*b*) For examples of such a gift in a shifting clause, see *Turton* v. *Lambarde*, 1 D. F. & J. 495; *D'Eyncourt* v. *Gregory*, 34 Bea. 36.

accumulation, can establish their claim " (*c*). And the rule was the same with regard to trusts (*d*).

Otherwise if real and personal estate are blended.

But if the real and personal estates were blended in one gift, it was considered to denote an intention that both species of property should be subject to the rule applicable to personalty. Thus in *Genery* v. *Fitzgerald* (*e*), Lord Eldon decided that a gift of all the residue of the real and personal estate to the eldest of three persons who should attain twenty-one, charged with a sum of money to the others if they should attain that age, comprised the rents accruing between the testator's decease and the attainment by the devisee of the prescribed age. He said, " The general principles are these. When personal estate is given to A at twenty-one, that will carry the intermediate interest. If a testator gives his estate Blackacre at a future period, that will not carry the intermediate rents and profits. But when he mixes up real and personal estate in the same clause, the question must be, whether he does not show an intention that the same rule shall operate on both."

What constitutes a blending.

What amounted to such a mixing up of real and personal property in one mass as to bring a specific case within the rule, has been much discussed. It is clear that if there were separate trusts of the realty and the personalty, and the trusts were not identical, so that they might or might not carry the property to the same persons, the rule in *Genery* v. *Fitzgerald* did not apply (*f*). But in *Re Dumble* (*g*), where a testator devised his residuary real estate upon certain trusts (including trusts for maintenance, etc., and bequeathed his residuary personal estate upon trusts which were identical with those declared of the real estate, except that they did not include trusts for maintenance, etc., it was held by Pearson, J., that the rule in *Genery* v. *Fitzgerald* applied (*h*).

Where remainderman is excluded.

But a testator might make such a disposition of his real and personal estate during the period preceding the future or contingent interest, as to exclude the presumption that he meant it

(*c*) *Per* Wood, V.-C., 1 H. & M. 392; and see Sir E. Sugden's remarks in *Wills* v. *Wills*, 1 D. & War. 451, 452, upon *Duffield* v. *Elwes*, 2 S. & St. 544; and *ante*, p. 701. *Sidney* v. *Wilmer*, 4 D. J. & S. 84, *contra*, is not law; *Wade-Gery* v. *Handley*, 3 Ch. D. 374.

(*d*) *Per* Lord Talbot, *Hopkins* v. *Hopkins*, *ante*, p. 929, cited by Sugden, C., 1 D. & War. 455; *Wade-Gery* v. *Handley*, 1 Ch. D. 653, 3 *ib.* 374.

(*e*) Jac. 468; see also *Gibson* v. *Montfort*, 1 Ves. sen. 485; *Glanvill* v. *Glanvill*, 2 Mer. 38; *Ackers* v. *Phipps*, 3 Cl. & Fin. 665; *Lachlan* v. *Reynolds*, 9 Hare, 796; *Re Taylor*, [1901] 2 Ch. 134. The decision on this point in *Green* v. *Tribe* (*Re Love*), 47 L. J. Ch. 783, seems to have been given *per incuriam*.

(*f*) *Hodgson* v. *Bective*, 1 H. & M. 376; *Re Williams*, 54 L. T. 831.

(*g*) 23 Ch. D. 360.

(*h*) See further on this point *Re Drakeley's Estate*, 19 Bea. 395; *Marriott* v. *Turner*, 20 *ib.* 557; *Re Williams*, 54 L. T. 831; *Re Burton's Will*, [1892] 2 Ch. 38.

to carry the intermediate income. Thus in *Re Townsend's Estate* (*i*), a testator gave his real and personal estate upon trust to pay the income to A for life, and after his death upon trust for his children : there was a gift over, in the event of A dying without issue, to a class to be ascertained at his death ; the gift to A for life failed and he had no children : it was held that during A's life and until he had a child, the income of the trust funds (which consisted of real estate only) went to the heir-at-law. So if a testator directed the intermediate income to be accumulated, and the accumulation was stopped by the Thellusson Act, the income went to the heir-at-law and next-of-kin (*k*).

After 1925 contingent residuary devise carries income.

New Law. In the case of wills coming into operation after 1925 a contingent residuary devise carries the intermediate income unless it is otherwise expressly disposed of (*l*).

Operation of a general devise on reversions.

III.—In regard to Reversions and Remainders.—" It remains to be considered," says Mr. Jarman (*m*), " whether reversions will pass under a general devise of lands. In regard to this question, an undisposed-of interest which, on his decease, would become a reversion left in the testator after other dispositions of his own will, is obviously distinguishable from a reversion of which he is the owner at the time of his will (*n*) ; but they have been generally treated as belonging to the same class, and approximate sufficiently in principle to warrant at least their juxtaposition.

" Reversions in fee, then, will pass under a general devise of lands or hereditaments (*o*), although the testator be seised of real estate in possession to satisfy the words of the devise (a fact however, which, in regard to wills made since 1837, would be immaterial) ; and although he may have been ignorant when he made his will of his having such a disposable interest (*p*) ; or it may have been unlikely, from its remoteness or liability to be defeated by the act of another, ever to fall into possession, as in the case of a reversion expectant on an estate tail (*q*).

(*i*) 34 Ch. D. 357. See also *Re Sanderson's Trust*, 3 K. & J. 497; *Marriott* v. *Turner*, 20 Bea. 557.

(*k*) See *Talbot* v. *Jevers*, L. R. 20 Eq. 255; *Weatherall* v. *Thornburgh*, 8 Ch. D. 261; *Re Travis*, [1900] 2 Ch. 541, and the other cases cited, *ante*, p. 365.

(*l*) Section 175 of the Law of Property Act, 1925, stated *ante*, p. 920.

(*m*) First ed. p. 599.

(*n*) See *Tennent* v. *Tennent*, 1 Jo. & Lat. 379.

(*o*) *Chester* v. *Chester*, 3 P. W. 56; *Ridout* v. *Pain*, 3 Atk. 486; *Atkyns* v. *Atkyns*, Cowp. 808, 3 B. P. C. Toml. 408; see also *Doe* d. *Crump* v. *Sparkes*, 4 D. & Rly. 246.

(*p*) " Persons not professionally informed do not readily apprehend the alienable nature of reversionary contingent interests." (Note by Mr. Jarman.)

(*q*) *Dalby* v. *Champernoon*, Skinn. 631, where, however, it was controlled by the context.

Devise of lands "not settled," includes unsettled reversion in settled lands.

"It has been even held that a testator's reversion in fee in settled lands will pass under a devise of his '*lands not settled*' (*r*), or of his lands and hereditaments '*out of settlement*' (*s*), or '*in the towns of L., M. and N., or elsewhere, not by him formerly settled or thereby disposed of*' (*t*). The argument in these cases was, that, although certain estates in those lands were settled, yet that the reversion was not, and consequently it fell within the restrictive terms of the testator's description."

Incorporated Society v. *Richards*.

So, in *Att.-Gen.* v. *Vigor* (*u*) Lord Eldon expressed a decided opinion that the reversion in lands, settled on the marriage of the testator's son with Lady K., passed by a devise of all the testator's lands, which he had not settled or assured, or agreed to settle or assure, to the use of his said son and the issue male of his body, upon his marriage with Lady K. his wife. And in *Incorporated Society* v. *Richards* (*x*), where the testator—having upon his marriage agreed to settle certain estates in trust for himself for life, remainder to provide a jointure for his wife, remainder to his issue in tail, remainder to himself in fee—devised all his unsettled real estate to his wife for life, remainder over, Sir E. Sugden, C., held that the reversion passed as part of the unsettled estates.

The foregoing cases also show that the possession by the testator at the date of his will of lands, no estate or interest in which has been settled, and to which the devise is applicable, will not exclude the operation of the will.

Mr. Jarman continues (*y*): "Though the rule of construction established by the preceding cases has been much condemned, as savouring of extreme technicality, and inimical to popular notions and probable intention (*z*), they have, it is conceived, placed it beyond the reach of controversy.

"Lands not before devised."

"On a principle not very dissimilar, it has been held, that a devise of land 'not before devised,' or 'not before disposed of,'

(*r*) *Cooke* v. *Gerrard*, 1 Lev. 212; *Glover* v. *Spendlove*, 4 Br. C. C. 337 ("lands not settled in jointure"). The *dictum contra* of Lord Ellenborough, in *Goodtitle* d. *Daniel* v. *Miles*, 6 East, 494 (except so far as it may be supported on special grounds), must be regarded as untenable).

(*s*) *Strode* v. *Russell*, 2 Vern. 621, 1 Eq. Ca. Ab. 210, pl. 18, 3 Ch. Rep. 169, and (*nom. Falkland* v. *Lytton*) 3 B. P. C. Toml. 24.

(*t*) *Chester* v. *Chester*, 3 P. W. 56, 2 Eq. Ca. Ab. 330, pl. 9.

(*u*) 8 Ves. 256, 272.

(*x*) 1 D. & War. 258; see also *Jones* v. *Skinner*, 5 L. J. (N.S.) Ch. 87; *Crowe* v. *Noble*, Sm. & Bat. 12; *Re Mather*, 71 Sol. J. 142 ("no disposition by mortgage"—equity of redemption passes).

(*y*) First ed. p. 601.

(*z*) Sir J. Mansfield, in *Morgan* v. *Surman*, 1 Taunt. 292, characterised *Chester* v. *Chester* as "a shocking decision"; but he admitted it had been followed by numerous others; and see the rule defended by Sir E. Sugden, 1 Dr. & War. 285; and by Pepys, M.R., 5 L. J. (N.S.) Ch. 87.

carries the reversion in lands which the testator had previously devised for life (*a*).

Reversion not excluded by equivocal expressions.

"The inclination of the Courts at the present day not to exclude a reversion from a general devise upon slight or equivocal grounds, is strongly illustrated by *Doe* d. *Howell* v. *Thomas* (*b*), in which a reversion in fee in an estate limited to the testator's first and other sons in strict settlement, was held to pass under a devise of estates over which the testator had a power of disposal, though in another part of the will he referred to the estate in question *as property over which he had no power*" (*c*). And in *Ridgeway* v. *Munkittrick* (*d*), where a testator directed his trustees to let a certain mill, and also dispose of his stock in trade and other properties to the best advantage, Sir E. Sugden held that the mill was included in the term "other properties."

Mostyn v. *Champneys.*

In *Mostyn* v. *Champneys* (*e*), an attempt was made to exclude a reversion in fee expectant on an estate tail from a devise of all the testator's real estate, whatsoever and wheresoever, over which he had any disposing power, to trustees for a term for raising debts, funeral charges and legacies, on the ground that the testator himself was tenant in tail of the lands in question; and that he could not intend to describe such a remote reversion as property over which he had a disposing power, he having taken no steps to enlarge his estate tail, as he might have done, into a fee simple. The testator had other real estate in possession, to which it was admitted the devise in question extended. The Court of C. P. certified that, the words of the devise being sufficient to include the reversion, and no intention to exclude it being expressed, or necessarily implied from other parts of the will, such reversion passed.

But of course, a testator may refer to a particular reversion in such a way as to show that he does not intend it to pass by a general devise (*f*).

(*a*) *Rooke* v. *Rooke*, 2 Vern. 461; *Willows* v. *Lydcot*, 2 Vent. 285; *Taafe* v. *Ferrall*, 10 Ir. Ch. Rep. 183.

(*b*) 1 M. & Gr. 335.

(*c*) *Morris* v. *Lloyd*, 33 L. J. Ex. 202, illustrates the general principle. And see *Kelly* v. *Duffy*, 4 L. R. Ir. 601.

(*d*) 1 D. & War. 84.

(*e*) 1 Scott, 293.

(*f*) *Strong* v. *Teatt*, 2 Burr. 912; 3 Br. P. C. 219; *Doe* v. *Saunders*, Cowp. 420. See *Hyley* v. *Hyley*, 3 Mod. 228; *Doe* d. *Morris* v. *Underdown*, Willes, 293. The decision in *Roe* v. *Avis*, 4 T. R. 605 was disapproved by Mr. Jarman (first ed., p. 606; fourth ed., p. 659 *seq.*) and that in *Goodtitle* v. *Miles*, 6 East, 494, by Sir E. Sugden in *Incorporated Society* v. *Richards* (*ante*, p. 932). The modern tendency of the Courts is to give effect to the literal wording of a general devise (*post*, p. 934). *Honywood* v. *Honywood*, 2 Y. & C. C. C. 471, is not a valuable authority, as the grounds of the decision are not stated.

CHAP. XXV.

Whether inapt limitations exclude a reversion.

A question which was formerly much debated, in regard to the operation of a general devise upon a reversion, is whether the inaptitude of some of the limitations is a ground for excluding the reversion. The general principle is now well established, namely, that in construing a general devise "the words of the will should be taken to comprehend every subject which falls within their proper meaning, unless that meaning is excluded by the context or by the circumstances of the case; and that mere conjecture will not do" (*g*). In the case from which the foregoing remark is quoted a testator who was entitled to an estate in remainder expectant on the death of his wife, by his will gave all his property to his wife for life and after her decease to his children; it was held that the remainder passed by the devise.

In the first edition of this work Mr. Jarman divided the cases on this subject into two classes: first, those in which there were other lands to which the limitations in question were applicable; and secondly, those in which the reversion was the only property of the testator that the devise could apply to. As the distinction in question is immaterial as regards wills made since 1837, it will be sufficient to say that the former class comprises the cases of *Doe* d. *Earl Cholmondeley* v. *Weatherby* (*h*), *Doe* d. *Moreton* v. *Fossick* (*i*), *William* d. *Hughes* v. *Thomas* (*j*), *Freeman* v. *Duke of Chandos* (*k*), and *Doe* d. *Nethercote* v. *Bartle* (*l*). The latter class includes *Strong* v. *Teatt* (*m*), *Roe* d. *James* v. *Avis* (*n*), *Goodtitle* d. *Daniel* v. *Miles* (*o*), *Att.-Gen.* v. *Vigor* (*p*), and *Church* v. *Mundy* (*q*). A detailed examination of these cases will be found in the fourth and earlier editions of this work. Mr. Jarman, after criticising the remarks made by Sir W. Grant (*r*) on the decision in *Church* v. *Mundy* (*s*) (which established the modern doctrine) proceeds as

(*g*) *Per* Turner, V.-C., in *Ford* v. *Ford*, 6 Ha. 486. See also *Morris* v. *Lloyd*, 33 L. J. Ex. 202.
(*h*) 11 East, 322.
(*i*) 1 B. & Ad. 186.
(*j*) 12 East, 141.
(*k*) Cowp. 363.
(*l*) 5 B. & Ald. 492. To these may be added *Goodright* v. *Downshire*, 2 B. & P. 600.
(*m*) Burr. 912; s.c. in D. P. 3 Br. P. C. 219.
(*n*) 4 T. R. 605.
(*o*) 6 East, 494.
(*p*) 8 Ves. 256.
(*q*) 15 Ves. 396. See also *Wintour* v. *Clifton*, 3 Jur. (N.S.) 74; *Alliston* v. *Chapple*, 6 Jur. (N.S.) 288; *Taafe* v. *Ferrall*, 10 Ir. Ch. R. 183; and *Tennent* v. *Tennent*, 1 Jo. & Lat. 379, where Sugden, L.C., said: "*Roe* v. *Avis* has been overruled by the current of later authorities."
(*r*) In *Welby* v. *Welby*, 2 V. & B. 187.
(*s*) 15 Ves. 396.

follows (*t*) :—" Since this period, in every instance in which the question whether a reversion passes by a general devise has been agitated, it has been decided in the affirmative; and though in all these cases, there happened to be other real estate to which the limitations inapplicable to the reversion might be referred, yet little or no stress seems to have been laid on that circumstance, and they were decided on the broad ground, that the words of the devise being sufficient to comprise the property, it would pass, without going into the question, whether the testator could be supposed to have had it actually in his contemplation when he framed the devise or not.

General conclusion from the cases.

" The sound conclusion, then, seems to be, that a general devise will in all cases operate on a reversion or remainder belonging to the testator, notwithstanding the remoteness of such reversion or remainder, as being expectant on an estate tail or otherwise (whether such estate tail be vested in the testator or another), and notwithstanding the inapplicability of some of the limitations or purposes of the devise to the interest in question and, that, too, whether the testator had at the time of the making of the will any other real estate to which such inapplicable limitations or purposes can be applied or not. Indeed, the latter fact would, of course, be wholly immaterial in the case of a will made or republished since the year 1837, any general devise in which would, under the new law, comprise after-acquired real estate; precluding, therefore, all inquiry into the *then* state of the testator's property, as affording any insight into the intention."

Where none of the limitations are applicable. Opinion of Sir W. Grant.

But if the testator is possessed of a reversion to which none of the limitations are applicable, the question, it is conceived, is by no means the same. Sir W. Grant, indeed, thought there would be no room for arguing such a case; for that would be to say, the reversion passed, although it were so given that nobody could take it (*y*). There seems to be no decision on the point.

(*t*) First ed. p. 610. Mr. Jarman's observations on this subject were approved by Turner, V.-C., in *Ford* v. *Ford*, *supra*, n. (*g*).

(*y*) *Welby* v. *Welby*, 2 V. &. B. 187. The point was touched upon in argument in *Tennent* v. *Tennent*, Dru. 161, 1 Jo. & Lat. 379, where, first, the T. estate was entailed on R. J., and then the residue was devised to R., with a direction at his death to entail the subject of disposition on R. J. in the same manner as the T. estate was entailed on him. It was argued that as the prescribed entail would be wholly inoperative upon the reversion in the T. estate, this reversion was not subject to the direction; and if not, so neither were certain other estates which were included with it in the devise to R., and which he thus took in fee. But Sugden, C., rejected this argument: he treated the gift to R. and the direction to entail as parts of one devise or series of limitations, so that the case became one where some, not all, of the limitations were inapplicable to the reversion. " It is now settled," he said, " that a reversion in fee will pass under a general devise unless a clear intention to include it is shown, though it is limited in part to the same uses to which the particular estate is already dedicated." There was thus no decision on the point in question.

CHAP. XXV.

Leaseholds for years, when they pass under a general devise.

Rules under the law before the Wills Act.

IV.—In regard to Leaseholds.—Mr. Jarman continues (*z*) :—"The next inquiry is, whether property in which the testator is possessed of a term of years only, will pass by a general devise. [In reference to wills made before the year 1838,] the rule on this subject, of which the early case of *Rose* v. *Bartlett* (*a*) is the well-known leading authority, is, that 'where a man hath lands in fee and lands for years, and deviseth all his *lands and tenements*, the fee simple lands pass only, and not the leases for years; but if he hath no fee simple, the lease for years passeth (*b*), [for otherwise the will should be merely void.]'

"Both these propositions are law at the present day, in reference to wills made before the year 1838. The former indeed, was long *vexata quæstio*; and the reluctance to assent to it arose from the conviction, that it subverted the intention of testators, who, it is obvious, employ general words of this nature in a comprehensive sense, and without having in view the purely technical distinction respecting the quality of the estate" (*c*).

Leaseholds pass by a devise of land under Wills Act.

As Mr. Jarman points out (*d*) :—"The exclusion of leaseholds from a general devise, where the testator has freeholds, founded as it is on a distinction purely technical, has been considered to militate so strongly against intention, that this rule of construction has been abrogated by the recent Act of the 1 Vict. c. 26, the 26th section of which provides, that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise, which would (*e*) describe a customary, copyhold or leasehold

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(*z*) First ed. p. 616.

(*a*) Cro. Car. 292; *Hobson* v. *Blackburn*, 1 Myl. & K. 751.

(*b*) Quoted by Sargant, J., in *Re Holt*, [1921] 2 Ch. at p. 22.

(*c*) The cases establishing these propositions are stated and examined in the fourth and earlier editions of this work: the principal ones are—*Davis* v. *Gibbs*, 3 P. W. 26; *Knotsford* v. *Gardiner*, 2 Atk. 450; *Pistol* v. *Riccardson*, 2 P. W. 459, n.; *Thompson* v. *Lawley*, 2 B. & P. 303, where Lord Eldon reviewed the authorities and fully recognised the rule. See also *Whitaker* v. *Ambler*, 1 Ed. 151; *Parker* v. *Marchant*, 5 M. & Gr. 498, 2 Y. & C. C. C. 279. The rule applied where the will was inoperative from defect of execution, *Chapman* v. *Hart*, 1 Ves. sen. 271; see also *Sampson* v. *Sampson*, 2 V. & B. 337; *Watkins* v. *Lea*, 6 Ves. 633. The rule, of course, yielded to an indication of contrary intention. As to what was deemed to amount to evidence of such intent, see *Hartley* v. *Hurle*, 5 Ves. 540; *Swift* v. *Swift*, 1 D. F. & J. 160; *Doe* d. *Belasyse* v. *Lucan*, 9 East, 448; *Lane* v. *Stanhope*, 6 T. R. 345; *Arkell* v. *Fletcher*, 10 Sim. 299; *Addis* v. *Clement*, 2 P. W. 456; *Dixon* v. *Dawson*, 2 S. & St. 327; *Hobson* v. *Blackburn*, 1 My. & K. 571; *Goodman* v. *Edwards*, 2 My. & K. 759. As to leaseholds passing with copyholds of inheritance, see *Roe* d. *Pye* v. *Bird*, 2 W. Bl. 1301. As to leaseholds passing by a devise of "farms," see *Holmes* v. *Milward*, 47 L. J. Ch. 522, *post*, p. 1264, n. (*m*).

(*d*) First ed. p. 627.

(*e*) That is, "would before the Act have described"; see judgment in *Wilson* v. *Eden*, 5 Ex. 752.

estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

Unless a contrary intention appears by the will.

The burden of proof is thus shifted to those who assert that leaseholds do not pass by a devise of "land": and the proof must appear on the will itself. The subject was much discussed in *Wilson* v. *Eden* (*f*), where a testator, after bequeathing his personal estate to A absolutely, devised all his messuages, lands, tenements and hereditaments situate at or near W., and other specified places in the county of D., and at other places in the county of Y., and all other his real estates in the said counties and elsewhere in Great Britain, to uses in strict settlement in favour of A and his issue. Lord Langdale, M.R., thought that renewable chattel leaseholds situate near W., and contiguous to, and occupied with, the freeholds, were not included in this devise: not only were uses in strict settlement inapplicable in their integrity to leaseholds, but the ambiguity of the word "land" was removed by the subsequent words "other real estates." So that the case did not come within the Act (*g*). But on a case from Chancery, the Courts of Exchequer and Q. B. successively came to the opposite conclusion. Lord Campbell observed that if (as was admitted) the devise of lands at or near W., taken by itself, was within the Act (*h*), he could not understand why it was the less so because of the use of the subsequent words. Accordingly, it was decided by Sir J. Romilly that the leaseholds passed; he remarked that though general words might be cut down by the effect of previous enumeration, yet it was new to him to say that those general words cut down the prior enumeration.

Wilson v. *Eden.*

Strict settlement of freeholds and leaseholds.

But leaseholds will clearly not pass by a devise of "lands," if a contrary intention appears from the whole scheme of the will; as in the ordinary case of "lands" being devised in strict settlement, and "personal estate" being bequeathed on corresponding trusts (*i*).

General devise of "real estate."

In *Wilson* v. *Eden*, Lord Langdale was clearly of opinion,

(*f*) 11 Bea. 237, 5 Ex. 752, 14 Bea. 317, 18 Q. B. 474, 16 Bea. 153.

(*g*) See also *per* K. Bruce, V.-C., *Parker* v. *Marchant*, 2 Y. & C. C. C. 282.

(*h*) It is stated in the report that seventy-two acres of the leaseholds were on the northern side of a high ridge, the greater portion being on the southern side, and that the former were two miles from the house and estate at W. It is not stated whether they were disconnected. If they were, it might be a little difficult to reconcile the decision as to the seventy-two acres with *Doe* d. *Ashforth* v. *Bower*, 3 B. & Ad. 453.

(*i*) *Prescott* v. *Barker*, L. R. 9 Ch. 174.

and (for the purpose, at least, of the ultimate decision) it was assumed by the other Judges, that the Act had not the effect of making leaseholds pass by a general devise of "real estate": and this appears to be the proper construction of section 26, which was probably intended merely to abolish the rule of construction established by *Rose* v. *Bartlett* (*k*). And Chitty, J., so decided in *Butler* v. *Butler* (*l*), where the testator gave "my real estates wheresoever situate," to one set of beneficiaries, and "my personal estate wheresoever situate" to another set of beneficiaries. There can, of course, be no question if the testator gives his "real estate" to one person and his "leasehold estate" to another (*m*).

Re Holt.

In *Re Holt* (*n*), the testator gave all his personal property in one direction and all his real property in another. He had no real property, but he had two farms each held for a long term of years. It was held that section 26 of the Wills Act did not apply and that in such a case the rule in *Rose* v. *Bartlett* (*o*) was not altered, so that the leaseholds passed under the devise of real estate.

Devise of "real estate at A."

But if the devise were of "real estate at A.," there can be little doubt that leaseholds at A. would have passed under the old law if the testator had had no freeholds there; and notwithstanding that the words appear rather to point to specific property, it seems to have been assumed, since the Act, that this is a "general devise" within the meaning of section 26.

Moase v. *White.*

Thus, in *Moase* v. *White* (*p*), a testator having freeholds and leaseholds at E., and leaseholds but no freeholds at W., gave all his "real estate" at E. and W. upon certain trusts: it was held by Bacon, V.-C., that all the leaseholds passed, although in one of the other clauses of the will "leaseholds" were expressly referred to as forming part of the personal estate.

Specific devise of "freehold" where no freehold.

And leaseholds will still, as before the Act, pass even as "freehold," if the devise is clearly specific in form, and the testator has at the date of his will no freehold property to

(*k*) *Ante*, p. 936.

(*l*) 28 Ch. D. 66. See also *Turner* v. *Turner*, 21 L. J. Ch. 843. In *Gully* v. *Davis*, L. R. 10 Eq. 562, leaseholds were held to pass by a general devise of "real estate." The decision turned partly on the fact that the testator never had any freeholds, and partly on the admission (by demurrer) that the testator thought his leaseholds were freeholds.

(*m*) *Re Guyton and Rosenberg*, [1901] 2 Ch. 591.

(*n*) [1921] 2 Ch. 17, distinguishing *Butler* v. *Butler*, 28 Ch. D. 66.

(*o*) Cro. Car. 292.

(*p*) 3 Ch. D. 763. See also *Best* v. *Standeven*, [1872] W. N. 44; *Re Davison*, 58 L. T. 304 (see the remarks of North, J., on the decision in *Butler* v. *Butler*). See also *Re Uttermare*, [1893] W. N. 158, where an appointment by will of "all real estate in the county of S." was held to pass long leaseholds intermixed with freeholds.

answer the description (*q*). Thus, where a man devised all his "freehold houses in Aldersgate-street," to A and his heirs, and he had some leasehold but no freehold houses there, the leaseholds passed; it being the plain intention of the will to pass some houses, and the word "freehold" should rather be rejected than the will rendered void (*r*). And as such a gift points to a specific property as then belonging to the testator, the construction of it is not affected by section 24 of the Wills Act (*s*).

Where testator has freehold and leasehold interest in same property.

In *Mathews* v. *Mathews* (*t*), a testator devised all his "freehold land, messuages, or tenements and hereditaments," comprising a specified set of buildings; he died, seised in fee of part of the property subject to a lease, possessed of another part for a term of years, and possessed of a third part, X, for a term of years, and he was also seised of the reversion of X in fee from the expiration of three years after the end of the term; it was held that both the leasehold and freehold interest in X passed by the devise.

But in the absence of special circumstances, a devise of "real and freehold" property will not include leaseholds (*y*).

V.—In regard to Powers of Appointment.—This subject has been already discussed (*z*).

(*q*) *Nelson* v. *Hopkins*, 21 L. J. Ch. 410. See *Stone* v. *Greening*, 13 Sim. 390.

(*r*) *Day* v. *Trig*, 1 P. W. 286; *Doe* d. *Gunning* v. *Lord Cranstoun*, 7 Mee. & W. 1.

(*s*) *Nelson* v. *Hopkins*, 21 L. J. Ch. 410.

(*t*) L. R., 4 Eq. 278.

(*y*) See *Greer* v. *Waring*, [1896] 1 Ir. R. 427. In that case (which was one of a charge, not a devise) the testator referred in one part of the will to his "real freehold and leasehold property."

(*z*) Chap. XXIII. As to general powers, see p. 792, as to special powers, see p. 800.

CHAPTER XXVI.

DEVISES BY MORTGAGEES AND TRUSTEES.

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Devises by mortgagees.

Mr. Jarman points out (*a*) that: "As mortgages are of a complex nature, involving on the one hand a personal debt (*b*), with all the claims and obligations incident to the relation of creditor and debtor, and on the other an interest in real estate for the purpose of securing the debt, absolute at law after forfeiture, but redeemable in equity, it follows that the testamentary disposition of a mortgagee presents two distinct subjects for consideration.

Whether beneficial interest in mortgage will pass under devise of lands.

I.—In regard to the Beneficial Interest in Mortgages.—"With respect to *the beneficial interest in the mortgage*, it is clear that a general devise of lands will not commonly have the effect of including it (*c*). The contrary, indeed, is laid down by a respectable writer (*d*), but his position is not warranted by either authority or principle. The case of *Ex p. Sergison* (*e*) cited by him does not support it, for the devisee was executor and residuary *legatee*, and consequently entitled, *in that character*, to the beneficial interest in the mortgage: besides, the only question in the case related to the *legal estate* in the lands (*f*). The position is opposed, too, by the established principle of equity, which considers the mortgagee as holding the land in a fiduciary character only, and the estate as still substantially belonging to the mortgagor. The person taking the

(*a*) First ed., p. 633.
(*b*) See *Re Gibbon*, [1909] 1 Ch. 367.
(*c*) *Strode* v. *Russel*, 2 Vern. 621, 3 Ch. Rep. 169, 2 Vent. 851, 3 P. W. 61; *Casborne* v. *Scarfe*, 1 Atk. 603 and n. by Sanders, 2 J. & W. 194.
(*d*) 1 Rob. on Wills, 3rd ed. 403.
(*e*) 4 Ves. 147.
(*f*) "Mr Roberts evidently confounds the two questions; his positions are inapplicable to either." (Note by Mr. Jarman.)

mortgaged lands therefore by devise or descent, from the deceased mortgagee, it is obvious, is a trustee for the person entitled to the money or debt, by virtue of the will or otherwise (*g*), unless, of course, both these interests happen to unite in the same person.

Effect of devise of mortgaged lands on beneficial interest.

"Nor is it, I apprehend, universally true, that an *express* devise of the lands, or (which seems to be the same in effect) a devise of all the testator's lands in a particular place, he having no other than mortgaged lands there, will carry the beneficial interest to the devisee, though the affirmative has been sometimes laid down in very unqualified terms (*h*).

Fact of the mortgagee being in possession.

"It is observable that in the cases cited in support of the doctrine referred to, *the testator was in possession* at the time (*i*), and in most of them the operation of the devise was not called in question, the only point being as to the right of redemption. The fact of such possession, particularly where it has been of long continuance, and accompanied with acts of ownership, certainly strongly favours the supposition that the testator, in expressly devising the property, means to give the beneficial interest. Having himself enjoyed the property beneficially, he can hardly but intend that his devisee's enjoyment should be of the same nature, especially where it is given not to the devisee simply in fee, but to several persons consecutively for limited estates (*j*). The testator, too, may be ignorant whether the right of redemption, on which the nature of the property depends, be barred or not; and may therefore choose to avoid using any expressions which might be construed into a recognition of it (*k*). Indeed, in such cases there would be strong ground to contend that the beneficial interest would pass, even under a general devise of lands, especially if there were no other lands to satisfy the devise, a circumstance, however, which would be immaterial, in regard to a will which is governed by the *existing* law.

"In *Martin* d. *Weston* v. *Mowlin* (*l*), Lord Mansfield held that a copyhold estate, of which the testator was in possession as mortgagee, did not pass under a devise of all his 'lands, tenements and hereditaments, within and parcel of the manor of W.,' the surrender to the use of the will referring to the property as subject to a condition of redemption and resurrender; and the will *containing a recital that the mortgagor*

(*g*) *Att.-Gen.* v. *Meyrick*, 2 Ves. sen. 44.
(*h*) 1 Pow. Mortg. Cov. Ed. 409.
(*i*) *Clarke* v. *Abbot*, 2 Eq. Ab. 606, Barn. Ch. Rep. 457. In *How* v. *Vigures*, 1 Ch. Rep. 32, this fact, though not stated, seems very probable, as the object of the suit was to foreclose.
(*j*) *Woodhouse* v. *Meredith*, 1 Mer. 450.
(*k*) But now see stat. 37 & 38 Vict. c. 57, s. 7.
(*l*) 2 Burr. 969.

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stood indebted to him, and giving her time for payment of the debt. It appeared, moreover, that the testator was seised of other lands, also surrendered to the use of his will, in the manor of W.

Beneficial interest in mortgage, held to pass under devise of lands in K.

"In *Woodhouse* v. *Meredith* (*m*), Sir W. Grant held that the testator's beneficial interest in leasehold property at K., of which he was in possession as mortgagee, and of which an assignment in trust for sale had been executed to him, passed under a devise of all his freehold, copyhold and leasehold messuages, farms, lands and tenements whatsoever and wheresoever, in the county of H. *and the town of K.*, to various limitations, the testator having no other than the mortgaged lands at K., though the will contained a subsequent devise of all estates vested in him as mortgagee or trustee, but which was satisfied by other lands of which the testator was seised as mortgagee. The same observation applied to the bequest of securities for money, which also occurred (*n*).

"It is observable that the M.R. considered, from the nature of the limitations and provisions in the will, (which consisted of successive estates for life, with an estate interposed in trustees to preserve contingent remainders,) that, if the property passed at all, it was the beneficial interest, and not the mere legal estate, which was disposed of.

Cases suggested in which devise of mortgage-estate would not carry beneficial interest.

"But cases might be suggested in which an express devise of lands, even by a mortgagee in possession, would not carry the beneficial interest; for instance, if the will contained a specific bequest of the mortgage debt, which would show that the devisee of the land was intended to be a trustee for the legatee. But it is clear that a general bequest of mortgages or securities for money would not have such effect (*o*), for, as such a bequest would pass after-acquired property of this description, the testator is not necessarily presumed to have any specific subject in his contemplation when he makes his will."

Re Clowes.

An intention not to give the devisee any interest in the mortgage debt may also appear from other circumstances. Thus in *Re Clowes* (*p*) a testator who was absolutely entitled to a freehold estate specifically devised it to H. Afterwards he sold the estate and took a reconveyance from the purchaser by way

(*m*) 1 Mer. 450. This decision was followed in *Re Carter*, [1900] 1 Ch. 801.

(*n*) But as to which see next note.

(*o*) See Mr. Justice Le Blanc's judgment in *Doe* d. *Freestone* v. *Parratt*, 5 T. R. 652 ["Le Blanc" appears to be a misprint for "Lawrence"]; and Lord Eldon's in *Thompson* v. *Lawley*, 2 B. & P. at p. 314.

(*p*) [1893] 1 Ch. 214. The principle was applied in *Re Bick*, [1920] 1 Ch. 488, where after devising a rentcharge the testator subsequently purchased the property out of which it issued.

of mortgage for securing part of the purchase money : it was held that the mortgage debt did not pass by the specific devise to H. The decision of the Court of Appeal seems to have turned, not on the fact that the testator was not a mortgagee in possession (*q*), but on the doctrine of revocation by change of estate, laid down in *Moor* v. *Raisbeck* (*r*).

Re Carter.

The decision in *Re Carter* (*s*) seems to have been based partly on the fact that the testator was in possession as mortgagee, and partly on the general principle that a devise of specific property is intended to pass all the interest of the testator in the property. But these considerations are not necessarily conclusive. Thus in *Bowen* v. *Barlow* (*t*) an owner in fee demised a piece of land for a term of years to B, who assigned the term by way of mortgage to the lessor, and afterwards built four houses on the land. The lessor then made his will, and thereby devised his four freehold houses specifically on one set of trusts, and bequeathed his personal estate on another set; at his death he was in possession as mortgagee; and it was held that the mortgage debt was a distinct subject from the reversion, and did not pass by the devise, but by the bequest of personal estate. That the debt was charged on the term, that the term was merged at law, and that the testator had entered into possession, were considered immaterial facts, so long as the equity of redemption remained unbarred.

Bowen v. *Barlow.*

Re Richards.

In *Re Richards* (*u*) the testator bequeathed a leasehold house, which he subsequently sold, taking a mortgage for part of the purchase money. He subsequently executed a codicil confirming his will. Held that his interest in the house as mortgagee did not pass to the legatee.

Devise of "estate and interest."

If a testator expressly devises "all his estate and interest" in certain lands, this may be sufficient to pass his beneficial interest in a sum charged on the lands (*v*).

It has been suggested that section 30 of the Conveyancing Act, 1881, now replaced by section 1 of the Administration of Estates Act, 1925, has altered the general rule above stated (*w*), on the ground that a testator cannot now dispose by will of the legal estate in land of which he is mortgagee, and that consequently

(*q*) As suggested by Cozens-Hardy, J., in *Re Carter*, *supra*.
(*r*) 12 Sim. 123; *ante*, p. 149.
(*s*) [1900] 1 Ch. 801.
(*t*) L. R. 11 Eq. 454; 8 Ch. 171.
(*u*) 65 Sol. J. 542.
(*v*) *Mackesy* v. *Mackesy*, [1896] 1 Ir. R. 511. In that case the testator was the owner of the land subject to a mortgage debt, vested in trustees, to which he was beneficially entitled. See also *Kilkelly* v. *Powell*, [1897] 1 Ir. R. 457. These cases are distinguished in *Davy* v. *Redington*, [1917] 1 Ir. R. 250.
(*w*) *Ante*, p. 940.

by a devise of the land he must mean his beneficial interest in it, namely, the mortgage debt (*x*). The argument attributes to testators an acquaintance with the details of real property law which they do not always possess.

Devises of land contracted to be sold, held not to pass benefit of the contract.

"And here it may be observed," continues Mr. Jarman (*y*), "that a devise by a testator to his wife of an estate which he had 'lately contracted to sell to A.' has been held to be a mere devise of the legal estate, to enable her to carry the contract into execution, and did not entitle the devisee to the purchase-money (*z*).

"Upon the whole, it is clear that the proposition which states that an express devise of mortgaged lands will carry the beneficial interest in the mortgage, must be received with some qualification.

Passes by word "mortgages."

"In the case of *Wilkinson* v. *Merryland* (*a*) it was doubted whether the benefit of a mortgage would pass by the word 'mortgages,' collocated with other personal chattels; but the affirmative is now perfectly clear (*b*).

Charge when extinguished by union of character of mortgagor and mortgagee.

As to the Extinction of the Charge by Union of Character of Mortgagor and Mortgagee.—"In conclusion of this branch of the subject, it may be observed, that where a person having a mortgage or other charge upon lands, becomes himself entitled to *the inheritance* of the lands so charged, a question frequently arises between his representatives, whether the charge is to be considered as subsisting for the benefit of his personal representatives, or is merged for the benefit of the person taking the land. The rule in these cases is, that if it be indifferent to the party in whom this union of interest occurs, whether the charge be kept on foot or not, it will be extinguished in equity by force of the presumed intention (*c*), unless an act declaratory of a contrary intention, and consequently repelling such presumption, be done by him (*d*). But if a purpose beneficial to the owner can be answered by keeping the charge on foot, as if he be an infant, so

(*x*) See *Re Clowes*, *ante*, p. 942. Coote on Mortgages (9th ed.), 868.

(*y*) First ed. p. 636.

(*z*) *Knollys* v. *Shepherd*, cited in *Wall* v. *Bright*, 1 Jac. & W., at p. 499, stated *ante*, p. 713.

(*a*) Cro. Car. 447; Sir W. Jones, 380, *post*, p. 951.

(*b*) *Att.-Gen.* v. *Bowyer*, 3 Ves. 714; *Dicks* v. *Lambert*, 4 Ves. 725.

(*c*) As to the implication of such an intention from the terms of the will, see *Re Nunn's Estate*, 23 L. R. Ir. 286.

(*d*) *Price* v. *Gibson*, 2 Ed. 115; *Donisthorpe* v. *Porter*, *ib.* 162, Amb. 600; *Lord Compton* v. *Oxenden*, 2 Ves. jun. 261; *Johnson* v. *Webster*, 4 D. M. & G. 474; *Price* v. *John*, [1905] 1 Ch. 744; *Re Duke of Somerset*, 55 L. T. 753; *Re Hole*, [1906] 1 Ch. 673; *Re Gibbon*, [1909] 1 Ch. 367; *Swinfen* v. *Swinfen* (No. 3), 29 Bea. 199; *Re Butlin's Estate*, [1907] 1 Ir. R. 159. The union of interest must happen in the lifetime of the party, and no other person must at that time have any interest in the charge, *Tucker* v. *Loveridge*, 1 Gif. 377, 2 De G. & J. 650; *Wilkes* v. *Collin*, L. R. 8 Eq. 338. General powers to appoint the land and the charge, which (in default) are respectively limited to the heirs and next-of-kin of the donee, do not produce the required union, *Clifford* v. *Clifford*, 9 Hare, 675.

that the charge would (under the old law allowing infants to bequeath personal estate) be disposable by him, though the land would not (*e*); or a beneficial use might have been made of it against a subsequent incumbrancer (*f*), or the other creditors of the person from whom the party derived the onerated estate (*g*); in these, and similar cases, equity will consider the charge as subsisting, although it may have become merged by mere operation of law (*h*). And the same rule obtains in favour of the creditors of the person in whom these interests centre (*k*). So, if mesne estates intervene between the charge and the estate of inheritance of the person entitled to it, the charge will subsist " (*l*).

II.—The legal estate of a mortgagee or trustee.—Since the year 1881, by the operation of section 30 of the Conveyancing Act 1881 (now replaced by section 1 of the Administration of Estates Act, 1925), trust and mortgage estates of the deceased (other than land of copyhold or customary tenure vested in the tenant on the Court rolls on trust or by way of mortgage, see Copyhold Act, 1894, s. 88), vested in his personal representatives. The last edition of this work treats fully the subject of the operation of a general devise on the legal estate, but as the subject is now nearly obsolete, the matter is omitted from this edition.

Devisee of trust estate held unable to make a title to a purchaser.

III.—Whether Trust can be performed by Devisee of Trust Estate.—The first edition of this work contained some observations by Mr. Jarman (*m*) on the case, then recently decided, of *Cooke* v. *Crawford* (*n*), in which Shadwell, V.-C., decided that

(*e*) *Thomas* v. *Kemeys*, 2 Vern. 348, 1 Eq. Ca. Ab. 269, pl. 9.

(*f*) *Gwillim* v. *Holland*, July 29, 1751, cit. 2 Ves. jun. 263.

(*g*) *Forbes* v. *Moffatt*, 18 Ves. 384; *Lord Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; *Davis* v. *Barrett*, 14 Bea. 542; see *Wigsell* v. *Wigsell*, 2 S. & St. 364; *Anderson* v. *Pignet*, L. R. 8 Ch. 180. The relative values of the estate and such other charges will not generally be inquired into; but *semble* the charges must be substantial, per Wood, V.-C., *Richards* v. *Richards*, Johns. at p. 767.

(*h*) See Sir W. Grant's judgment in *Forbes* v. *Moffatt*. Those cases, where the charge and the inheritance become united by descent or devise, are to be distinguished from *Mocatta* v. *Murgatroyd*, 1 P. W. 393; *Toulmin* v. *Steere*, 3 Mer. 210, as to which, see 1 Ll. & Go. 251, 1 D. M. & G. 244, *Adams* v. *Angell*, 5 Ch. D. 634, and *Whiteley* v. *Delaney*, [1914] A. C. 132.

(*k*) *Powell* v. *Morgan*, cit. 2 Vern. 208. See also Lord Northington's judgment in *Donisthorpe* v. *Porter*, 2 Ed. 162; *Pears* v. *Weightman*, 2 Jur. (N.S.) 586.

(*l*) *Wyndham* v. *Earl of Egremont*, Amb. 753. As to the evidence required to rebut the presumption of extinguishment, see *Tyrwhitt* v. *Tyrwhitt*, 32 Bea. 244, and cases there cited. And as to the effect of a declaration against merger, see *Re Gibbon*, [1909] 1 Ch. 367.

(*m*) First ed., vol. ii, pp. 713 *seq.*

(*n*) 13 Sim. 91, where *Bradford* v. *Belfield*, 2 Sim. 264, and *Townsend* v. *Wilson*, 1 B. & Ald. 608; 3 Mad. 261, are referred to. In the former case

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where land was devised to A, B, and C upon trust that they or the survivors or survivor of them, or the heirs of the survivor, should sell, a devisee of the survivor could not execute the trust : the survivor ought, as the V.-C. pointed out, to have allowed the land to descend to his heir, who could have executed the trust. Mr. Jarman thought that the case contradicted previous opinions and practice, and went " to establish a rule most unconvenient in its operation " (*o*).

In *Osborne to Rowlett* (*p*), Jessel, M.R., also disapproved of the decision, holding that where real estate is devised to trustees and their heirs in trust for sale, the trust should be considered as annexed, not to the person, but to the fee simple estate taken by the trustees, so that the trust can be executed by the devisees of trust estates of the surviving trustee; and he treated *Cooke* v. *Crawford* as overruled. But in *Re Morton and Hallett* (*q*), James and Baggallay, L.JJ., said that they were not prepared to dissent from *Cooke* v. *Crawford*, and it still applies to cases not within section 30 of the Conveyancing Act, 1881.

Mr. Jarman's theory.

In commenting on *Cooke* v. *Crawford*, Mr. Jarman objected to any distinction being made between cases in which assigns are mentioned, and those in which they are not, and he expressed the wish (*r*), that " instead of adopting any such distinction, the Courts would establish the general rule, that trusts for sale and other trusts relating to real estate, and which are not specially restricted to the trustee personally, but extend to his representatives, should be held to devolve to every person to whom the estate happens to come, either by devise or descent, unless the author of the trust has shown a special intention, by negative words, to restrict it to the heirs, properly so called, of the trustee. Convenience requires, and principle, it is conceived, allows such a general doctrine; and the Courts might surely adopt it without going the length of enabling a trustee to transfer the trust estate to a third person in his lifetime. *This*

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it was held that a trust for sale vested in A and his heirs could not be executed by an assignee of the heir of A, *i.e.*, a person to whom the heir in his lifetime had conveyed the estate. But Lord Langdale, M.R., drew a distinction between such an assignment and a devise.

(*o*) First ed. vol. ii. p. 717. See also Davids. Prec. iv. 53 n.

(*p*) 13 Ch. D. 774. The M.R. went through the authorities, including *Macdonald* v. *Walker*, 14 Bea. 556; *Wilson* v. *Bennett*, 5 De G. & Sm. 475; *Hall* v. *May*, 3 K. & J. 585, and *Stevens* v. *Austen*, 3 E. & E. 685. The case of *Beasley* v. *Wilkinson*, 13 Jur. 649, does not throw any light on the question. These cases are stated and criticised in earlier editions of this work.

(*q*) 15 Ch. D. 143. See also the remarks of Stirling, J., in *Re Rumney and Smith*, [1897] 2 Ch., at p. 356; Lewin on Trusts (3rd ed.), 258; Williams, V. & P. (3rd ed.), 258, citing *Crewe* v. *Dicken*, 4 Ves. 97; *Cole* v. *Wade*, 16 Ves. 27, 46, 47. But as to this latter case see *Re Smith*, [1904] 1 Ch. 139, *post*.

(*r*) First ed. vol. ii. p. 716.

would be a substitution of a stranger for the person nominated by and enjoying the confidence of the author of the trust; *that* operates only to regulate the transmission of the estate and office when they can no longer be held and exercised by the trustee himself, in short, substitutes the *hæres factus* for the *hæres natus* of the trustee. The former is clearly as much within the scope of the confidence of the creator of the trust, as the latter, who is equally unknown to him, and may be connected with the original trustee by only a very remote degree of relationship, and may, moreover, be subject to personal or legal disability. The writer cannot help expressing his hope, if not his conviction, that eventually the more liberal doctrine will be established, notwithstanding the cloud brought upon the prospect by the case of *Cooke* v. *Crawford*."

Where trust is annexed to estate.

Mr. Jarman's hope has been realised in some degree, for the general principle now is that "every power given to trustees which enables them to deal with or affect the trust property is *prima facie* given them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being: whether a power is so given *ex officio* or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the *prima facie* presumption, and little regard is now paid to such minute differences as those between 'my trustees A and B,' and 'A and B my trustees'; the testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language" (*s*). This doctrine has been acted on in several recent cases (*t*).

Effect of Conveyancing Act, 1881.

The effect of section 30 of the Conveyancing Act, 1881, now replaced by section 1 of the Administration of Estates Act, 1925, in cases within the Act is twofold. In the first place, the personal representatives of a sole trustee merely take the place of his heir or devisee, so that if land was given to A and B upon trust for sale, the personal representatives of the survivor could not sell (*u*), any more than, in a case before 1882, his heir could have sold (*x*). But if the devise was to A and B and their heirs, or

(*s*) *Per* Farwell, J., in *Re Smith*, [1904] 1 Ch., p. 144; *Re De Sommery*, [1912] 2 Ch. 622; *Re Robinson*, [1912] 1 Ir. R. 410. The question whether a power given to executors is annexed to the office is discussed *post*, p. 1596.

(*t*) *Ante*, Chap. XXIV, p. 912, where the cases of *Re Waidanis*, 77 L. J. Ch. 12, and *Re Routledge's Trusts*, [1909] 1 Ch. 280 are referred to.

(*u*) *Re Ingleby and Boak*, 13 L. R. Ir. 326; *Re Crunden and Meux*, [1909] 1 Ch. 690.

(*x*) See *Re Morton and Hallett*, 15 Ch. D. 143.

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their heirs and assigns, then the personal representatives of the survivor could sell (*y*). In the second place, it is now not only unnecessary, but also useless, to make any devise of trust or mortgage estates. It has indeed been suggested (*z*) that the section does not take away the power of devising real estate held in trust, and that such a devise by a sole trustee, to persons other than his executors, would create a difficulty as to the execution of the trust by the executors. It is submitted, however, that the section took away the power of devising trust estates, and that its effect is to enable the personal representatives of a deceased trustee to exercise all trusts and powers which, under the old law, he could have transmitted to a devisee of his trust estate.

Trustee Act, 1925, s. 18.

Section 18 of the Trustee Act, 1925, replacing section 22, sub-section 1 of the Trustee Act, 1893 (which took the place of section 38 of the Trustee Act, 1881, and section 8, sub-section 1 of the Conveyancing Act, 1911), provides that (1) where a power or trust is given to or imposed on two or more trustees jointly the same may be exercised or performed by the survivors or survivor of them for the time being; (2) until the appointment of new trustees the personal representatives or representative for the time being of a sole trustee, or, where there are two or more trustees of the last surviving or continuing trustee shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by the sole or last surviving trustee, or other the trustees or trustee for the time being of the trust.

(*y*) See *Re Pixton and Tong's Contract*, 46 W. R. 187, where the devise included the heirs, and the power of sale was exercisable by the trustees for the time being; see *Re Crunden and Meux*, *supra*, n. (*u*).

(*z*) Williams, V. & P. (3rd ed.), p. 260.

CHAPTER XXVII.

WHAT GENERAL WORDS CARRY REAL ESTATE.

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I.—Preliminary.—If a testator gives all his "estate," or all his "property," these words will *prima facie* carry his real estate, for they are sufficient to include both real and personal estate (*a*). General words.

It is true that in *D'Almaine* v. *Moseley* (*b*), Kindersley, V.-C., qualified the general rule; he said: "One rule is, that the word *estate* simply, is sufficient to pass real estate; but in most cases the word *estate* is not used simply; and another rule is, that, supposing that there is nothing in other parts of the will to control the meaning of the gift, the effect of the word *estate*, coupled with other words, is this: if the other words would without the word *estate* not be sufficient to pass the whole personal estate, the word *estate* will be considered as used to effect a complete passing of the personal estate; but if the other words are sufficient to pass all the personal estate, then the word *estate* must be read as intended to apply to real estate." The second rule appears to be based on a misapprehension of the *ejusdem generis* principle of construction as laid down by Lord Hardwicke, when he said that in a bequest of "all my mortgages, household goods and estate," the word "estate" would be Dictum of Kindersley, V.-C., as to meaning of "estate."

(*a*) *Barnes* v. *Patch*, 8 Ves. 604; *Hawksworth*, v. *Hawksworth*, 27 Bea. 1. "The word 'estate' is *genus generalissimum*, and includes all things real and personal," *Countess of Bridgwater* v. *Duke of Bolton*, 1 Salk. 236. See *O'Toole* v. *Browne*, 3 E. & B. 572, and the cases there cited; *Beachcroft* v. *Beachcroft*, 2 Vern. 690 ("worldly estate"); *Doe* v. *Chapman*, 1 H. Bl. 223. Also *Scott* v. *Alberry*, *post*, p. 952, and *Mayor of Hamilton* v. *Hodsdon*, *post*, p. 957. As to "property," see *post*, p. 958.

(*b*) 1 Dr. at p. 632.

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restrained to personal estate (*c*). But the modern cases do not recognise the rule stated by Kindersley, V.-C.; the assumption is that when a man makes his will he does not intend to die intestate as to any part of his property, and such a general word as "estate" has its full meaning given to it, unless the context clearly restricts it to personal property (*d*).

"Property."

The same principle applies where the word "property" is used (*e*).

"Fortune" and other informal expressions.

There are other expressions, such as "my fortune," "all I am worth," or the like (*f*), which will pass the whole of the testator's real and personal estate, unless the context shows that they are used in a restricted sense (*g*). So the appointment of a person as the testator's "heir" may operate as a general devise of real estate (*h*).

The question what will pass by a specified devise of "land," or of a "house," "farm," etc., or of the "rents and profits," or the "use and occupation" of land or house, etc., is discussed in Chapter XXXV.

When restrained by association with personalty.

II.—Words "Estate," "Property," etc., whether restrained by Association with Words descriptive of Personalty.—"It is obvious," says Mr. Jarman (*i*), "that the question, whether real estate passes under a devise, cannot occur, unless the testator has either used terms not properly and technically descriptive of such property, or else, though using terms properly applicable thereto, has created doubt by their position, or their improper use in other parts of the will. General expressions, when collocated with words descriptive of personal estate, are some-

(*c*) *Tilley* v. *Simpson*, 2 T. R. 659, n., cited *post*, p. 952.

(*d*) See *Loftus* v. *Stoney*, 17 Ir. Ch. 178, where Messrs. Wolstenholme and Vincent's note in the second and third editions of this work, stating that the modern cases are founded on a principle which is inconsistent with the doctrine laid down by Kindersley, V.-C., was cited and approved. See also *Smyth* v. *Smyth*, *Mayor of Hamilton* v. *Hodsdon*, and other cases cited *post*, p. 958. In the older case of *Scott* v. *Alberry*, Com. 337 (*post*, p. 952), the construction suggested by Lord Hardwicke was excluded by the context. The proposition laid down by Kindersley, V.-C., in *D'Almaine* v. *Moseley*, was cited with approval by Buckley, J., in *Kirby-Smith* v. *Parnell*, [1903] 1 Ch. 483, where, however, the point did not arise, as the other words were sufficient to pass the personal estate.

(*e*) *Jones* v. *Skinner*, 5 L. J. Ch. 87; *Morrison* v. *Hoppe*, 4 De G. & S. 234; *Loftus* v. *Stoney*, 17 Ir. Ch. 178 ("the remainder of my properties, debentures, funded and securities"); *Re Greenwich Hospital*, 20 Bea. 458.

(*f*) See *Baring* v. *Ashburton*, 54 L. T. 463; *Huxtep* v. *Brooman*, 1 Br. C. C. 437, and other cases cited *post*, p. 971.

(*g*) "Patrimony" would probably have the same meaning. In Roman law, *patrimonium* meant not only that which is derived by inheritance from a father, but also the whole private property of a man (Dirksen Man. Lat. s.v.), and "patrimony" is often used in this sense, but the word may of course be used in a restricted sense; see *Mannox* v. *Greener*, L. R. 14 Eq. 456; *Green* v. *Giles*, 5 Ir. Ch. 25.

(*h*) *Ante*, p. 76.

(*i*) First ed. p. 657.

times restrained by that association to subjects of the same species, agreeably to the maxim *noscitur a sociis;* and accordingly we find many instances, especially among the early authorities, in which the word *estate*, and other such terms clearly capable, *viribus suis*, of comprehending real estate (*j*), have been restrained by the context to personalty."

As instances of this mode of construction, Mr. Jarman examines in detail several cases (*k*), many of which, it is clear, would not be followed at the present day, and continues as follows (*l*) : " But it is not to be inferred from the preceding cases, that the words *estate* and *property*, and others of the like import, when accompanied by words descriptive of personal estate merely, are by that association invariably restricted to property *ejusdem generis*. On the contrary, the presumption generally is against such a construction, as it supposes the testator to use words in another sense than that which judicial construction has given to them, and frequently in a sense which is fully expressed in the context, and therefore renders them inoperative. It should be observed, however, that the circumstance of there being other words adequate to carry the whole personal estate, always affords an argument for making the words under consideration include land, since the contrary construction reduces them to silence; an argument upon which, it will be seen, great stress was laid by Lord Hardwicke, in *Tilley* v. *Simpson* (*m*), stated in the sequel. But it must be remembered, that the fact of the word being wanted to give completeness to the disposition of the personal estate, does not raise so strong an argument in favour of the restrictive construction : since there is no reason why a testator should not have used the words for both purposes.

When not restrained.

" The following cases seem fully to sustain the position, that to warrant the confining of the word ' estate ' and other such expressions to personal estate, there must be a clear indication of an intention in the will so to confine them, for where this indication has been wanting, or has been less clear than in the preceding cases, the words have been held to be used in their proper, *i.e.*, their unrestricted sense.

Cases in which general words have been held to be unrestricted.

(*j*) *Barnes* v. *Patch*, 8 Ves. 604.

(*k*) *Wilkinson* v. *Merryland*, Cro. Car. 447 and 499, Sir W. Jones, 380; *Cliffe* v. *Gibbons*, 2 Lord Raym. 1324; *Marchant* v. *Twisden*, Gilb. Eq. Ca. 30; *Doe* d. *Bunny* v. *Rout*, 7 Taunt. 79; *Woollam* v. *Kenworthy*, 9 Ves. 137; *Bebb* v. *Penoyre*, 11 East, 160; *Timewell* v. *Perkins*, 2 Atk. 102; *Roe* d. *Helling* v. *Yeud*, 2 B. & P. N. R. 214. Mr. Jarman's criticisms on these cases will be found in earlier editions of this work, and some of them are referred to later in this chapter.

(*l*) First ed. p. 663.

(*m*) 2 T. R. 659, n.

"Money, goods and chattels, *and other estate.*"

"Thus, in *Terrell* v. *Page* (*n*), where the testator bequeathed certain legacies, and devised some lands, and then devised as follows :—'All the rest and residue of my money, goods and chattels, *and other estate whatsoever*, I give to J. S., whom I make my executor'; it was held, that the lands not previously devised passed under the latter clause.

'Wearing apparel, etc., *with all other my estate.*"

"So, in *Scott* v. *Alberry* (*o*), where the testator, 'as touching the worldly estate it had pleased God to bestow' upon him, devised in these words :—'I give to my cousin T. S., all that my parcel of land lying in W. A. Item, I gave to my said cousin T. S., my wearing apparel, linen, books, *with all other my estate whatsoever and wheresoever*, not hereinbefore given and bequeathed; and him, the said T. S., I make the sole executor of this my will for performing the same.' The question was, whether the reversion in fee in the lands in W. A., before devised to T. S., which were copyhold surrendered to the use of testator's will, passed under the latter devise; and it was held that it did.

"Residue of money, goods, chattels and *estate* whatsoever."

"Again, in *Tilley* v. *Simpson* (*q*), where a testator, after declaring his intention to dispose of all his worldly estate, and making several devises to different persons, devised *all the rest and residue of his money, goods, chattels and estate whatsoever;* Lord Hardwicke held that the fee passed : he said, where the Court had restrained the word 'estate' to personal estate only, it had been where the intention of the testator that it should be so used had appeared; as where it had stood coupled with a particular description of part of the personal estate, as a bequest of all mortgages, household goods and estate, in which the preceding words were not a full description of the personal estate; that if the testator had said, 'All the rest and residue of my personal estate and estates whatsoever,' a real estate would have passed (*r*); that this bequest amounted to the same, for the word 'chattels' is as full a description of the personal estate as the words '*personal estate*'; that therefore, *when he had used words comprehending all his personal estate, and then made use of the word 'estate,' that word would carry a real estate.* That the word 'whatsoever' was used here, which was the same as if he had said of *whatever kind it be;* and, if that had been the case, it would most certainly have carried the real estate. He

Lord Hardwicke's reliance upon the fact that the other words were adequate to describe the personal estate.

(*n*) 1 Ch. Cas. 262, 1 Eq. Ca. Ab. 209, c. 11.

(*o*) Com. 337, 8 Vin. 229 pl. 14; see also *Awbrey* v. *Middleton*, 4 Vin. Ab. 460, pl. 15, 2 Eq. Ca. Ab. 497, pl. 16.

(*q*) In Chancery, 1746, before Lord Hardwicke, stated 2 T. R. 659, n.; and see 1 Cox, 362.

(*r*) As to this, see *Jones* v. *Robinson*, 3 C. P. D. 344.

observed that *Terrell* and *Page* was very material to the present question, and he thought could not be distinguished : the only difference was, in that case there was the word ' other,' which he did not think could distinguish it. If the devise had been, *and all the rest and residue of my household goods, mortgages and all other estate*, he did not think the words would have extended to the testator's real estate.

"Goods, estates, bonds, debts."

" So, in *Jongsma* v. *Jongsma* (*s*), where a testator gave to his executors ' all his goods, *estates*, bonds, debts, to be sold.' The question was, whether this would pass a copyhold estate surrendered to the use of the will. Sir Lloyd Kenyon, M.R., said that, according to the case of *Tilley* v. *Simpson* (*t*), wherever the word ' estate ' or ' estates ' was restrained to personalty, it was done upon the ground of the testator's showing his intention by joining it with words which related to personalty only; but, on the other hand, *where such other words were in themselves sufficient to pass all the personal estate, then, in order to give some effect to the word ' estate,' it was holden to pass realty.* In this case, the word ' goods ' seemed to be sufficiently comprehensive; and the copyhold, therefore, passed by the word ' estates.'

Residue of " effects, real and personal," after an express devise of lands.

" In *Hogan* v. *Jackson* (*u*), a testator, after commencing his will with the words ' as to my worldly substance,' devised certain lands to his mother M. for life : and, after giving certain legacies to be raised out of those lands, concluded as follows :— ' I give and bequeath unto my dearly-beloved mother M. all the remainder and residue of *all the effects both real and personal, which I shall die possessed of*.' It was contended that the words ' real effects ' meant real chattels, and that the words ' bequeath,' ' effects ' and ' possessed,' were applicable rather to personal than real property; but the Court held that the clause amounted to a disposition of the whole of the testator's real and personal estate.

Remark on *Hogan* v. *Jackson*.

" This is a strong decision, and has been much cited in subsequent cases (*v*). It is clear, however, that the word *effects*, without *real*, would not, *proprio vigore*, comprehend land, though followed by the words, ' of what nature, kind or quality soever ' (*w*).

(*s*) 1 Cox, 362; see also *Smith* v. *Coffin*, 2 H. Bl. 444; *Roe* d. *Penwarden* v. *Gilbert*, 3 Br. & B. 85; *Churchill* v. *Dibben*, 9 Sim. 447, n.; *King* v. *Shrives*, 4 Moo. & Sc. 149, 5 Sim. 461.

(*t*) Which he denominated *Tiddy* v. *Simms*.

(*u*) Cowp. 299, 3 B. P. C. Toml. 388; see also *Lord Torrington* v. *Bowman*, 22 L. J. Ch. 236, where there was no previous devise of land.

(*v*) It was followed in *Lord Torrington* v. *Bowman*, 22 L. J. Ch. 236.

(*w*) *Camfield* v. *Gilbert*, 3 East, 516; *Doe* d. *Chillcott* v. *White*, 1 East, 33; *Macnamara* v. *Lord Whitworth*, G. Coop. 241; *Doe* d. *Hick* v. *Dring*,

In *Grayson* v. *Atkinson* (*x*), a testator, prefacing his will with the expression, 'as to all my temporal estate,' gave certain legacies, and directed A. to sell any part of his real and personal estate for the payment of his debts and legacies; and, as to all the rest of his '*goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements*, share in the Copperas Works,' etc., he gave the same to A. Lord Hardwicke held that this devise carried a fee, though he did not think that the words 'goods and chattels, real and personal,' would have included the lands, if the devisor had not gone on to explain himself by the subsequent words, 'as houses,' etc. (*y*); ['all the rest,' etc., he thought plainly related to something mentioned before, and that mentioned before, which he was about to dispose of, was 'all his temporal estate,' which passes a fee when the testator has one.]

"Goods and chattels, real and personal, as houses, etc."

"In *Fletcher* v. *Smiton* (*z*), a testator, after directing all his debts to be paid, gave to M., his wife, all his household goods, etc., and a legacy and annuity; and then proceeded as follows:—'The profit of my four shares in the Corn Market during her life; also the income and profit of my estates as follows, during her life, my lands lying, etc. (enumerating them), as also the residue of my personal estate to be laid out in Bank Annuities; and then my wife to have the income, during her life only, of this and the estates before mentioned; and after her decease, as follows:—I give to W. the income of my four shares in the Corn Market for his natural life; and all the rest of *my estates*, with all moneys in securities, to be divided in equal shares, to' B. C., etc. The question was, whether the reversionary interest in the shares of the Corn Market, which were freehold of inheritance, passed to B. C., etc. It was contended that it did not; for that the word 'estates' in the last clause must have the same signification with the same word in the first clause, where it could not possibly extend to the Corn Market; but the Court, relying much on *Tilley* v. *Simpson*, held that the reversion in fee passed.

Realty passed by the word "estates," although the word was before used exclusively of the particular subject.

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2 M. & Sel. 448; *Doe* d. *Haw* v. *Earles*, 15 M. & Wels. 450. The rule as stated by Mr. Jarman is still recognised by the Courts, but it is applied less inflexibly than when he wrote. See *Hall* v. *Hall*, [1892] 1 Ch. 361, and other cases *post*, s. VI. It would perhaps be more accurate to say that the word "effects" *prima facie* means personal estate only; see Hawkins on Wills, (3rd edition) p. 70.

(*x*) 1 Wils. 333.

(*y*) "If, without the words 'houses,' etc., the devise would not have carried real estate, it is difficult to find a satisfactory ground for giving to the devisee the fee. His lordship seems to have relied more upon the introductory words for this purpose than is consistent with later authorities. See *infra*." (Note by Mr. Jarman.)

(*z*) 2 T. R. 656.

"Goods and chattels, rights, credits, personal and *testamentary estate*," held to pass land.

"In *Smith* v. *Coffin* (*a*), a testator, after prefacing his will with the words, 'as to my worldly estate,' etc., and devising certain freehold lands, gave and bequeathed all the residue of his 'goods and chattels, rights, credits, *personal and testamentary estate whatsoever*,' to his wife, for her own use and disposal. The real estate was held to pass.

"In a subsequent case (*b*), where there were also the prefatory expressions, 'as to my temporal estates and effects,' and a devise of all the testator's lands to J. G., the reversion in fee in those lands was held to pass to him under these words:—'And all the rest and residue of my goods and chattels, *personal and testamentary estate and effects whatsoever*, I give and bequeath unto the said J. G., whom I make whole and sole executor.'

"By confining the devise to personal estate, in the two preceding cases, the words 'and testamentary' would have been rendered inoperative.

"So, in *Doe* d. *Andrew* v. *Lainchbury* (*c*), where a testator said,—'As to the little money and effects with which the Almighty has intrusted me, I dispose thereof as follows'; and, after several devises of land, concluded thus:—'And as to all the rest, residue and remainder of my money, stock, *property and effects*, of what kind and nature soever, at the time of my decease, I leave and bequeath the same, and every part thereof, unto my nephew J., and my niece S., for to be equally divided between them, share and share alike; and I do hereby also appoint my said nephew J., and my said niece S., executor and executrix, and likewise joint and equal residuary legatees,' etc.; it was held that real estate passed, which construction Lord Ellenborough considered to be strengthened by the circumstance of the testator having, in a preceding part of his will, directed money to be laid out in the purchase of land, 'to be added to his other adjoining *property*,' which he said gave a standard of his meaning of the word 'property,' and showed that he meant by it real estate.

Residue of "money, stock, *property*, and effects," held to carry a fee.

"In most of the preceding cases, the will contained specific devises of land; a circumstance which, as before observed, always favours the extension of the subsequent general words to property of the same description; but the cases do not warrant the considering the absence of the circumstance as conclusively establishing the exclusion of real estate from such terms, though

Circumstance of there being a prior devise of lands.

(*a*) 2 H. Bl. 444.

(*b*) *Roe* d. *Penwarden* v. *Gilbert*, 3 Br. & B. 85 (the marginal note omits the material word); see also *Doe* d. *Evans* v. *Walker*, 15 Q. B. 28.

(*c*) 11 East, 290.

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associated with words descriptive of personal property only. On the contrary, real estate has sometimes been held to pass in cases of this nature.

Although no such devise, land passed in following cases.

Residue of "*estate*, goods, and chattels."

"Thus, in *Tanner* v. *Morse* (*d*), real estate was held to pass under the following words :—'As to my temporal estate, I bequeath to my nephew T. (who was the heir-at-law) the sum of £50'; then follow several legacies : 'And *all the rest and residue of my estate, goods and chattels whatsoever*, I give and bequeath to my beloved wife M. C., whom I make my full and sole executrix.' Lord King laid much stress upon the words 'temporal estate,' in the introductory clause.

Residue of "my property, goods and chattels."

"So, in *Doe* d. *Wall* v. *Langlands* (*e*), where a testator, after giving several pecuniary legacies, bequeathed as follows :—'to R. D., and E. W., I give and bequeath *the residue of my property, goods and chattels*, to be divided equally between them, share and share alike'; it was contended, that the word 'property' was restrained by the subsequent words, the clause being read, *videlicet*, 'my goods and chattels'; but Lord Ellenborough held that the more obvious and natural sense was, that they are to be taken *cumulatively*, that is, as *property, and goods and chattels*, and, consequently, that the real estate passed under the former word.

"All my property and effects."

"Again, in the case of *Doe* d. *Morgan* v. *Morgan* (*f*), where a testator, after bequeathing two pecuniary legacies, devised as follows :—'All my *property* and effects of all claims that I shall have, I give to my brother J. M., but my mother is at liberty to give £1,000 of my property where she pleases.' It was contended, that the gift of the pecuniary legacies, the use of the word 'effects' conjunctively with 'property,' and the clause respecting the £1,000 showed that the testator, by the latter term, intended to denote personal estate only; but the Court held that the real estate passed.

"Lastly, a similar construction prevailed in *Doe* d. *Evans* v. *Evans* (*g*), where a testator, after bequeathing certain articles of personal estate, gave, bequeathed and devised to his wife A., all his money, securities for money, goods, chattels, *estate* and effects, of what nature or kind soever, and wheresoever the same might or should be at the time of his death.

General remark on preceding cases.

"The last three cases are certainly important authorities, and

(*d*) Cas. t. Talb. 284, *S. C. sub. nom. Tanner* v. *Wise*, 3 P. W. 295; see also *Lumley* v. *May*, Pre. Ch. 37.

(*e*) 14 East, 370.

(*f*) 6 B. & Cr. 512, 9 D. & Ry. 633; see also *Bradford* v. *Belfield*, 2 Sim. 264.

(*g*) 9 Ad. & E. 719; s.c. 1 Per. & Dav. 472, see also *D'Almaine* v. *Moseley*, 1 Drew. 629, cited *post*, p. 958.

they demonstrate the inclination of the Courts at the present day, to hold lands to pass under words capable *per se* of comprehending them, notwithstanding their association with terms applicable to personalty only. To reconcile all the cases would require the adoption of some very subtle and unsubstantial distinctions; but the preceding review will convince the reader of the necessity of withholding implicit reliance from some of the early decisions in which the restricted construction prevailed " (*h*).

Many of the early authorities proceeded on the principle that the heir was not to be disinherited except by clear words (*i*); at the present day, however, more respect is paid to the intention of testators, and in seeking to ascertain in any particular case what the intention is, the Court proceeds on the theory that a man who makes a will does not, as a general rule, wish to die intestate as to any part of his property (*j*).

The following cases, decided since Mr. Jarman wrote, may be shortly referred to as illustrating the modern principle of construction.

In *Sanderson* v. *Dobson* (*k*), *O'Toole* v. *Browne* (*l*), and *Dobson* v. *Bowness* (*m*) the word " estate," although used in collocation with words descriptive of personal property, was held to pass real estate. In *O'Toole* v. *Browne* the testator owned no land at the date of the will (*n*).

" Estate " held to pass realty notwithstanding context.

In *Mayor, etc., of Hamilton* v. *Hodsdon* (*o*), a testator directed any shares he might have in a vessel to be sold " for the benefit of his estate," and after making some specific devises of " houses and lands," in some of which the fee was not exhausted, and bequeathing to his wife certain specific chattels " which she had from her father's estate," he gave " all the remainder of his estate that was then in his possession or might thereafter be his " to his wife; and directed " his estate," after payment of debts and legacies, to be " kept together " until the time thereby appointed for " dividing " it; and declared his wife entitled, in

(*h*) This passage was cited with approval by Malins, V.-C., in *Smyth* v. *Smyth*, 8 Ch. D. 561.

(*i*) See *Shaw* v. *Bull*, 2 Eq. Ca. Abr. 320, 321.

(*j*) See *per* Malins, V.-C., in *Smyth* v. *Smyth*, 8 Ch. D. 561; *per* Buckley, J., in *Kirby-Smith* v. *Parnell*, [1903] 1 Ch. 483.

(*k*) 1 Exch. 141; 7 C. B. 81, 10 Bea. 478.

(*l*) 3 E. & B. 572.

(*m*) L. R., 5 Eq. 404. The question arose on the same will as in *Sanderson* v. *Dobson*, 10 Bea. 478.

(*n*) See also *Edwards* v. *Barnes*, 2 Bing. N. C. 252; *Ridgeway* v. *Munkittrick*, 1 Dr. & War. 84, where the word was " properties," and *Waite* v. *Morland*, 12 Jur. (N.S.) 763, where a disposition of " all my property, brewery etc.," was held to mean " all my brewery property."

(*o*) 11 Jur. 193.

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a certain event, to one-third of "his personal estate." It was argued that the trusts and purposes of the will showed the testator's mind to be directed to personal estate only, and that he had himself supplied a vocabulary for the interpretation of the term "estate." Lord Brougham, in delivering the judgment of the Privy Council, observed (in effect) that "estate" meant both realty and personalty, and that the realty was not to be excluded merely because there was personalty upon which the term could operate; that, when realty was meant to be excluded the expression personal estate was used; and that the will was to be construed *reddendo singula singulis*, by which method all parts of it became consistent; so that there was not that clear intent on the will to restrict the meaning of the term estate which was necessary to prevent its natural operation in comprising realty as well as personalty. The unexhausted reversion was, therefore, held to pass.

D'Almaine v. *Moseley.*

In *D'Almaine* v. *Moseley* (*p*), where a testator gave "all the rest and residue of my estate and effects," Kindersley, V.-C., in deciding that the word "estate" was sufficient to pass real estate, said: "The cases on this subject are very numerous, and not very easy to be reconciled; but the tendency of modern decision is to give less effect to minute and trivial matters than was attributed to them in former times. Now in this case, it is said on the part of the Crown, that in the former part of the will there is no gift of any real estate: but it appears to me that to lay stress on that would be to rely on grounds too minute; and that no indication of intention is afforded by it."

Operation of word "estate."

There are numerous other modern decisions to the effect that "estate" or "estates," used in conjunction with words descriptive of personalty, will pass real estate unless a clear intention to the contrary appears (*q*).

"Property."

"Property" is a word of almost, if not quite, as strong operation as the word "estate" (*r*).

Restricted construction of "estate," "property," etc.

But a testator may show by the context that he uses the word "estate" or "property" in a restricted meaning. Thus if he disposes of his "personal estate and property," or

(*p*) 1 Drew. 629. Passages from other parts of the V.-C.'s judgment are cited in *Kirby-Smith* v. *Parnell*, [1903] 1 Ch. 483, stated *post*, p. 968.

(*q*) *Midland Counties Railway Company* v. *Oswin*, 1 Coll. 74; *Patterson* v. *Huddart*, 17 Bea. 210; *Gyett* v. *Williams*, 2 J. & H. 429; *Hamilton* v. *Buckmaster*, L. R., 3 Eq. 323 (in none of which was there a devise of lands specifically); *Meeds* v. *Wood*, 19 Bea. 215; *Hawksworth* v. *Hawksworth*, 27 Bea. 1.

(*r*) *Edwards* v. *Barnes*, 2 Bing. N. C. 252; *Wilce* v. *Wilce*, 7 Bing. 664; *Footner* v. *Cooper*, 2 Drew. 7; *Saumarez* v. *Saumarez*, 4 Myl. & Cr. 331: *Re Greenwich Hospital*, 20 Bea. 458; *Re Smart's Estate*, [1882] W. N. 77. See also the cases cited *ante*, pp. 955, 956, in some of which the word "property" was used. But the context may limit "property" to personal estate. *Re Featherstonhaugh-Whitneys Estate*, [1924] 1 Ir. R. 153.

" personal property, estate and effects," the word " personal " will as a general rule override the whole (*s*).

So if a testator gives a share of his real and personal property to A, and the remainder to other persons, and then provides that in the event of A dying under twenty-one, " the said property and effects " shall go to B, this means the share given to A, and not all the testator's property (*t*).

" Estate " followed by an enumeration of particulars explanatory and restrictive of it.

If a testator uses a general word, such as " estate " or " property," followed by an enumeration of particulars, the question arises whether the enumeration shows an intention to make the gift as sweeping as possible, or whether it should be held to be explanatory and restrictive of the prior general expression. The latter principle of construction was applied in several of the older cases. Thus, in *Timewell* v. *Perkins* (*u*), where a testator devised in these words, " All those my freehold lands, with the messuages, etc., now in the occupation of L., and all other the rest and residue and remainder of my estate, consisting in ready money, plate, jewels, leases, judgments, mortgages, or in any other thing whatsoever or wheresoever, I give unto A. H. and her assigns for ever." In the preamble of the will occurred the clause, " as touching the temporal (*v*) estate with which it hath pleased God to bless me, I dispose thereof as follows." The question was, whether land not described in the will passed under the residuary clause. Fortescue, J., held that it did not, relying on the analogy of the case to *Wilkinson* v. *Merryland*.

Remark on *Timewell* v. *Perkins*.

" In the case just stated," as Mr. Jarman points out (*w*), " there was a preceding specific devise of land; but the intention to confine the word ' estate ' to personalty, was inferred from the subsequent explanatory words of description; which, however, were themselves followed by expressions scarcely less strong than many which have been held sufficient to include real estate (*x*). *Timewell* v. *Perkins* is unquestionably a strong case,

(*s*) *Buchanan* v. *Harrison*, 31 L. J. Ch. 74; *Belaney* v. *Belaney*, L. R. 2 Eq. 210; 2 Ch. 138; *Jones* v. *Robinson*, 3 C. P. D. 344. The testator may, however, show by the context that he means real estate to pass by a gift of his " personal estate and effects " : *Re Wass*, 95 L. T. 758.

(*t*) *Re Willomier's Trust*, 16 Ir. Ch. R. 389.

(*u*) 2 Atk. 102; see also *Doe* v. *Rout*, 7 Taunt, 79, *ante*, p. 951.

(*v*) Mr. Jarman, in commenting on *Timewell* v. *Perkins*, gives the word " personal " instead of " temporal," and suggests that the introductory clause, referring to personal estate only, may be considered a circumstance of distinction. No such argument can be drawn from the use of the expression " temporal estate," which includes real and personal property. See *Tanner* v. *Wise*, 3 P. W. 295; *Grayson* v. *Atkinson*, 2 Ves. 454, *ante*, p. 954.

(*w*) First ed. p. 662.

(*x*) See *Hopewell* v. *Ackland*, 1 Com. 164, and *Wilce* v. *Wilce*, 7 Bing. 644, stated *post*, pp. 970, 971.

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and has generally been much relied upon as an authority for the restricted construction on subsequent occasions.

"Property" restrained by subsequent explanatory particulars.

"So, in *Roe* d. *Helling* v. *Yeud* (*y*), where a testator, after giving certain legacies, and appointing certain persons executors, added, 'and to whom I give *all the remainder of my property whatever and wheresoever*, to be equally divided amongst them, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, debts and demands, or any I may hereafter make by codicil to this my will, all my goods, stock, bills, bonds, book debts and securities in the Witham Drainage, in Lincolnshire, and funded property.' The question was whether real estate passed. The Court held that it did not; considering that the enumeration at the end of the clause was explanatory of the words 'remainder of my property' (*z*).

"The two preceding cases, *Timewell* v. *Perkins*, and *Roe* v. *Yeud*, were much relied upon by Gibbs, C.J., in the subsequent case of *Doe* v. *Rout*" (*a*).

It may be doubted, however, whether this restricted construction would find favour with the Courts at the present day. The three cases last referred to were all decided on the principle that clear words are required to disinherit the heir, a principle which has little, if any, force at the present day (*b*). Accordingly in *Mullally* v. *Walsh* (*c*), where a testator bequeathed a legacy "to be paid by my wife or by my executors," and then gave to his wife "the remaining part of my whole property, both in stock, household furniture and cash, &c., &c.," it was held by the Court of Appeal that chattels real (with which alone the suit was conversant) passed by the gift. The principle on which the judgment of the Court proceeded seems to apply with equal force to freeholds.

"Property" used in limited sense.

But "property" sometimes denotes merely the fact of ownership, and then it does not have the sweeping effect which it has when used in its more usual sense. As in *Doe d. Haw* v. *Earles* (*d*), where a testator gave all "effects at this time in my possession or that hereafter may become my property" to his wife, and it was held that "property" did not enlarge the

(*y*) 2 B. & P. N. R. 214.

(*z*) But observe the tone of Lord Ellenborough's remarks on this case in *Doe* v. *Langlands*, 14 East, 373.

(*a*) 7 Taunt. 79.

(*b*) It was referred to as an existing principle in *Buchanan* v. *Harrison*, 31 L. J. Ch. 82, and in *Re Cameron*, 26 Ch. D. 25.

(*c*) 3 L. R. Ir. 244, overruling decision of Court below, Ir. R. 6 C. L. 314. Compare *Loftus* v. *Stoney*, 17 Ir. Ch. R. 178, referred to *post*, p. 975.

(*d*) 15 M. & Wels. 450.

meaning of "effects." In a later part of the same will the testator used the word "property" to denote the property before given to his wife, that is, effects merely. A similar construction prevailed in *Barnaby* v. *Tassell* (*e*).

With the foregoing cases may be compared those in which realty has been held to pass by the use of untechnical expressions (*f*).

Copyholds excluded from a gift of "property" by subsequent disposition of "copyholds."

It is a wholly different question, where a will contains two distinct devises, either of which would alone be sufficient to carry the property, under which of the two it shall be held to pass. Thus in *Chapman* v. *Prickett* (*g*), where a testator entitled to copyholds, which he had surrendered to the use of his will, devised his freehold messuages, stock in the funds, money, and debts, and all shares or property of which he might be possessed or entitled to, to trustees in trust to pay the rents of his freeholds and leaseholds and the dividends of his stock and shares to his wife for life, and afterwards to make division by sale or otherwise of his said freeholds, and to transfer "all stock or shares, my property, estate, and effects," equally among his children. By codicil he devised his copyhold estate to his wife for a term, and afterwards directed it to be sold for the benefit of his children as directed by the will, but did not actually devise the copyholds to the trustees. It was held that no estate in the copyholds passed to the trustees by the word "property" in the will. Tindal, C.J., observed that the general effect of the disposition of the copyhold by the codicil was the same as that of the freehold which had already passed by the will, *viz.*, that the wife of the testator should receive the rents and profits during her life, and after her death a sale should take place and a division be made among the children. So that the disposition of the copyhold made by the codicil was unnecessary, except upon the supposition that the testator thought he had not disposed of it by the will.

Clear gift of realty in will not cut down by gift of "estate, furniture, etc.," in codicil.

And it has been elsewhere noticed as an established rule, that a gift once clearly expressed in a will, shall not be cut down by ambiguous expressions contained in a codicil. It was mainly on this principle that in *Molyneux* v. *Rowe* (*h*), a devise of "real estate" to A was held not to be affected by a codicil by which the testator gave "all his estate, household furniture, linen, china, and all other his personal property" to B.

(*e*) L. R. 11 Eq. 363.
(*f*) *Post*, p. 970.
(*g*) 6 Bing. 602. See also *Acheson* v. *Fair*, 3 D. & War. 512, which is analogous to *Wilde* v. *Holtzmeyer*, 5 Ves. 811.
(*h*) 8 D. M. & G. 368.

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Effect of mistake.

In *Hounsell* v. *Dunning* (*i*), a testatrix was entitled to some copyholds as customary heiress of her deceased husband, but she erroneously supposed that they belonged to her son as his father's heir; by her will she gave to her daughters all the share of her late husband's "estate" to which she was entitled on his decease; she also gave them pecuniary legacies, and declared that she made this provision for them in lieu of the various freehold and copyhold lands of her late husband which descended to her son: it became unnecessary to decide the point, but Joyce, J., thought that the copyholds in question did not pass by the word "estate."

Devise associated with nomination to executorship.

III. Words "Estate," etc., whether restrained by Collocation with Executorship.—Mr. Jarman continues (*j*): "Sometimes words adequate to comprise land have been confined to personal estate, from their association with the legatee's nomination to the executorship, which has been considered as explanatory, and restrictive of the general expressions to that species of property which was connected with the character of executor.

"As in *Shaw* v. *Bull* (*k*) where one seised in fee of five messuages, by will devised two to his wife for life, remainder to his two daughters in fee; the third messuage to his wife and her heirs; the fourth to his wife and her heirs, she paying his legacies, in case his goods and chattels did not answer them all; and, if she did not make provision for the payment of his legacies in her lifetime, that it should be lawful for the legatee, after her death, to sell the said messuage, to satisfy the legacies out of the value thereof. Then follows this clause, on which the question arose :—'And all the overplus of my estate to be at my wife's disposal, and make her my executrix.' Blencowe, J., said, if he had at first devised to his wife all his estate, this (the fifth) house would have passed to her; but compare this clause with the subsequent words, 'and I make her my executrix,' it shows that his intent was to grant her such estate as she was capable of as executrix. He considered 'overplus' to refer to the price of the house, after payment of legacies.

"Overplus of my estate" restricted to personalty by this association.

Remark on *Shaw* v. *Bull*.

"It is to be observed, however, that this construction renders the words in question nugatory, since the appointment of the wife to be executrix was itself, in the then state of the law, a disposition of the whole personal estate; a species of argument to which great attention is paid at this day, for in modern cases no principle is more conspicuous than an anxiety to give effect

(*i*) [1902] 1 Ch. 512.
(*j*) First ed. p. 671.
(*k*) 12 Mod. 593, 2 Eq. Ca. Ab. 320, pl. 8.

to every word of the will. It is impossible to reconcile this case with the general current of authorities (*l*).

"Although it is indisputably clear that the word *lands* will carry real estate, notwithstanding it be collocated with words descriptive of personal property only (*m*); yet in several early cases (*n*) it has been decided, that where a testator appoints another executor of all his goods, *lands*, &c., he refers to such lands as the person may take as executor, namely, leaseholds; and accordingly real estate does not pass. Thus, in *Piggot* v. *Penrice* (*o*), freehold lands were held not to pass under the words, 'I make my niece *executrix of all my goods, lands and chattels*,' although the testator had no leaseholds (*p*). It was said that by this construction the word lands was not (as objected) useless, and to be rejected; for that, in all probability, there might be rents in arrear of those lands, which would pass to the niece by her being made executrix. This explanation, however, fails to show that any efficient signification was given to the word 'lands,' since it is clear the executorship would have entitled the niece to the arrear of rent. The word 'chattels,' too, was sufficient to pass any leasehold lands of which the testator might have been possessed at his death.

"Executrix of all my *goods*, *lands*, and chattels."

"In *Doe* d. *Gillard* v. *Gillard* (*q*), real estate was held to pass under the words, 'I do make, constitute and appoint R. G. my whole and sole *executor of all my lands for ever, and leasehold property* here or at Beeston.' The question principally agitated was, whether the restrictive words 'here or at Beeston,' applied to both freehold and leasehold, or to leasehold lands only; and it was held that they were confined to the latter, and that the devise of the freehold lands was general, without any local restriction.

"Executor of all my *lands* for ever and leasehold property," not so restricted.

"Whatever opinion may be formed of the case of *Piggot* v. *Penrice*, it is not necessarily overruled by this case, where the will contained additional expressions, strongly aiding the construction adopted.

"So, in *Noel* v. *Hoy* (*r*), a copyhold estate surrendered to

Noel v. *Hoy*.

(*l*) See *Noel* v. *Hoy*, 5 Mad. 38, stated *supra*.

(*m*) *Roe* d. *Walker* v. *Walker*, 3 B. & P. 375, stated *post*, p. 979.

(*n*) 1 Roll. Ab. 613, 1 Eq. Ca. Ab. 209, pl. 12; see also *Clements* v. *Cassye*, Noy, 48.

(*o*) Pre. Ch. 471, 1 Eq. Ca. Ab. 209, pl. 13.

(*p*) "This circumstance does not seem to be very material; for, as such a bequest operates upon all the leaseholds of the testator *at his death*, the fact of his having or not having any such at that period, does not mark his intention *at the making* of the will. See Lord Eldon's judgment in *Wright* v. *Atkyns*, as reported G. Coop. 111, but as to which see *infra*." (Note by Mr. Jarman.)

(*q*) 5 B. & Ald. 785; and see *Marret* v. *Sly*, 2 Sid. 75, *ante*, p. 430, n. (*l*).

(*r*) 5 Mad. 38.

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"All the property I may die possessed of," held to include land.

the use of the will was held to pass under the following disposition: 'In respect of worldly affairs, I cannot better manifest my love and attachment to my family, than in nominating (which I hereby do) my dearly beloved and most amiable wife A. F. M., the sole executrix of this my will, thereby *bequeathing* to her *all the property of whatever description or sort that I may die possessed of*, to be by her appropriated in any manner she may think proper, for the maintenance of herself and such of my children,' &c. Sir J. Leach, V.-C., thought that the criticism upon the words 'possessed of,' and 'appropriated,' on which had been founded the argument for excluding the copyholds, was too nice.

Thomas v. *Phelps.*

"Again, in *Thomas* v. *Phelps* (*s*), where the testator, as to his worldly estate, gave, devised and disposed of the same as follows: and then, after giving some pecuniary legacies, proceeded in these words: 'I also give and bequeath the lease of the colliery of L. to my son J. P.; him and my daughter E. P. I do make, constitute and appoint my joint executor and executrix of this my last will and testament, *of all that I possess in any way belonging to me, by them freely to be enjoyed or possessed of whatsoever nature or manner it may be*, only my household furniture, which I give to my daughter who lives the longest single, and after her decease or marriage to be sold and equally divided between my remaining children, &c. Sir J. Leach, M.R., held, that the real estate passed by this devise, the words being equivalent to a gift of all the testator's property. He observed, that the exception of the household furniture was of little weight; for where the prior words imported real as well as personal estate, it mattered not that the exception to the gift happened to be of personal chattels only (*t*).

"All that I possess in any way belonging to me."

"So, in *Doe* d. *Pratt* v. *Pratt* (*u*), where a testator directed that his debts and funeral expenses should be paid by his executor thereinafter named; and after giving two life annuities of £2 10s. each, and a legacy of 5s. to J. P., his heir-at-law, he appointed W. P. *whole and sole executor of all his houses and lands situate at F.* It was held, after an extensive review of the authorities,

(*s*) 4 Russ. 348.

(*t*) See also *Steignes* v. *Steignes*, Mos. 296; such an exception, though of little weight to show what is excluded (see however *Camfield* v. *Gilbert*, 3 East, 516; 2 M. & Sel. p. 454), is strong to prove what is intended to be included in the gift from which the exception is made; see *Davenport* v. *Coltman*, 12 Sim. 588, 598, 603; and see *Hotham* v. *Sutton*, 15 Ves. 319, and other cases cited therewith, *post*, Chap. XXIII; *Marshall* v. *Hopkins*, 15 East, 309.

(*u*) 6 Ad. & E. 180; *Doe* d. *Hickman* v. *Haslewood*, *ib.* 167; *Day* v *Daveron*, 12 Sim. 200, stated *post*, p. 971.

that the houses and land at F. passed to W. P., and that he took an estate in fee.

General remark on preceding cases.

" These cases evince that little attention is now to be paid to the circumstance of the association of the devise with the appointment of the devisee to the executorship, as confining it to personal estate, if the words of the devise will fairly bear a wider construction; and *Thomas* v. *Phelps* also shows that an exception of articles of personalty affords no ground for cutting down the general words of the devise."

In the cases above cited the question was whether the executors took the real estate beneficially, but an appointment of a person as " executor " of the testator's property may of course operate to give him the land as trustee (*v*).

Power to sell " estate " to pay legacies.

In *Re Cameron* (*w*), a testator gave certain legacies, and empowered his executors to realise such parts of his estate as they should think fit to pay them; he did not dispose of any of his real estate, except a particular house: it was held that the provision for payment of legacies referred to that part of the estate which vested in the executors as such, namely, the personal estate, and did not charge the legacies on the real estate.

Land Transfer Act, 1897.

It may be a question whether the Land Transfer Act, 1897, now replaced by the Administration of Estates, Act, 1925, affected the rule of construction above considered. In the case of a testator dying since 1897, his real estate vests in his executors, and this would be an additional reason (to borrow Mr. Jarman's language) for disregarding the circumstance that the testator has, in devising his property by informal words, associated the devise with the appointment of the devisee to the executorship. But in such a case as *Re Cameron*, *supra*, it is submitted that the Act would not affect the construction of the will.

Inapplicability of limitations, where restrictive.

IV.—Words " Estate " etc., whether restrained by the Nature of Limitations.—Mr. Jarman continues (*x*): " The introduction of limitations and expressions inapplicable to real estate has sometimes been made a ground for excluding such estate from words of general description, capable, *ex vi terminorum*, of comprehending property of that species."

The authorities on the subject, however, are somewhat conflicting. At the time when Mr. Jarman wrote, the introduction of limitations and expressions inapplicable to real

(*v*) *Murphy* v. *Donelly*, Ir. R. 4 Eq. 111.
(*w*) 26 Ch. D. 19.
(*x*) First ed. p. 675.

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estate had been held, in several cases, to be a sufficient reason for excluding it from a gift of the testator's "estate and effects" (*y*), while in other cases it was held that the mere introduction into some of the clauses of a will of expressions inapplicable to real estate, did not necessarily confine the word "estate" to personal estate (*z*).

As to preamble intimating intention to dispose of whole estate.

In some of the cases bearing on this subject (for example, in *Doe* v. *Buckner*), the testator, in the preamble or exordium to his will, intimated an intention to dispose of all his real estate. "This circumstance," as Mr. Jarman points out (*a*), "has had various degrees of importance assigned to it. Most of the Judges who have held the real estate to pass, have thrown it into the argument. It certainly shows that the testator commenced his will with the intention not to die intestate with respect to any portion of his property; but does not supersede the necessity of that intention being subsequently carried into effect by an actual disposition." It has had considerable weight assigned to it in cases where the testator has made no disposition of his residuary estate except by untechnical words, as by appointing some one to be his residuary legatee, or the like (*b*), a matter which is considered in a subsequent part of this chapter.

Realty held to pass notwithstanding trusts in terms applicable only to personalty.

The true principle governing the class of cases now under discussion was laid down in *Saumarez* v. *Saumarez* (*c*). In that case a testator, after giving certain directions about his dwelling-

(*y*) *Doe* d. *Spearing* v. *Buckner*, 6 T. R. 610, see *post*, p. 967, n. (*d*); *Doe* d. *Hurrell* v. *Hurrell*, 5 B. & Ald. 18; *Woollam* v. *Kenworthy*, 9 Ves. 137; and *Pogson* v. *Thomas*, 6 Bing. N. C. 337. Some of these decisions seem to have proceeded on the ground that a limitation to the executors and administrators of a person was inapplicable to real estate (see Shadwell, V.-C., 12 Sim. at p. 204), although a gift of land to A, his executors, etc., even under the old law, gave A the fee (*Rose* d. *Vere* v. *Hill*, 3 Burr. 1881, Fearne, Posth, 144).

(*z*) *Doe* d. *Burkitt* v. *Chapman*, 1 H. Bl. 223; *Affleck* v. *James*, 17 Sim. 121. In *Newland* v. *Marjoribanks*, 5 Taunt 268, the Judges were divided in opinion. *Barclay* v. *Collett*, 6 Scott, 408, is cited by Mr. Jarman in the next section of this chapter, but so far as it has any bearing on the questions discussed in this chapter it seems more pertinent to the present section.

(*a*) First ed. 678.

(*b*) See *Doe* d. *Wall* v. *Langlands*, 14 East, 370; 2 Ed. 145, n. (*a*); *Gulliver* v. *Poyntz*, 3 Wils. 141, 2 W. Bl. 726; *Smith* v. *Coffin*, 2 H. Bl. 444; *Grayson* v. *Atkinson*, 1 Wils. 333; *Pocock* v. *Bishop of Lincoln*, 3 Br. & B. 27; *Roe* v. *Gilbert*, *ib.* 85; *Saddler* v. *Turner*, 8 Ves. 617; *Doe* v. *Dring*, 2 M. & Sel. 448, 456; *Bradford* v. *Belfield*, 2 Sim. 264; *Sutton* v. *Sharp*, 1 Russ. 146; *Wilce* v. *Wilce*, 7 Bing. 664; and particularly *Hughes* v. *Pritchard*, 6 Ch. D. 24. The absence of such a clause was relied on in *Roe* v. *Yeud*, 2 B. & P. N. R. 214; *Doe* v. *Rout*, 7 Taunt. 79, 84; *Re Methuen and Blore's Contract*, 16 Ch. D. 696; but stated by Lord Hardwicke, in *Crichton* v. *Symes*, 3 Atk. 61, to afford no indication of intention.

(*c*) 4 My. & C. 331. See also *Morrison* v. *Hoppe*, 4 De G. & S. 234; *Stokes* v. *Salomons*, 9 Hare, 75; *Hunter* v. *Pugh*, 4 Jur. 571; *Mayor, etc., of Hamilton* v. *Hodsdon*, 6 Moo. P. C. C. 76, 11 Jur. 193; stated *ante*, p. 957; *D'Almaine* v. *Moseley*, 1 Drew. 629; *Fullerton* v. *Martin*, 22 L. J. Ch. 893; *Streatfield* v. *Cooper*, 27 Bea. 338; *Morris* v. *Lloyd*, 3 H. & C. 141; *Hamilton* v. *Buckmaster*, L. R., 3 Eq. 323; *Lloyd* v. *Lloyd*, L. R. 7 Eq. 458.

house, gave to his son R. his freehold land in D. (without words of limitation), and directed that the residue of his property, which he might leave at his death, might be divided between him and his two sisters in equal proportions, subject to the following restrictions. The testator then directed his son's portion to be placed in the names of trustees, and the interest to be paid to him (he being already tenant for life of the land). After his death his share to be divided between his children, and placed in the names of trustees, with a power to employ the interest for their maintenance and part of the capital for their advancement; and at their age of twenty-five to transfer the whole to them: with certain ulterior limitations in case R. died without issue. Lord Cottenham, notwithstanding the inapplicability of the trusts to real estate, held that the reversion of the estate in D. passed by the residuary clause, and that the trusts and limitations must be applied distributively to the real and personal estate. "In considering gifts of residue," he said, "whether of real or personal estate, it is not necessary to ascertain whether the the testator had any particular property in contemplation at the moment. Indeed, such gifts may be introduced to guard against the testator having overlooked some property or interest in the gifts particularly described. If he meant to give the residue of his property, be it what it may, it is immaterial whether he did or did not know what would be included in it; and if so, it cannot make any difference that such ignorance is manifested upon the face of the will, unless the expressions manifesting it are sufficient to prove that the testator did not intend to use the words of gift in their ordinary, extended, and technical sense." And, applying himself to the particular will before him, he said: "The circumstance of the testator using expressions and giving directions applicable only to the personal estate may prove that he did not at the time consider or was not aware that this fee would be part of the residue; but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the operation of the general intent of passing all the residue of his property."

The cases of *Fullerton* v. *Martin* (*d*) and *D'Almaine* v. *Moseley* (*e*), both decided by Kindersley, V.-C., illustrate the same principle. It is true that in *Coard* v. *Holderness* (*f*), where there was a gift of all the testator's estate, effects and property, described in the most sweeping terms, it was held by Romilly, M.R., that the use of the words "bequeath," "executors and

(*d*) 22 L. J. Ch. 893. In that case the V.-C. remarked of *Doe* v. *Buckner* that it would be decided differently at the present day.

(*e*) 1 Drew. 629. See also the other cases cited *ante*, p. 949, note (*a*).

(*f*) 20 Bea. 147.

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administrators," " income " and " principal," and the absence of such words as " devise," " heir " and " rent," coupled with the general scope and object of the will, showed the testator did not mean to dispose of his real estate, but whether the case was rightly decided or not, no general principle can be deduced from it (*g*).

Kirby-Smith v. Parnell.

In *Kirby-Smith* v. *Parnell* (*h*) a testator gave and bequeathed all his ready money, securities for money, stock in any of the public stocks of Great Britain, and all the rest, residue and remainder of his estate and effects whatsoever and wheresoever, upon trusts which were technically appropriate rather to personal than to real estate, but Buckley, J., held on the whole will that the dominant intention of the testator was to dispose of everything, and that the gift operated as a valid gift of his real estate. The learned Judge relied on *Saumarez* v. *Saumarez*, *D'Almaine* v. *Moseley*, and *Fullerton* v. *Martin*, and treated *Coard* v. *Holderness* and *Longley* v. *Longley* (*i*), as decisions on the wording of particular wills, from which no general principle could be deduced.

In some cases where the words of a devise to trustees have been sufficiently ample to include real estate, but the trusts have applied to personalty only, the legal estate in the realty has been held to pass by the devise, with a resulting trust to the heir.

" Estate or effects " held to include land, but trusts of will confined to personalty.

As in *Dunnage* v. *White* (*j*), where the testator, after devising certain real estate, and bequeathing some pecuniary legacies, proceeded as follows :—" And all the rest, residue and remainder, of my estate or effects, whatsoever and wheresoever, of what nature or kind soever, I give, devise (*k*), and bequeath unto my said trustees and executors after named and appointed, upon the trusts following : that is to say, that they my said executors do and shall, as soon as may be conveniently after my decease, make sale and absolutely dispose of my household goods and stock in trade, by public auction, for the most money that can be had or gotten for the same; and also do and shall, with all convenient speed, collect in all debts due and owing to me at the

(*g*) The M.R. seems to have misapprehended the true ground of the decision in *Saumarez* v. *Saumarez*, 4 My. & C. 331, *ante*, p. 967. See *Stokes* v. *Salomons*, 9 Hare 75; *Buchanan* v. *Harrison*, 31 L. J. Ch. 74.

(*h*) [1903] 1 Ch. 483.

(*i*) *Post*, p. 969.

(*j*) 1 J. & W. 583.

(*k*) That this word, when applied to " effects " alone, will not carry real estate, see *Camfield* v. *Gilbert*, 3 East, 516; *Hall* v. *Hall*, [1891] 3 Ch. 389; [1892] 1 Ch. 361; but see *Phillips* v. *Beal*, 25 Bea. 25. Conversely, the word " bequeath " will not be sufficient to confine the effect of a gift otherwise capable of including real estate, *Whicker* v. *Hume*, 14 Bea. 518; *Gyett* v. *Williams*, 2 J. & H. 429.

time of my decease, together with all monies owing or belonging to me upon mortgage, bond, bill, note, specialties, simple contract, or otherwise howsoever; and when the same shall be so collected and got in, to divide the same into six parts or shares, and to pay the same, when so divided, in manner following; that is to say, four equal sixth parts thereof to certain persons named, and the remaining two-sixth parts thereof to invest in the public stocks or funds," etc. Sir T. Plumer, M.R., held it impossible not to construe the devise as comprising the real estate; but that the testator having given both the real and personal property to the trustees, and having only said what was to be done with the personalty (for not a word of the disposition of the beneficial interest referred to real estate), the consequence was that the trust of the realty resulted to the heir-at-law (*l*).

Resulting trust for the heir.

This decision was followed in *Longley* v. *Longley* (*m*), where a testator devised and bequeathed all his estate and effects to trustees, their heirs, executors and administrators, upon trust to convert his personal estate and stand possessed of the proceeds of sale, and of the rest and residue of his estate and effects, upon trust to invest the same in government or real securities, and to stand possessed of the investments upon trusts for the benefit of his wife, children, brothers and sisters: it was held by Romilly, M.R., that the real estate passed to the trustees, but that the trusts were "rigidly and exclusively" applicable to personal estate, and that there was a resulting trust of the real estate for the heir-at-law. It does not appear whether the testator owned any real estate at the date of his will, which was made fifteen years before his death (*n*).

Since after 1925, it is possible to limit personalty in the same way as realty, the argument based on the inapplicability of the limitations will in most cases lose its force.

New law.

(*l*) "It seems to have been overlooked in this case, that the freehold farm, in respect to which the question arose, had been contracted to be purchased by the testator before he made his will, *but had never been conveyed to him;* so that there was no legal estate in the testator upon which that part of his Honor's decision which gave the estate to the trustees, could operate." (Note by Mr. Jarman.)

(*m*) L. R., 13 Eq. 133.

(*n*) As to the materiality of this circumstance, see *per* Jessel, M.R., in *Re Methuen and Blore's Contract*, 16 Ch. D. 696. Compare also the effect of the decision in *Saumarez* v. *Saumarez* (*supra*) as stated by Wood, V.-C., in *Buchanan* v. *Harrison*, 31 L. J. Ch. at p. 82: "Lord Cottenham says, and I entirely follow the reasoning, that where the testator used the word property he only meant personal estate, but he did mean to dispose of all his property whatever it was. He believed he was passing the whole of his estate, but believed it was personal property." The decision in *Longley* v. *Longley* was referred to by Buckley, J. (whether with approval or disapproval does not appear), in *Kirby-Smith* v. *Parnell*, [1903] 1 Ch. 483.

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Real estate held to pass by vague and informal words.

"Whatsoever else I have not before disposed of."

V.—General untechnical Words held to pass Land.—"In some cases," as Mr. Jarman remarks (*o*), "real estate has been held to pass under words, even more vague and informal than any which have yet been the subject of consideration. Thus, in *Hopewell* v. *Ackland* (*p*), where the testator devised as follows:—'I devise all my lands, tenements, and hereditaments to A. Item, I devise all my goods and chattels, monies, debts, and *whatsoever else I have* (*in the world* (*q*)) *not before disposed of*, to the said A, he paying my debts and legacies; and make him executor.' Trevor, C.J., held, that by these words an estate in fee passed; for it could not have any effect upon the personal estate, because that was given away as fully as possible by the words precedent; therefore it must extend to the remainders in the real estate.

"The reasoning of the learned Chief Justice deserves attention, though the point seems not to have been necessary to the construction that the devisee took a fee; for the prior devise was clearly adequate to carry all the lands, and the charge upon the devisee would enlarge his estate in those lands to a fee.

"All I am worth," held to carry land.

"So, in *Huxtep* v. *Brooman* (*s*), the words 'all I am worth' were held to comprise land in the will of a very illiterate testator. . . . This case may be considered as exhibiting the extreme point to which the decisions have gone, in applying general informal words to real estate. Nothing could be more comprehensive or more untechnical than the expression here used. The case was cited with approbation by Gibbs, C.J., in *Doe* v. *Rout* (*t*)," and by the Court of Exchequer in *Davenport* v. *Coltman* (*u*), where it was said never to have been doubted. The only apparent exception is a dictum of Sir E. Sugden, to the effect that it might be a little difficult to support it (*v*).

"All that I shall die possessed of, real and personal," held to pass realty.

In *Pitman* v. *Stevens* (*w*), the testator devised as follows: "I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts are paid. I do hereby appoint P. my residuary legatee and executor"; and, in a subsequent part of his will, he desired his legatee and executor to let his sister be interred in a certain vault, and recommended him to do something handsome for the

(*o*) First ed. p. 680.
(*p*) Salk. 239, 1 Com. 164.
(*q*) These words do not occur in Salkeld.
(*s*) 1 Br. C. C. 437. As to the words "I make A my sole heir," see *Tayler* v. *Web*, Sty. 301, 307, 319; 2 Sid. 75, *ante*, p. 430, n. (*l*). As to the expression "my fortune," see *ante*, p. 950.
(*t*) 7 Taunt. at p. 81, *ante*, p. 951.
(*u*) 9 M. & Wels. 481 stated *post*, p. 972.
(*v*) 1 D. & War. 444.
(*w*) 15 East, 505.

testator's brother-in-law at his death, or when he should want anything to live on : it was held that P. took a fee in the real estate (*x*).

"Every thing else I die possessed of."

So, in *Wilce* v. *Wilce* (*y*), a testator commenced his will as follows :—" As touching such worldly property, wherewith it hath pleased God to bless me in this world, I give, devise and dispose of the same in the following manner and form." He then proceeded to make several dispositions of land and goods, and concluded with the following residuary clause :—" All the rest of my worldly goods, bills, bonds, notes, book debts and ready money, and every thing else I die possessed of, I give to my son George, whom I make my whole and sole executor." It was held, on the authority of the preceding cases, especially *Smith* v. *Coffin* (*z*), that certain real estate, not included in the specific devises, passed by this clause to the testator's son George, and that he took the fee. Seeing what was the testator's intention, as disclosed by the preamble, the Court could not but say he had employed sufficient words to carry it into effect (*a*).

And in *Evans* v. *Jones* (*b*), where a testator appointed his wife executrix, and continued—" First, I give and bequeath to my said wife all my household furniture, linen, glass, china, plate, farming stock, and all my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, or whatever I may be possessed of at the time of my decease " : it was held that the testator's real estate passed to the wife.

Day v. *Daveron.*

In *Day* v. *Daveron* (*c*), a testator gave his house M to his wife (without words of limitation), and his house N to his wife for life, together with his household goods, etc.; but if she married again (which she did not do), " the above property was to become the property " of his daughter for life, remainder to her children; but if his wife remained unmarried, then, after her death, he gave house N to the daughter for her life and her children. The testator then went on : " I appoint my wife sole executrix and residuary legatee to all other property I may possess at my decease. . . . Now concerning my funded property, I hereby give " one moiety to the wife and the other to the daughter. Sir L. Shadwell held that the wife, under the

"I appoint my wife sole executrix and residuary legatee to all other property I may possess at my decease."

(*x*) As to *Barclay* v. *Collett*, 6 Scott, 408, 4 Bing. N. C. 658, cited by Mr. Jarman in this section, see *ante*, p. 966, n. (*z*).

(*y*) 5 M. & Pay. 682, 7 Bing. 664.

(*z*) *Ante*, p. 955.

(*a*) But as to its carrying the fee, see Chap. XLV.

(*b*) 46 L. J. Ex. 280. See also *Warner* v. *Warner*, 15 Jur. 141; *Phillips* v. *Beal*, 25 Bea. 25; *Re Gyles*, 14 Ir. Ch. 311, where a gift of " everything I may die possessed of, except the household furniture," was held to pass real estate.

(*c*) 12 Sim. 200; *Warren* v. *Newton*, Dru. 464.

residuary clause, took the remainder in house M. He thought it clear, that this clause did not refer to personal property; for the testator almost immediately afterwards spoke of his funded property in a distinct sentence (*d*).

"A. and B. to take as residuary legatees whatever I may die possessed of."

In *Davenport* v. *Coltman* (*e*), a testator, after certain pecuniary legacies, bequeathed to his wife for her life his freehold house at C, together with the use of plate, etc., and of interest of stock; and declared that, "at her decease, it was his will that A and B should divide equally between them, as residuary legatees, whatever he might die possessed of, except what was already mentioned in favour of others." And after appointing executors, he authorised them to sell certain leaseholds immediately, "but the house at C must not be sold as long as my wife lives." On a case from Chancery, the Court of Exchequer certified their opinion that A and B were entitled in fee simple to the whole real estate of the testator at the death of the wife, subject, as to the house at C, to the wife's life estate. They relied partly on the generality of the expression "whatever I may die possessed of," which they thought was not to be limited to personal estate, being, in their opinion, equivalent to "all I am worth" (*f*), or "all I have" (*g*); but they also relied on the direction to postpone the sale of the house at C, which could only refer to a sale for convenience of division between A and B according to the terms of the residuary clause, and that, if any real property was included in that clause, all must be so. Sir L. Shadwell, V.-C., confirmed the certificate; observing that besides the terms "whatever I shall die possessed of" (which he thought would comprehend estates in fee simple), there was an exception of "what was already mentioned in favour of others," and that one of the things already mentioned was the possession of the freehold house for the life of the wife.

"All I may die possessed of," held not to pass realty.

"What little I have left to call my own."

It is true that in *Monk* v. *Mawdsley* (*h*), Leach, V.-C., said that in their ordinary sense the words "possessed of" would not import real estate, but as the context in that case was sufficient to show that the testatrix did not mean them to include real estate, the remark of the V.-C. is merely a dictum (*i*).

(*d*) As to the effect of appointing a person "residuary legatee," without any gift to him, see *post*, p. 975, and *ante*, p. 970.

(*e*) 9 M. & Wels. 481, 12 Sim. 588.

(*f*) *Huxtep* v. *Brooman*, 1 Br. C. C. 437, *ante*, p. 970.

(*g*) See *per* Bayley, J., *Doe* v. *Morgan*, 6 B. & Cr. at p. 518, 9 D. & Ry. 633.

(*h*) 1 Sim. 286. Compare remarks by the same Judge upon the word "possessed" in *Noel* v. *Hoy*, and *Thomas* v. *Phelps*, *ante*, p. 964.

(*i*) Compare *Cook* v. *Jaggard*, L. R., 1 Ex. 125, where the words were "or whatever I may be possessed of or entitled to." In both these cases the wills were before the Wills Act, so that the persons to whom land was expressly devised only took life estates, and the question was whether the

In *Henderson* v. *Farbridge* (*j*), it was held that the equity of redemption in a copyhold estate did not pass under an informal gift of "what little I have left to call my own."

"My fortune" confined to personalty by context.

In *Maitland* v. *Adair* (*k*), a testator devised his estate at T. to his nephew A, and bequeathed money legacies to several other relations; and by a codicil directed his undisposed-of money to be divided among his said relations in the proportion he had bequeathed (*l*) the other part of his fortune; Lord Rosslyn held that the word "fortune" must mean money legacies, and that A was not entitled to a share in respect of the value of the T. estate.

"Rest and residue," held not to include real estate, notwithstanding previous devise of land.

In *Bebb* v. *Penoyre* (*m*), real estate was held not to be included in a devise of "the rest and residue," on the ground of the restraining effect of the immediate context, although there was a previous devise of land in the same will. The testator, after various devises and bequests, concluded his will in the following words:—"I order the lease of my house, with all the furniture (except the eight worked chairs), to be sold, and all the rest and residue to be divided among the four daughters of A, share and share alike; and I appoint C and D executors." It was contended, that the reversion in fee of a moiety of certain houses devised by the will for the life of the devisee, passed by the words "rest and residue." But Lord Ellenborough thought that these words, in the place in which they stood, and so accompanied, must mean property of a similar nature to the lease of the house and furniture before mentioned, that is, his personal estate. He considered the division ordered was to be made by the executors immediately afterwards named.

"All the rest."

But in *Attree* v. *Attree* (*n*), a testatrix gave a certain house and garden (which were leasehold) to A, then bequeathed several pecuniary legacies, and proceeded, "and all the rest to be divided between the daughters of B." It was held by Sir J. Romilly, that "rest" included the rest of all the property real as well as personal. And in *Smyth* v. *Smyth* (*o*), where a

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subsequent general words were sufficient to pass the remainders in fee, as in *Hopewell* v. *Ackland*, 1 Salk. 239, *ante*, p. 970; and see the following cases where the residuary devises contained the word "estate" or "property": *Scott* v. *Alberry*, Com. 337, *ante*, p. 952; *Roe* v. *Gilbert*, 3 Br. & B. 85, *ante*, p. 953; *Day* v. *Daveron*, 12 Sim. 200, *ante*, p. 971; *Saumarez* v. *Saumarez*, 4 My. & C. 331, *ante*, p. 966.

(*j*) 1 Russ. 479. It was also held not to pass under a gift of "all my effects."

(*k*) 3 Ves. 231.

(*l*) As to this word *vide ante*, p. 968, n. (*k*).

(*m*) 11 East, 160. As to the effect of the context in restraining the force of such words as "estate," "property," etc., see *ante*, p. 959.

(*n*) L. R., 11 Eq. 280.

(*o*) 8 Ch. D. 561.

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testator made his will thus, "I give to A £100, also to B £50; and lastly, I give my sheep and all the rest, residue, moneys, chattels and all my other effects to be equally divided among my four brothers (naming them) whom I appoint executors"; it was held by Sir R. Malins, V.-C., that "rest and residue" were sufficient to carry real estate, and were not cut down by the subsequent enumeration. Indeed, he thought the realty would pass under the word "effects" alone, but in this he perhaps went too far (*p*).

"Et cætera."

In *Re Andrew's Estate* (*q*), a testator, after giving his real estates and all his personal estate and effects to his wife for her life, gave to certain relatives after her death "an equal share of my personal estates, &c., &c."; it was held that this latter gift included the real estate of the testator (*r*).

"I make A my heir."

There are several cases in which such words as "I make A B my heir," have been held to operate as a general devise of the testator's real estate (*s*).

In *Gould* v. *Gould* (*t*), a testator by his will gave his real estate to trustees upon trusts for his sister; by a codicil, in which he called his nephew his heir-at-law, he directed that the making of the codicil should not extend to give his trustees, for the benefit of his sister, any after-acquired freeholds or copyholds, but that the same should descend, as to freeholds to his heir-at-law, and as to customary estates, to his customary heir: it was held this did not prevent her from taking by descent after-acquired copyholds, she being the testator's customary heir.

Words descriptive of personal estate only, held to carry land—when.

VI.—Words descriptive of Personalty only, held, by force of Context, to include Real Estate.—"It remains to be observed," says Mr. Jarman (*u*), "that words applicable exclusively to personal estate have sometimes, by force of the context, been held to include land. This frequently happens where an expression is evidently used as referential to and synonymous with an anterior word, clearly descriptive of real estate; in which case its extent of operation is measured, not by its own inherent strength, but by the import of its synonym.

Word *legacy* held to refer to real estate antecedently devised.

"Thus, in *Hope* d. *Brown* v. *Taylor* (*v*), where a testator,

(*p*) See *post*, p. 977.

(*q*) 50 W. R. 471.

(*r*) As to the effect of the expression "et cætera" see *post*, p. 989.

(*s*) *Marret* v. *Sly*, 2 Sid. 75, *S. C. sub nom. Tayler* v. *Web*, Styles 301, 307, 319; *Rogers* v. *Rogers*, 3 P. W. 193; *Parker* v. *Nickson*, 1 D. J. & S. 177 ("I acknowledge A. B. to be my heir-at-law").

(*t*) 32 Bea. 391.

(*u*) First ed. p. 684.

(*v*) 1 Burr. 268. See also *Hardacre* v. *Nash*, 5 T. R. 716; *Brady* v. *Cubitt*, Dougl. 31, 40. As to the words "share," "share aforesaid," "portion," and similar expressions, as applying to one or more of several preceding subjects, *vide Doe* d. *Stopford* v. *Stopford*, 5 East, 501; *Hardman*

Hope v. *Taylor.*

after devising certain lands to A, B and C, and giving pecuniary legacies to B and C, provided that, if either of the persons before named died without issue, then *the said legacy* should be divided equally between them that were alive : it was held that the word ' legacy ' in this clause extended to the land before devised. Foster, J., observed that one of the persons named had no pecuniary legacy."

"Residuary legatee."

In several of the cases cited in the previous section, there was an appointment of a person to be the testator's residuary legatee of whatever property the testator might die possessed, and although the words " residuary legatee " are properly applicable to personalty only (*w*), it was held in each of these cases that the appointment took effect as a devise of the testator's realty (*x*). And an appointment of a person to be " my residuary legatee " will have this effect if the testator shows an intention to dispose by his will of all his property, real as well as personal. For example, in *Hughes* v. *Pritchard* (*y*), where a testator began thus : " As to my estate which God has bestowed on me, I do make this my last will and testament as follows (that is to say) " : he then devised certain freehold land to A for life with remainder over, and another freehold farm to B for life with other remainders over; next he gave pecuniary legacies, then a specific legacy, and afterwards more pecuniary legacies, " and I make A, C and D my residuary legatees " : it was held by Jessel, M.R., and James and Bramwell, L.JJ., that the testator's real estate not specifically devised passed to A, C and D.

"I appoint A. residuary legatee," held to carry real estate.

"I leave A. residuary legatee," held not to carry after-acquired real estate.

But in *Re Methuen and Blore's Contract* (*z*), a testatrix made her will as follows :—" I commit to paper my wishes respecting the disposal of my property. . . . Everything I am possessed of I leave to my sister for her life, after her decease I give and

v. *Johnson*, 3 Mer. 347; *Doe* d. *Gibson* v. *Gell*, 2 B. & Cr. 680, 4 D. & Ry. 387; *Doe* d. *Driver* v. *Bowling*, 5 B. & Ald. 722; *Scrivener* v. *Smith*, 2 D. M. & G. 399.

(*w*) *Doe* d. *Roberts* v. *Roberts*, 7 M. & Wels. 382; *Lea* v. *Grundy*, 1 Jur. (N.S.) 951; *Windus* v. *Windus*, 21 Bea. 373, aff. 6 D. M. & G. 549, diss K. Bruce, L.J.

(*x*) *Pitman* v. *Stevens*, 15 East, 505, *ante*, p. 970; *Day* v. *Daveron*, 12 Sim. 200, *ante*, p. 971; *Re Greatly*, [1910] 1 Ir. R. 239; *Davenport* v. *Coltman*, 9 M. & Wels. 481, 12 Sim. 588; *Alleyne* v. *Alleyne*, 2 Jo. & Lat. 544, *per* Sugden, C.; *Evans* v. *Crosbie*, 15 Sim. 600. And see *Kellett* v. *Kellett*, 3 Dow, 248, and *Singleton* v. *Tomlinson*, 3 A. C., 404, stated *ante*, p. 756; *Wildes* v. *Davies*, 1 Sm. & Gif. 475; in each of which the surplus proceeds of converted realty were held on the context to pass to persons appointed " residuary legatees."

(*y*) 6 Ch. D. 24. See also *Warren* v. *Newton*, Dru. 464 (" residuary legatee to all my property "); *Re Salter*, 44 L. T. 603, and *Loftus* v. *Stoney*, 17 Ir. Ch. 178 (" leave and bequeath " residue of " my properties " to children " as residuary legatees ").

(*z*) 16 Ch. D. 696; see also *Gethin* v. *Allen*, 23 L. R. Ir. 236; *Hillas* v. *Hillas*, 10 Ir. Eq. 134; *Wills* v. *Wills*, 1 Dr. & W. 439; *Re Gyles*, 14 Ir. Ch. 311; *Cooney* v. *Nicholls*, 7 L. R. Ir. 107.

devise as here annexed. . . . My two nephews H. and F. I leave my executors, and the latter residuary legatee after the demise of my sister" : Jessel, M.R., held that after-acquired realty of which the testatrix was possessed at her death did not pass by the will. He distinguished this case from that of *Hughes* v. *Pritchard* on the ground that here there was no direct indication of intention to give all property, real as well as personal, as there was in that case, and said that though the words here used might well pass everything which the testatrix had, including realty, to the sister for life, there was no indication of intention that the remainderman must necessarily take all that was given to the tenant for life. His Lordship attached some importance to the fact that at the date of the will the testatrix had no real estate.

A similar construction prevailed in *Re Morris* (*a*); in that case the question was simplified by the fact that the "residuary legatee" was tenant for life of the testator's real estate under a preceding devise.

In fact, it may be laid down as a general rule that the mere appointment or nomination by a testator of a person as "my residuary legatee" will not operate as a devise to him of the testator's residuary real estate; and even where a testator throughout his will uses "bequeath" and "legacy duty" as applicable to real estate, this will not justify the Court in construing "residuary legatee" as equivalent to "residuary devisee," if the will specifically disposes of all the real estate which the testator was possessed of at the date of the will (*b*).

"Executors of my entire property."

An appointment of three persons as joint executors of "my entire property, for the purpose of putting it to the best advantage of my sister, wife and children," operates as a devise of fee-simple lands (*c*).

"Effects."

Upon the principle already stated, the word "effects" (though applicable strictly to personalty only (*d*)) has been held to comprehend the several particulars before mentioned, consisting of both real and personal estate (*e*).

"Said effects," held to comprehend land previously mentioned.

As in *Doe* d. *Chillcott* v. *White* (*f*), where a testator after

(*a*) 71 L. T. 179.

(*b*) *Re Gibbs*, [1907] 1 Ch. 465. In *Re Stephen*, [1913] W. N. 210, *Re Gibbs* was distinguished.

(*c*) *Murphy* v. *Donelly*, Ir. R. 4 Eq. 111.

(*d*) *Camfield* v. *Gilbert*, 3 East, 516; *Henderson* v. *Farbridge*, 1 Russ. 479, *ante*, p. 973; *Doe* d. *Hick* v. *Dring*, 2 M. & Sel. 448; *Doe* d. *Haw* v. *Earles*, 15 M. & Wels. 450; *Doe* d. *Morgan* v. *Morgan*, 6 Barn. & Cr. 512, *ante*, p. 956; but see the *dicta* of Malins, V.-C., *Smyth* v. *Smyth*, 8 Ch. D. 561. The decision itself was referred to without disapprobation by the C A. in *Hall* v. *Hall*, [1892] 1 Ch. 361.

(*e*) A gift of "real effects," as already mentioned, will, as a general rule pass real estate : *Hogan* v. *Jackson*, 3 B. P. C. 338, *ante*, p. 953.

(*f*) 1 East, 33.

making several pecuniary bequests, devised to A the income of a certain cottage, and to E. the half of a certain estate; and all the residue of his goods, chattels, rights, credits, personal and testamentary estate, and also his lands, tenements and hereditaments, he gave to his wife for life, whom he made sole executrix; and he allowed her to give what she thought proper of "her said effects" to her sisters, the said A. and E., for their lives; and, after the above lives were expired, he gave all his lands to J., who was his heir-at-law: it was held that the power of the widow extended to all the real and personal estate given to her for life, including the cottage in which A had a life interest.

"Effects" may extend to real estate.

So, in *Marquess of Titchfield* v. *Horncastle* (*g*) real estate was held on the special wording of the will to pass under a gift of effects.

"Said effects bequeathed to E." referred to land before devised.

So, in *Den* d. *Franklin* v. *Trout* (*h*), where the devise was to E of "all my estate and effects whatsoever and wheresoever, which I shall be possessed of or entitled to at the time of my decease," in trust to pay funeral expenses and debts. The testator then subjected his "said effects bequeathed to E. to the following legacies," and went on to enumerate certain pecuniary legacies, and gave to S. a house in W. He directed that all the above legacies should be paid out of his effects by the said E within twelve months after his decease, and then gave and bequeathed all the residue and remainder of his "said effects" to the said E., her heirs and assigns for ever. It was held, that she took the remainder in fee in the house devised to S. (which was the testator's only real property,) by this devise. Lord Ellenborough relied much on the testator having included the house among the enumerated legacies, by which he had explained himself to describe that property under the denomination of "effects" and "legacies."

"Effects" held not to pass real estate.

In *Doe* d. *Haw* v. *Earles* (*i*), a testator made his will as follows: "I dispose of all my effects as follows:—all my household goods, live stock, furniture, plate, wearing apparel and other effects at this time in my possession, or that hereafter may become my property, to my wife": and a second husband was

(*g*) 2 Jur. 610. See also *Milsome* v. *Long*, 3 Jur. (N.S.) 1073; *Phillips* v. *Beal*, 25 Bea. 25; *Re Sheridan*, 17 L. R. Ir. 179. In *Att.-Gen. for British Honduras* v. *Bristowe* (6 A. C. at p. 149), where a testator used these words, "I leave them and their heirs and assigns all my effects . . . (my lands and effects in Jamaica excepted)," Sir M. E. Smith, in delivering the judgment of the Privy Council, said: "Their Lordships think that the word 'effects' would pass land." As to the influence of the words "of what nature and kind soever," following the word "effects," see *Doe* v. *Dring*, 2 M. & Sel. at p. 454.

(*h*) 15 East, 394. Mr. Jarman's note "as to the effect of some referential expressions of frequent occurrence" has been omitted; the cases cited by him will be found in Chap. XX.

(*i*) 15 M. & Wels. 450.

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to have no power of disposition over "any part of the property which was then or might thereafter be in his (the testator's) possession." Platt, B., admitting that the word "effects" alone could not include real estate, was induced by the context to think the testator had here used "effects" as synonymous with the word "property," and that real estate passed. But Pollock, C.B., and Parke, B., were of opinion that there was nothing in the will to extend the natural meaning of the word "effects," which they held meant personal things only.

"Devise" of "effects" "wheresoever situate."

In *Hall* v. *Hall* (*j*), a testator "gave, devised and bequeathed" to his wife all his furniture, goods, chattels and effects "whatsoever the same might be or wheresoever the same might be situate," and requested her to pay his debts, etc., and after the death of his wife he "gave, devised and bequeathed" to be equally divided amongst three of his children until they attained twenty-one, "the furniture and moneys or any property" which his wife might have become entitled to through his will or through any other source; and after they attained twenty-one, he directed that "the furniture, goods, chattels and effects, whatsoever the same may be or wheresoever it may be situated," and any moneys his wife might be entitled to at the time of his decease, should be equally divided amongst his six children. The testator's personalty was of small value, the bulk of his property consisting of some real estate to which he became entitled about a year before he made his will. It was held by Fry, L.J., and by the Court of Appeal, that the testator intended to dispose of all his property, and that the real estate passed by the will.

"Worldly goods" held on the context to pass real estate.

Again, the phrase "worldly goods," though properly applicable only to personal estate, will include the realty if aided by the context. Thus, in *Wright* v. *Shelton* (*k*), where a testator gave to trustees all his worldly goods of what nature and kind soever and wheresoever they might be found, upon the trusts undermentioned; his wife to have possession while she lived, but if she married, to quit possession: all his debts and legacies to be paid out of his personal estate and W. Close. To his son A £20 and H. Close: to his children B, C and D the rest of his worldly goods: it was held by Sir W. P. Wood, V.-C., that the real estate was included in the gift of "worldly goods."

"Personal estates," held sufficient upon the context to pass realty.

Even the expression "personal estates," or "personal estate and effects" (*l*), will carry realty if the testator has clearly shown his intention that it shall do so. As in *Doe* d. *Tofield* v.

(*j*) [1891] 3 Ch. 389; [1892] 1 Ch. 361.
(*k*) 18 Jur. 445.
(*l*) In "personal estate and property" or "personal property, estate and effects," the word "personal" will generally override the whole, *ante*, p. 958.

Tofield (*m*), where after some pecuniary bequests and a particular devise of realty, the testator proceeded to give to his wife all his stock, etc., ready money, etc., " and personal estates whatsoever and wheresoever, subject nevertheless to the above legacies," during widowhood : but if she married she was to resign " all my personal estates to the after-mentioned legatees in manner following " ; first, he gave and bequeathed to J. the house and premises in which he the testator then dwelt, with the closes adjoining, to hold in fee ; " and the remaining of my personal estates " to other persons in fee. The Court of K. B. were clearly of opinion that the wife took the real estate for her life (*n*).

Mr. Jarman observes (*o*) that the " cases in which words, in themselves clearly inapplicable to real estate, have been held to extend thereto by force of the context, are the exact converse of those discussed in the first division of the present chapter.

" But in *Roe* d. *Walker* v. *Walker* (*p*), a testator devised to his wife a certain house, with all his *lands, goods and chattels*, whatsoever and wheresoever, for her life ; and if his aforesaid wife should die before his sons H. and R. came to the age of fifteen, then that his *house*, *lands*, *goods and chattels*, that is to say, the rents arising from the same, should be employed in bringing them up, until the age of fifteen. The testator then declared his will to be, that his aforesaid *house*, *goods and chattels*, equally should be divided between all his sons and daughters that should be living at that time, share and share alike. It was held, that under the last devise, the lands did not pass.

" Said house, goods and chattels " (omitting the word " lands " before used), did not pass lands.

" It will be observed that in *Doe* d. *Chillcott* v. *White*, and in *Den* d. *Franklin* v. *Trout*, the word ' effects ' was used as synonymous with, and descriptive of the same subject as, the anterior expressions, which unquestionably comprised real estate ; but in *Roe* v. *Walker*, the testator had in the third devise adopted precisely the same phraseology as in the first and second, with the omission of a single word, and that word the only one which applied to the land. It was too much, therefore, to infer that these words, with so material an omission, were intended to describe the same subject as the preceding expressions, however reasonable might be *the conjecture* that the omission was

Remark on *Doe* v. *White*, *Den* v. *Trout*, and *Roe* v. *Walker*.

(*m*) 11 East, 246. See also *Cadman* v. *Cadman*, L. R. 13 Eq. 470 ; *Re Smalley*, 49 L. T. 662 ; *Re Wass*, 95 L. T. 758.

(*n*) Compare *Re Andrew's Estate*, 50 W. R. 471, *ante*, p. 974.

(*o*) First ed. p. 689.

(*p*) 3 B. & P. 375. Cf. *Lethbridge* v. *Kirkman*, 25 L. J. Q. B. 89, 2 Jur. (N.S.) 372.

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undesigned. If the testator in the third gift had used terms of description not exactly corresponding, so far as they went, with those of the preceding devises, the difficulty of adopting this construction might not have been so insuperable. It would not then have imposed upon the Court the necessity of treating the same words in the several gifts as descriptive of a different subject."

CHAPTER XXVIII.

WHAT WORDS WILL COMPRISE THE GENERAL PERSONAL ESTATE.

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"Estate," "property," etc.

I.—"Estate," "Property," etc.—When a testator makes use of such expressions as "all my estate," or "all my property," a question as to their effect can hardly arise, for these are words of the widest possible meaning (*a*). But if the testator adds some qualification or description—as where he bequeaths all his property in a particular locality to A and all his property in another locality to B; or where he disposes of "all my property, brewery, etc."—difficult questions may arise (*b*).

In *Re Johnson* (*c*), the testatrix made some specific bequests, and continued: "With the exception of the above legacies I direct that the remainder of my household property, including house in M., should be sold," etc.; it was held that the entire residuary personal estate passed.

Word "effects," "goods," or "chattels," whether it comprises entire personal estate.

II.—Extent of words "Goods," "Chattels," "Effects," etc., when restrained by Context.—Mr. Jarman states the general rule thus (*d*): "The word *effects* (*e*), and even the word *goods* (*f*),

(*a*) As to "estate" see *ante*, p. 949; as to "property" see *Re Prater*, 37 Ch. D. 481; *Doe* v. *Earles*, 15 M. & W. 450, *ante*, p. 960. As to "fortune" see *ante*, p. 950, and *Slingsby* v. *Grainger*, 7 H. L. C. 273. As to "patrimony" see *ante*, p. 950.

(*b*) *Waite* v. *Morland*, 12 Jur. (N.S.) 763. As to the locality of shares, bonds and other choses in action, and as to gifts of personalty described with reference to its locality, see *post*, p. 1046 and p. 1278.

(*c*) 92 L. T. 357.

(*d*) First ed. p. 692.

(*e*) *Hogan* v. *Jackson*, Cowp. 299; *Campbell* v. *Prescott*, 15 Ves. 500; *Hearne* v. *Wiggington*, 6 Madd. 119, *post*, p. 987, n. (*f*); *Malone* v. *Malone*, [1925] 1 Ir. R. 140 ("effects" held to include money on deposit). *In b. Wolfe*, [1919] 2 Ir. R. 491 (persons effects).

(*f*) See *Portman* v. *Willis*, Cro. El. 386, where it was held that leaseholds passed under a bequest of "the residue of my goods." See also *Anon.*, 1 P. W. 267.

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or *chattels* (*g*), will, it seems, comprise the entire personal estate of a testator, unless restrained by the context within narrower limits (*h*). Where, however, such general expressions stand immediately associated with less comprehensive words, they have been sometimes restrained to articles *ejusdem generis*; the specified effects being considered as denoting the species of property, which the larger term was intended to comprise; and this upon a principle, evidently analogous to that on which (as we have seen) the words 'estate' and 'property' have been confined to personalty by their juxta-position with words descriptive of that species of property.

Words "and all things" restricted by prior terms of description.

"As in *Cook* v. *Oakley* (*i*), where the testator (who was sailor on ship-board) gave to his mother if alive, his gold rings, buttons and chest of clothes, and to his loving friend F. (a shipmate), his red box, arrack *and all things not before bequeathed*, and made him sole executor. Sir J. Trevor, M.R., held, that the testator's share in a leasehold estate did not pass by these words.

"The circumstance of a specific or pecuniary legacy being given to the same legatee (*j*), or of the general bequest being followed by dispositions of particular portions of the personal property to other persons, has commonly been considered to favour the supposition, that such bequest was not to comprise the general residue.

Word "effects" restrained by the context.

"Thus, in *Rawlings* v. *Jennings* (*k*), where the testator gave to his wife certain Bank stock, together with all his 'household furniture *and effects, of what nature or kind soever*,' that he might be possessed of at the time of his decease; and then bequeathed certain stock and money legacies to other persons, Sir W. Grant, M.R., held, that the bequest to the wife was confined to articles of the nature of those specified, and did not

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(*g*) Co. Lit. 118 a.; *Tilley* v. *Simpson*, 2 T. R. 659, n., *per* Lord Hardwicke. So a bequest of all the testator's "moveables" would, it is said, if unrestrained by the context, pass the whole purely personal estate; *Steignes* v. *Steignes*, Mos. 296.

(*h*) A gift of "effects," etc., in a particular house, country, or other locality, is of course not a general bequest (*post*, p. 1046, where bequests of property in a particular place are considered). A bequest of effects, etc., in a particular house "or elsewhere" is, however, a general bequest: *In b. Scarborough*, 30 L. J. Pr. 85.

(*i*) 1 P. W. 302; but it appears from R. L. 1715 A, fo. 191, b., that the M.R. based his decision mainly on the circumstance that the testator was not aware that he possessed the leasehold interest, and therefore could not have intended to bequeath it. See also *Boon* v. *Cornforth*, 2 Ves. sen. 277; *Cavendish* v. *Cavendish*, 1 Br. C. C. 467; *Porter* v. *Tournay*, 3 Ves. 311; *Hunt* v. *Hort*, 3 Br. C. C. 311; *Re Ludlow*, 1 Sw. & Tr. 29.

(*j*) See *Trafford* v. *Berrige*, 1 Eq. Ca. Ab. 201, pl. 14, *post*, p. 984, note (*t*).

(*k*) 13 Ves. 39.

comprise the general residue; observing, that part of the property being given to her afterwards (*l*), the word 'effects' must receive a more limited interpretation.

Remark on *Rawlings* v. *Jennings*.

" The words here were very general, but the manner in which the testator, after making the bequest in question, had gone on to give specific and pecuniary legacies (though he did not complete the disposition of his personal estate by a residuary clause), seemed hardly reconcileable with the supposition, that the prior gift to the wife was intended to embrace the general residue, as it is more natural, though certainly not invariable, for a testator to reserve his residuary disposition until the end of his will (*m*). Had the decision rested solely on the bequest of the Bank stock to the wife, its soundness would have been questionable; for the argument, that the express gift of part shows that a legatee is not to take the remainder, admits of this answer, that the testator may have intended to place him in the favoured position of a specific legatee *pro tanto* " (*n*).

Word " goods " restrained by subsequent gifts.

Again, in *Wrench* v. *Jutting* (*o*), where a testator bequeathed " all his household furniture, plate, linen, china, books, pictures and all other goods of whatever kind to A.," and then proceeded to direct that certain specified particulars of his property should be divided, after payment of his debts, as " follows : £50 to B.; £100 to C., etc.; £3,000 to £4,000, or whatever remaining sum or sums, to A.," Lord Langdale, M.R., said, that if the first clause had been the only one in the will, there would have been strong reason for extending the operation of the words " all other goods," etc.; but that the testator did not intend all his estate to pass was shown by his subsequently stating what were his intentions as to a particular part of it. Those words must, therefore, be restricted to goods *ejusdem generis*.

Remark on preceding cases.

In each of the two last cases, the dispositions of particular portions of the personal property, which followed the disputed

(*l*) But according to the statement of the will in the report, the only other bequest to the wife is of the Bank stock, which is anterior. In *Parker* v. *Marchant*, 1 Y. & C. C. C. at p. 304, K. Bruce, V.-C., observed upon this case, that perhaps the word " household " belonged to the word " effects " as much as to the word " furniture " : which would of course have a restrictive effect, *Marshall* v. *Bentley*, 1 Jur. (N.S.) 786; *Newman* v. *Newman* (No. 2), 26 Bea. 220; and compare *Michell* v. *Michell*, 5 Mad. 69, stated *post*, p. 987.

(*m*) See 1 Russ. 146; 1 Y. & C. C. C. 301.

(*n*) And, accordingly, see *Leighton* v. *Bailie*, 3 My. & K. 267; *Hearne* v. *Wiggington*, 6 Mad. 119; *Brooke* v. *Turner*, 7 Sim. 671; *Rose* v. *Rose*, 17 Ves. 347.

(*o*) 3 Bea. 521. In *Collier* v. *Squire*, 3 Russ. 467, it was held that stock did not pass under a bequest of the testator's house, and all his household furniture, plate, china, books, linen and every other " article " belonging to him, both in and out of his house, and which might not be in his will mentioned; the M.R. remarking that the testator could scarcely say of stock that it might not be mentioned or included in the articles specified.

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clause, comprised a gift to the same person who was entitled under the first clause; that, at least, was the ground (however unsupported by the actual fact) upon which Sir W. Grant expressly went in the case before him; and where other persons are alone contemplated in the subsequent dispositions, the argument in favour of the restrictive construction is much weakened: for, as before observed, though the residuary clause is usually, it need not necessarily be, the last in the will: and any particular bequest which follows that clause may, if made to different legatees, reasonably be read as an exception out of the property comprised in it (*p*).

Subsequent explanatory restrictive expressions.

Mr. Jarman continues (*q*): "A more forcible argument in favour of the restricted construction, however, occurs where the testator has added to the equivocal words in question terms descriptive of a particular species of property, which those words in their larger sense would comprehend. In such case, the adoption of the more comprehensive meaning would have the effect of rendering the superadded expression nugatory and make the testator employ additional language, without any additional meaning.

"Thus, in *Timewell* v. *Perkins* (*r*), where the will was in the following words:—'I give to M. T. all mortgages, ground rents, judgments, etc., *whatever I have or shall have at my death*, as plate, jewels, linen, household goods, coach and horses, for her use.' Lord Hardwicke (*s*), held, that goldsmiths' notes and bank bills did not pass under the bequest: for though there was no doubt but the general words, *whatever I have or shall have at my death*, would have passed them; yet the particular words which followed, 'as plate, jewels,' etc., confined and restrained them to things of the same nature; his Lordship observing that it was so laid down in *Strafford* v. *Berridge* (*t*).

(*p*) See *Rogers* v. *Thomas*, 2 Kee. 8; *Martin* v. *Glover*, 1 Coll. 269; *Arnold* v. *Arnold*, 2 My. & K. 365; *In b. Shepheard*, 48 L. J. Pr. 62. "A well established rule of construction," *per* Jessel, M.R., in *Lysaght* v. *Edwards*, 2 Ch. D. at p. 513.

(*q*) First ed. p. 694.

(*r*) 2 Atk. 102. But this case is of doubtful authority, and probably would not be followed at the present day. See *Fisher* v. *Hepburn*, 14 Bea. 626, and other cases cited, *post*, p. 990.

(*s*) The Judge was Fortescue, J.

(*t*) "[*Trafford* v. *Berrige*,] 1 Eq. Ca. Ab. 201, pl. 14. A bequeathed all his *goods*, chattels, *household* stuff, furniture, and *other things*, which were then, or should be, *in* his house at the time of his death. Decreed, that money in the house did not pass: for, by the words *other things* should be intended things of like nature and species with those before mentioned; see also *Anon.*, Finch, 8, where a bequest of all the goods and chattels, plate, jewels, household stuff and stock upon the ground, in and belonging to the testator's house in N., was held not to include a sum of money found in the house; and *Roberts* v. *Kuffin*, 2 Atk. 112, where a bequest of all goods and things of every kind and sort whatever, which should be found in a certain closet, was held not to comprise a sum of money found in the closet. In the

"Goods, wearing apparel, of what nature and kind soever, except my gold watch."

"So, in *Crichton* v. *Symes* (*u*), where a testatrix bequeathed to A. and B., all her *goods*, wearing apparel, of what nature and kind soever, except her gold watch. Lord Hardwicke was of opinion, that the words were not intended to be a residuary clause; his Lordship observing, that the testatrix afterwards gave a legacy of £50 to her executor, and that there was not the word *residue*. . . . It was his opinion, that, as the words stood in the will, she intended to give only her wearing apparel, ornaments of her person, *household* goods and furniture, and no other parts of her personal estate; the testatrix here meant to give, not only what was properly clothes, but the ornaments of her person, and the exception of the gold watch showed the latitude of the expression.

Subsequent expressions held not to be restrictive.

"In some instances, however, the argument in favour of the restricted construction, founded on subsequent expressions, descriptive of a particular species of property, has not been allowed to prevail against the force of the previous general words.

"Thus, in *Bennet* v. *Batchelor* (*w*), where a testator bequeathed unto P. (to whom he had before devised real estates, and had also given specific legacies) all his household goods, books, linen, wearing apparel and all other, not before bequeathed, *goods and chattels that he should be in possession of at the day of his decease*, except the plate and legacies before and thereafter given and bequeathed; and he also bequeathed to the said P. all monies due from his (the testator's) tenants, and other persons. Lord Thurlow held, that the whole residue passed by the bequest; observing, in reference to the latter words, that the testator might not know that the debts would pass by the words 'goods and chattels' (*x*).

Exception, where explanatory of doubtful words.

"A conclusive ground for giving to equivocal words their larger signification, occurs where the bequest contains an exception of certain things, which such bequest, according to its restricted construction, would not comprise; the testator having in such a case afforded a key or explanation to his own ambiguous language, by showing that he considered that the bequest would,

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two last cases some stress was laid on the fact of a pecuniary legacy being bequeathed to the same legatee.

"The several preceding cases illustrate the application of the principle stated in the text, to bequests of personal moveable property answering to a certain locality." (Note by Mr. Jarman.) The question of gifts of chattels, etc., described with reference to their locality (which does not strictly belong here) is discussed *post*, p. 1046, and the meaning of such words as "furniture," "household effects," etc., *post*, p. 1277 *seq.*

(*u*) 3 Atk. 61.

(*w*) 3 B. C. C. 28, 1 Ves. jun. 63; see also *Fleming* v. *Burrows*, 1 Russ. 276, *post*, p. 987.

(*x*) See also *Bland* v. *Lamb*, 2 J. & W. 399.

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without the exception, have included the excepted articles. This question has generally arisen under gifts of goods and chattels, restricted to a certain locality; but the principle, it is obvious, is equally applicable to bequests not so restricted.

"Thus, in *Hotham* v. *Sutton* (*y*), where A., having two sons and a daughter, B., C., and D., after bequeathing for their benefit a sum of £12,700 Consols, gave all the residue of her personal estate and effects to her youngest children, C. and D., as therein mentioned. A. on the day of making her will executed a codicil, and revoked so much of her will as related to the bequest to her son C., of a share of her 'plate, linen, household goods, *and other effects* (*money excepted*),' and gave the whole thereof to her daughter. The question was, whether the revocation extended to the general residuary personal estate, or whether the words 'and other effects' were not restrained by the prior terms to articles *ejusdem generis*. Lord Eldon decided in favour of the former construction. He observed, 'The doctrine appears now to be settled, that the words "other effects" in general, mean effects *ejusdem generis*. I cannot help entertaining a strong doubt, whether this testatrix, if asked whether she meant effects *ejusdem generis*, or contemplated the share of all which she had considered her effects in the will, would not have answered that the latter was her meaning. Her expression is conclusive upon that. Money cannot be represented as *ejusdem generis* with plate, linen and household goods. The express exception of money out of the other effects shows her understanding, that it would have passed by those words; that express words were required to exclude it, and by force of that exclusion of the excepted article, she says, she thought the words of her bequest would carry things *non ejusdem generis*. This disposition must, therefore, be taken to comprehend all that she has not excluded, which is money only' (*z*).

"Household goods and other effects, money excepted."

"It will be observed, that Lord Eldon, in the last case, lays it down, that the words 'other effects,' in general, mean effects

"Other effects."

(*y*) "15 Ves. 319. Compare this case with *Fleming* v. *Brook*, 1 Sch. & Lef. 318, where Lord Redesdale, on the authority of *Moore* v. *Moore*, 1 B. C. C. 127, held, that a bequest of 'all my property, of whatever nature or kind the same may be, that may be found in A.'s house, except a bond of B. in my writing-box,' did not pass a mortgage security, and another bond and certain bankers' receipts, which were in the house, on the ground that choses in action had no locality for this purpose (a doctrine which is now well settled, 1 Ves. 273, 1 B. C. C. 127, 129, n.); and his lordship being of opinion that an exception in the will of one security was not sufficient evidence of the testator's intention to pass all the other choses in action." (Note by Mr. Jarman.) But the decision would probably not be followed at the present day; it is clear that choses in action may pass by a gift of property in a particular locality: see *post*, p. 1049.

(*z*) See also *Reid* v. *Reid*, 25 Bea. 469.

ejusdem generis (*a*); but such a position seems scarcely to accord with some subsequent decisions about to be stated; one of which, it will be seen, was determined by the same Judge who decided *Rawlings* v. *Jennings* (*b*), which case certainly carried the restricted construction to its extreme point; and probably was in Lord Eldon's view when he advanced the above dictum.

"And all effects whatsoever," not restricted by association with more limited terms.

"Thus, in *Campbell* v. *Prescott* (*c*), where a testator gave to his sons A. and J. all his sugar-house, cupola and merchandise stock with jewels, plate, household goods, furniture *and all effects whatsoever*, and appointed them executors; Sir W. Grant, M.R., held, that the whole personalty passed under this clause remarking, that there was no case for the restrictive sense attempted to be put upon the words 'all my effects whatsoever.'

"Plate, etc., and effects that I shall die possessed of."

"So, in *Michell* v. *Michell* (*d*), Sir J. Leach, V.-C., held, that the personal estate of a testator passed under a bequest of all and singular his plate, linen, china, household goods, and furniture (*e*), *and effects that he should die possessed of*. His Honor considered that this construction of the word 'effects' was aided by the subsequent words, 'that I shall die possessed of,' and observed, that the expression was not household goods, furniture, and effects; but 'household goods *and* furniture *and* effects,' which imported a distinct sense in the word 'effects' (*f*).

"Or whatever else I may then be possessed of."

"Again, in *Fleming* v. *Burrows* (*g*), where a testator, after commencing his will with the words 'As for such temporal estate as God in his mercy hath bestowed upon me, I give and dispose of the same that followeth'; devised certain lands to his natural son D., adding, 'likewise my furniture, plate, books, and live stock, *or whatever else I may then be possessed of at my decease*, also my shipping and ropery concerns at W. and H.,' he paying the debts. It was contended that these words were to be confined to articles *ejusdem generis* with those specified before, *i.e.*, furniture, etc., with which they stood immediately associated and also on the ground of their being followed by the mention

(*a*) So *per* Lord Redesdale, *Stuart* v. *M. of Bute*, 1 Dow, 84, 87, but in *Re Lea*, 104 L. T. 253, "all other the contents of a house" was held to pass jewellery notionally there.

(*b*) *Ante*, p. 982.

(*c*) 15 Ves. 500.

(*d*) 5 Mad. 69.

(*e*) Mr. Jarman's note on the meaning of the words "household goods" or "furniture," "live and dead stock," has been omitted, as it does not properly belong here; the cases which he refers to will be found in Chap. XXXV.

(*f*) See also *Hearne* v. *Wigginton*, 6 Madd. 119, where the testator, after some specific bequest, willed all his "other effects" to D to be sold for his benefit, and it was held that this gave D the general residue, although some of the particulars comprehended in it were not strictly speaking the subject of sale.

(*g*) 1 Russ. 276; see also *Sutton* v. *Sharp*, *ib.* 146; and *In b. Shepheard*, 48 L. J. P. 62.

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of specific articles, which were already included, if the previous words amounted to a general residuary gift; but Lord Gifford, M.R., held, on the authority of and the reasoning in *Bennett* v. *Batchelor* (*h*), that the circumstances were inadequate to restrain the generality of the bequest.

"Moneys, goods, etc., my property which may remain."

"Lastly, in the case of *Kendall* v. *Kendall* (*i*), where a testator, after bequeathing to his wife an annuity, proceeded thus: 'I also bequeath to my said wife all moneys, goods, chattels, clothing, etc., my property which may remain after paying the charges incident to my funeral, and such debts as I may owe at my death.' Sir J. Leach, M.R., held, that the residue, which consisted principally of stock, passed by these words: his Honor considering that the words 'clothing, etc.,' did not qualify the preceding general words.

General remark on preceding cases.

"These cases indicate the disposition of the Judges of the present day to adhere to the sound rule, which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense."

Other cases decided on same principle.

The principle thus stated by Mr. Jarman is now clearly settled, and accordingly the general personal estate has been held to pass by such expressions as: "all my jewels, plate, linen, china, carriages, wines and other goods, chattels and effects" (*j*); "effects" followed by a reference to various particular kinds of property (*k*); "the residue of my property hereinbefore mentioned," the property expressly mentioned being "household furniture and other effects" (*l*); "furniture, plate, books and other personalty" (*m*); "personal property, consisting of money and clothes" (*n*) or other items (*o*); "household furniture, goods, ready money, and also all debts and securities belonging to me" (*p*).

(*h*) *Ante*, p. 985.

(*i*) 4 Russ. 360.

(*j*) *Parker* v. *Marchant*, 1 Y. & C. C. C. 290; 1 Ph. 356; *Harris* v. *James*, 12 W. R. 509; *Hodgson* v. *Jex*, 2 Ch. D. 122; *In b. Shepheard*, 48 L. J. Pr. 62; *Re Parrott*, 53 L. T. 12; *In b. Jupp*, [1891] P. 300; *Anderson* v. *Anderson*, [1895] 1 Q. B. 749. In *Arnold* v. *Arnold*, 2 My. & K. 365, there was a specific bequest of "my wines and property in England," and it was held to include property not *ejusdem generis* with wine; see Chap. XXX.

(*k*) *Read* v. *Hodgens*, 7 Ir. Eq. R. 17.

(*l*) *Re Lloyd's Estate*, 2 Jur. (N.S.) 539.

(*m*) *Nugee* v. *Chapman*, 29 Bea. 290; *Martin* v. *Glover*, 1 Coll. 269; *Taylor* v. *Taylor*, 6 Sim. 246.

(*n*) *Dean* v. *Gibson*, L. R. 3 Eq. 713.

(*o*) *King* v. *George*, 5 Ch. D. 627; *Re Fleetwood*, 15 Ch. D. 594; *Tighe* v. *Featherstonhaugh*, 13 L. R. Ir. 401.

(*p*) *Avison* v. *Simpson*, Johns. 43. It has even been suggested that a bequest of "all my rights and credits" would pass the general personal estate: *Hutchinson* v. *Hutchinson*, 13 Ir. Eq. R. 382. See also *Bland* v.

A gift of household goods, furniture "and all other effects" is sufficient to pass the general personal estate, although it is followed by pecuniary and specific bequests (*q*), and even although specific bequests are given to the person who takes the residue under the general gift (*r*).

General gift, followed by specific gifts.

The principle which underlies many of these decisions is that when a man makes a will, he is presumed not to intend to die intestate as to any part of his property (*s*).

Presumption against intestacy.

In *Steignes* v. *Steignes* (*t*), the testator made his will in French, and thereby gave to his wife, "besides all moveables, plate, jewels, pictures, linen, &c." (except books), £6,000 South Sea stock, "moveables" being the translation in the probate copy, of the French word *meubles*; Sir J. Jekyll, M.R., said that by "moveables" the testator meant only corporeal things, and that the "&c." could not extend it to incorporeal things, such as stock; in other words, "&c." meant things *ejusdem generis*. *Newman* v. *Newman* (*u*) and *Barnaby* v. *Tassell* (*v*) are to the same effect.

"Et cætera."

In *Twining* v. *Powell* (*w*), the testatrix gave a house "and all therein" to A. for life; "at her death I give and bequeath the house, &c., &c. to R.": it was held that R. was entitled to the chattels in the house.

In *Chapman* v. *Chapman* (*x*) the testator directed his widow to pay his debts, and then bequeathed to her "all my money, cattle, farming implements, &c." subject to the payment to his brothers of legacies the amounts of which were left blank: it was held by Jessel, M.R., that this was a good residuary bequest. It may be observed that the will would have been insensible on any other construction, but the "et cætera" does not seem to have made any difference.

Chapman v. *Chapman*.

If the testator gives his residue in general terms, and then enumerates various particulars, concluding with "et cætera," this does not restrict the meaning of the general words (*y*).

Lamb, 2 Jac. & W. 399, where the effect of some "very singular" testamentary papers in disposing of the testator's property was discussed, but not decided.

(*q*) *In b. Shepheard*, 48 L. J. Pr. 62.

(*r*) *Fleming* v. *Burrows*, 1 Russ. 276. Compare *Bennett* v. *Batchelor*, 1 Ves. jun. 63, *ante*, p. 985.

(*s*) *Re Lloyd's Estate*, 2 Jur. (N.S.) 539, *ante*, p. 988, n. (*l*).

(*t*) Mose. 296. Compare *Hertford* v. *Lowther*, 7 Bea. 1, cited *post*, p. 1047.

(*u*) 26 Bea. 220.

(*v*) L. R. 11 Eq. 363.

(*w*) 2 Coll. 262.

(*x*) 4 Ch. D. 800.

(*y*) This statement is quoted by Younger, L.J., in *Ambatielos* v. *Anton Jurgens Margarine Works*, [1922] 2 K. B., at p. 201. *Kendall* v. *Kendall*, 4 Russ. 360, *ante*, p. 988; *Gover* v. *Davis*, 29 Bea. 222; *Mullaly* v. *Walsh*, 3 L. R. Ir. 244; *Loftus* v. *Stoney*, 17 Ir. Ch. 178.

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Special terms following the general, not necessarily restrictive.

In *Parker* v. *Marchant* (*z*), it was noticed by Sir J. K. Bruce, V.-C., as a circumstance favouring the unrestricted construction that the general terms there followed the specific. But, as already shown (*a*), a contrary order does not necessarily lead to a contrary result. In *Cambridge* v. *Rous* (*b*), the testatrix bequeathed " all the rest and residue of my property and effects whether in money or in the public funds or other securities of any sort or kind whatsoever." With reference to the words " whether in money or in the public funds " etc., Sir W. Grant, M.R., observed : " These are not words of restriction. They are rather words of enlargement. The object was to exclude nothing. Such an enumeration under a ' *videlicet*,' a much more restrictive expression, has been held only a defective enumeration, not a restriction to the specific articles " (*c*). So in *Fisher* v. *Hepburn* (*d*), where a testator expressed himself as follows : " As to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, canal shares, plate, linen, china and furniture, I give, devise and bequeath the same to my wife, for her own use and benefit " : Romilly, M.R., held the wife entitled to the general residue. And in a similar case (*e*), Sir W. P. Wood, V.-C., said, " The strong presumption is that the testator did not mean to do only what he might have effectually done by giving the enumerated articles simply." It scarcely need be added that it is immaterial that the enumeration comprises trivial things only, and omits all the important items of the personal estate. To hold the contrary would involve the admission of evidence to prove what the testator's personal estate consists of at the date of the will; which we have before seen is inadmissible (*f*). In *Re Roberts* (*g*), it was held that by a gift

Fisher v. *Hepburn*.

(*z*) 1 Y. & C. C. C. 290. See also by the same Judge 1 D. F. & J., at p. 416; and by Romilly, M.R., *Re Kendall's Trust*, 14 Bea., at p. 611; in this case the restrictive effect of the specific enumeration was removed by subsequent words.

(*a*) *Bennett* v. *Batchelor*, *ante*, p. 985.

(*b*) 8 Ves. 12.

(*c*) See *Bridges* v. *Bridges*, 8 Vin. Abr. 295 (Devise, O. b., pl. 13); see also *Chalmers* v. *Storil*, 2 V. & B. 222; *Nicholas* v. *Nicholas*, Taml. 269; *Ellis* v. *Selby*, 7 Sim. 352; *Everall* v. *Browne*, 1 Sm. & Gif. 368; *Choyce* v. *Ottey*, 10 Hare, 443; *Banks* v. *Thornton*, 11 Hare, 176; *Re Goodyar*, 4 Jur. (N.S.) 1243; *Gover* v. *Davis*, 29 Bea. 222; *Dean* v. *Gibson*, L. R. 3 Eq. 713; *King* v. *George*, 4 Ch. D. 435; 5 *ib.* 627; *Reeves* v. *Baker*, 18 Bea. 372; *Armstrong* v. *Buckland*, *ib.* 204.

(*d*) 14 Bea. 626. See also *Kendall* v. *Kendall*, 4 Russ. 360; *Avison* v. *Simpson*, Johns. 43; *Re Maberley's Trusts*, 19 W. R. 522; *Tighe* v. *Featherstonhaugh*, 13 L. R. Ir. 401, *supra*, n. (*o*). See also *Re Smalley*, 49 L. T. 662, where expressions following a gift of " personal property " were held to extend the gift so as to include realty. See *ante*, p. 978.

(*e*) *Dean* v. *Gibson*, L. R. 3 Eq., at p. 717.

(*f*) *King* v. *George*, 5 Ch. D. 627; *Re Fleetwood*, 15 Ch. D. 594.

(*g*) 55 L. T. 498, *per* Cotton and Bowen, L.JJ., Fry, L.J., *diss.*

of "all my property leasehold and freehold which I now possess," all the testator's personal estate passed.

The application of the principle above stated is not necessarily affected by a direction that the property is to be sold; thus a bequest of "all my other effects to A., to be sold for his benefit," will pass the general personal estate, although it includes property which is not the subject of sale, such as money (*h*).

Where there is a residuary bequest.

"It is to be observed, however," says Mr. Jarman (*i*), "that in all the preceding cases, there was no other bequest capable of operating on the general residue of the testator's personal estate, if the clause in question did not. Where this is such a bequest, it supplies an argument of no inconsiderable weight in favour of the restricted construction, which is then recommended by the anxiety always felt to give to a will such a construction as will render every part of it sensible, consistent and effective."

To this ground may be referred the case of *Woolcomb* v. *Woolcomb* (*j*), where the testator gave to his wife all the furniture of his parsonage house, and all his plate, household goods, and other goods, (except books and papers,) and all his stock within doors and without, and all his corn, wood, and other goods, belonging to his parsonage house; and gave the residue of his personal estate to J. The question was, whether ready money, cash, and bonds, should pass to the wife. It was held that the words "other goods" should be understood to signify only things *ejusdem generis* with household goods.

So in *Lamphier* v. *Despard* (*k*), where a testator, after devising certain real estates to his wife, bequeathed to her "all his household furniture, plate, house-linen, and all other chattel property that he might die seised or possessed of"; and after giving various legacies, he appointed A his executor and residuary legatee: Sir E. Sugden held that all other chattel property meant all *ejusdem generis*; relying partly on the subsequent residuary gift. He thought, however, that the words would clearly not pass money; so that the clause could not be a general bequest of the entire personal estate.

And in *Re Hammersley* (*l*), a gift of "my household furniture, books, pictures, paintings, engravings, plate, linen,

(*h*) *Hearne* v. *Wigginton*, 6 Madd. 119.

(*i*) First ed., p. 700.

(*j*) 3 P. Wms. 112, Cox's ed.; see *Marks* v. *Solomons*, 19 L. J. Ch. 555.

(*k*) 2 D. & War. 59; see also *Stuart* v. *Marquis of Bute*, 1 Dow, 73; *Barrett* v. *White*, 24 L. J. Ch. 724; *Smith* v. *Davis*, 14 W. R. 942; *Mullins* v. *Smith*, 1 Dr. & Sm. 204; *Gibbs* v. *Lawrence*, 30 L. J. Ch. 170; *Campbell* v. *M'Grain*, Ir. R. 9 Eq. 397.

(*l*) 81 L. T. 150, citing *Anderson* v. *Anderson*, [1895] 1 Q. B. 749 (assignment by deed).

china, and other effects," to A and B in equal shares, was held to pass only articles *ejusdem generis*, and not to include jewellery, there being a subsequent residuary gift.

It would also seem, that where a testator makes a specific bequest of property in general terms, but describes it as "consisting of" certain specific things, belonging to him at the date of the will, and bequeaths his residue, this shows that he intended to restrict the specific bequest to the enumerated things: as in *Drake* v. *Martin* (*m*), where the testator made a specific bequest of "my property not in England and in the hands of my attorney abroad, Mr. W., consisting of Russian bonds &c." there was a residuary bequest, but Romilly, M.R., held that all the testator's property not in England passed by the specific bequest.

Restrictive effect of context.

Even where there is no residuary bequest, the testator may show by the context, or by a codicil, that general words used by him were intended to have a limited effect. Thus in *Att.-Gen.* v. *Wiltshere* (*n*), the testator made dispositions with regard to what he repeatedly referred to as "all my property," but it was held, partly from the context and partly from the terms of a codicil made on the same day, that a sum of £5,000 consols belonging to the testator was undisposed of.

If a testator directs that in the event of A dying under twenty, "the said property and effects" shall go to B, this may refer to a share of the testator's property previously given to A, and not to the whole of the testator's estate (*o*).

III.—General Residue held to pass by Word "Money," and other informal Words.—Mr. Jarman continues (*p*): "As words in themselves the most general and comprehensive may, we have seen, be narrowed by their juxtaposition with more limited expressions, so on the same principle, terms which, in their strict and proper acceptation, apply to a particular species of personalty only, have been held, by force of the context, to embrace the general residue. In several instances, the word 'money' (*q*) (which is often popularly used in a vague and

Word "money" extends to general residue.

(*m*) 23 Bea. 89.

(*n*) 16 Sim. 36. Compare *Sutton* v. *Sharp*, 1 Russ. 146; *Slingsby* v. *Grainger*, 7 H. L. C. 273; *Wylie* v. *Wylie*, 1 D. F. & J. 410; *S. C. Enohin* v. *Wylie*, 10 H. L. C. 1; *Borton* v. *Dunbar*, 2 D. F. & J. 338; and *Stooke* v. *Stooke*, 35 Bea. 396, *post*, p. 997.

(*o*) *Re Willomier*, 16 Ir. Ch. R. 389. There is no invariable rule which refers the word "said" to the last antecedent: *Healy* v. *Healy*, Ir. R. 9 Eq. 418.

(*p*) First ed., p. 702.

(*q*) Mr. Jarman's note on the meaning of "money" in its strict acceptation is omitted, as it does not properly belong here; all the cases cited by him will be found in Chap. XXXV.

inaccurate sense, as synonymous with *property*,) has received this construction" (*r*).

The result has generally been due either, first, to the testator having directed his funeral expenses, debts or legacies (which ordinarily constitute a charge on the general residue) to be paid out of the "money" (*s*); or, secondly, to his having shown a clear intention to make a complete disposition of all his personalty, which intention can only be effected by adopting the enlarged interpretation of the word "money." For it is clear that if the word be used without any explanatory context, it will be construed in its strict sense (*t*); *a fortiori*, if the express purpose of the bequest be inconsistent with the notion that the testator could have intended so to apply the property alleged to be comprised in it. As where an officer on service after bequeathing two small legacies, and directing his portmanteau and other articles to be sent home, desired that "the remainder of his money and effects should be expended in purchasing a suitable present for his godson," it was held that a reversionary interest in stock did not pass (*u*).

Where testator has charged funeral expenses on "money."

Of the first class of cases alluded to, we have an instance in *Legge* v. *Asgill* (*v*), where a testatrix, after bequeathing £200 Long Annuities amongst several persons in specific legacies, proceeded to give a debt of £2,935 due to her, to A for her separate use; and added, "I believe there will be sufficient money to pay my funeral expenses," which she desired might be plain. The testatrix afterwards made a codicil to her will, commencing with the following words :—"If there is any money left unemployed, I desire it may be given in charity. My watch and pianoforte I give to C. The most useful of my clothes to be given to my present servant," and she concluded with some

(*r*) This rule of construction does not apply to a gift of "cash" (*Nevinson* v. *Lady Lennard*, 34 Bea. 487), or of "ready money" (*Re Powell's Trust*, Johns. 49; see *Bevan* v. *Bevan*, 5 L. R. Ir. 57), or of "money to my account" (*Hastings* v. *Hane*, 6 Sim. 67). As to the effect of a gift of money referred to as "invested," see *Stooke* v. *Stooke*, 35 Bea. 396; *Re Pringle*, 17 Ch. D. 819, cited, *post*, p. 995.

(*s*) Great stress was laid on this in *Chapman* v. *Chapman*, 4 Ch. D. 800, *ante*, p. 989.

(*t*) See *Shelmer's Case*, Gilb. Eq. R. 200; *Hotham* v. *Sutton*, 15 Ves. 319; *Read* v. *Hodgens*, 7 Ir. Eq. R. 17; *Lowe* v. *Thomas*, Kay. 369, affirmed 5 D. M. & G. 315; *Larner* v. *Larner*, 3 Drew. 704; *Cowling* v. *Cowling*, 26 Bea. 449; *Byrom* v. *Brandreth*, L. R. 16 Eq. 475; *Williams* v. *Williams*, 8 Ch. D. 789; *Re Sutton*, 28 Ch. D. 464; *In b. Aston*, 6 P. D. 203. Compare the cases on the effect of "money" as a word of specific description, *post*, p. 1034. So a legacy of stock does not come within the description of a "pecuniary legacy," *Douglas* v. *Congreve*, 1 Kee. 410; though in *Barclay* v. *Maskelyne*, 5 Jur. (N.S.) 12, stock legacies were held upon the context to be within a clause revoking "all monies bequeathed" to the legatees.

(*u*) *Borton* v. *Dunbar*, 2 Gif. 221; 2 D. F. & J. 338. Converse case—declared purpose too large for strict construction of "money," *Prichard* v. *Prichard*, L. R. 11 Eq. 232, stated p. 996.

(*v*) T. & R. 265, n., and cited 4 Russ., at p. 369.

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directions respecting the key of a trunk. The question was, whether the general residue, including the reversion of one-fourth of a sum of £10,000 secured by a settlement, passed by these words. Lord Eldon considered that under the will, and especially having regard to the charge of the funeral expenses, the word "money" was intended to comprise the entire personal estate; and that it was impossible to put a different construction upon the same word in the codicil.

"Money remaining after debts and legacies.

So, in *Rogers* v. *Thomas* (*w*), where a testatrix, after giving various pecuniary and specific legacies, bequeathed to the inhabitants of T. Row all which might remain of her money after her lawful debts and legacies were paid; and she went on to give other specific and pecuniary legacies: Lord Langdale, M.R., considered the charge of debts and legacies sufficient evidence of the testatrix's intention to include the general residue in the bequest of "all which might remain of her money."

In *Re Mellor* (*x*) after a direction to pay debts and certain bequests the testator (who died in 1928) continued: "the remainder of any monies shall be equally divided between" nine persons. Astbury, J., held that since under the new law real estate was liable to pay debts, it would pass as money.

"The rest of my money."

In *Re Capel* (*xx*), the testator, who was entitled to a reversionary interest, gave a pecuniary legacy to a charity, and proceeded, "the rest of my money I leave in equal shares to my brother and sisters," and after giving other legacies concluded, "anything belonging to me which I have not devised I leave to my father and mother, if they are not living I leave them to my sisters." It was held that the last bequest was not a true residuary bequest and that the reversionary interest passed under the gift of "the rest of my money."

Where there is a bequest of legacies, and a gift of the residue of testator's money.

It seems, indeed, that where a bequest of legacies, primarily payable out of the general estate, is followed by a gift of the residue or remainder of the testator's "money," the latter gift comprehends the general residue, although the testator has not expressly charged the legacies on his "money." Thus, in *Dowson* v. *Gaskoin* (*y*), where a testatrix, after bequeathing certain specific and pecuniary legacies, concluded her will as follows: "I appoint A. and B. my executors, and bequeath

(*w*) 2 Kee. 8; see also *Kendall* v. *Kendall*, 4 Russ. 360; *Phillips* v. *Eastwood*, 1 Ll. & Go. 270; *Barrett* v. *White*, 24 L. J. Ch. 724; *Grosvenor* v. *Durston*, 25 Bea. 97; *Stocks* v. *Barré*, Johns. 54; *Re Maclean*, 11 T. L. R. 82; *In b. White*, 7 P. D. 65; *Re Egan*, [1899] 1 Ch. 688, where the expression "any money that may be in my possession at my death" was held to pass a reversionary interest in personalty. But the principle will not govern cases where the bequest is of "ready" money: *Re Powell*, Johns. 49.

(*x*) [1929] W. N. 23.

(*xx*) 59 Sol. J. 177.

(*y*) 2 Kee. 14.

£200 to each for their trouble, and whatever remains of money I bequeath to E. D.'s five children." At the date of the testatrix's will and of her death, her personal estate consisted principally of stock, which, it was contended, would not pass under the word money; but Lord Langdale decided that the stock in question passed by the will (*z*).

Re Pringle.

So in *Re Pringle* (*a*), a gift of "all the rest of my money, however invested," preceded and followed by a number of pecuniary and specific legacies, was held to pass the general personal estate. Even a bequest of "any little money left" will operate as a residuary bequest and consequently as an exercise of a general power of appointment over personalty (*b*), but not a general power of appointment over realty (*c*).

Not if there be a distinct residuary bequest.

But the inference to be drawn from a charge of debts is not conclusive; since the testator may have intended so to charge the specific gift of "money" (*d*): and therefore if the will contains a distinct residuary clause, or otherwise gives evidence that the word is used in its strict sense, the enlarged construction is inadmissible notwithstanding the charge. Thus, in *Willis* v. *Plaskett* (*e*), where a testatrix made her will as follows: "I first direct my funeral expenses to be paid, and the remainder of what monies I die possessed of to be equally divided between A. and B. I also give to the said A. all my wearing apparel, trinkets and all other property whatsoever and wheresoever that I may die possessed of": Lord Langdale, M.R., said that when a testator directed the payment of his funeral expenses, there was an inference that he was referring to his general personal estate; but that, having regard to the other parts of this will, he was prevented from giving to the word "monies" its extended meaning.

(*z*) See also *Lynn* v. *Kerridge*, West's Ca. t. Hardwicke, 172; *Lowe* v. *Thomas*, 5 D. M. & G. 315; *Langdale* v. *Whitfeld*, 4 K. & J. 426, 436; *Montagu* v. *Earl of Sandwich*, 33 Bea. 324, where there was a specific bequest after the bequest of "money." These cases appear to overrule *Gosden* v. *Dotterill*, 1 My. & K. 56, although Wood, V.-C., in *Lowe* v. *Thomas* (Kay, 369) treated it as a binding authority. *Lynn* v. *Kerridge*, *supra*, was a strong case, as the will contained a general residuary bequest, but it is not quite clear whether it can be referred to the principle now under discussion, or whether it merely decided that the bequest of "moneys" included stock. See *Hart* v. *Hernandez*, *post*, p. 997; *Re Maclean*, 11 T. L. R. 82.

(*a*) 17 Ch. D. 819. See *Hastings* v. *Hane*, 6 Sim. 67, stated *post*, p. 997, and *Re Emerson*, [1929] 1 Ch. 128, where "the residue of my money" was held to pass the residuary personal estate, but not the residuary real estate.

(*b*) *Re Douglas*, [1905] 1 Ch. 279.

(*c*) *Re Tribe*, 113 L. T. 313.

(*d*) *Per* Leach, M.R., *Collier* v. *Squire*, 3 Russ., at p. 475.

(*e*) 4 Bea. 208; and see *Williams* v. *Williams*, 8 Ch. D. 789 (gift of residue in will not cut down by gift of "money" in codicil); *Re Mason's Will*, 34 Bea. 494. Cf. *Barrett* v. *White*, 1 Jur. (N.S.) 652; and consider *Chapman* v. *Reynolds*, 28 Bea. 221, especially with reference to the weight there attributed to the fact that the testatrix had no "money" in the strict sense.

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Where there is a clear intent to dispose of the whole personal estate.

The second class of cases indicated above is illustrated by *Waite* v. *Combes* (*f*), where a testator, after declaring himself desirous of making a settlement of his affairs, appointed A and B his executors to take and receive all monies that might be in his possession or due to him at the time of his decease, and to prosecute for the recovery of the same, if necessary, to be by them placed in the British funds or otherwise laid out upon security and held in trust: Sir J. Parker, V.-C., thought the whole will pointed to a complete disposition of the personal estate, and that, at all events, a sum of consols passed under the word "monies" (*g*).

Even a wrong description of the manner in which the testator's "money" is invested, will not prevent that word from comprising the residuary personal estate: as where a testatrix bequeathed "the remainder of my money in the Spanish bonds" to her nephews and nieces, "my intention being to divide my property equally between my two sisters' children" (*h*).

Prichard v. *Prichard.*

In *Prichard* v. *Prichard* (*i*), where a testator appointed an executor, and declared that the income arising from his principal money should be paid to his wife, while unmarried, for the support of herself and the education of his children, and at her death or marriage to be divided among them: it was held by Sir R. Malins, V.-C., that the declared purpose of the gift showed that the whole personal estate was intended to pass, including leaseholds.

Re Cadogan.

The decision in *Re Cadogan* (*k*), goes even farther, for in that case there was a simple gift of "the money of which I am possessed"; but the will was made two days before the testatrix's death, and her "money," in the strict sense of the word, only formed a trifling part of her property; on the strength of these circumstances, and the fact that part of the "money" was given to two beneficiaries for life with remainders to their children, Kay, J., held that the gift passed all the personal estate (*l*). In

(*f*) 5 De G. & S. 676. As to the weight allowed to the fact that at the time of his death the testator had little besides the consols, qu.; and see *Gosden* v. *Dotterill*, 1 My. & K. 56, which on this point is good law. If the gift is specific such evidence is admissible: *Gallini* v. *Noble*, 3 Mer. 691.

(*g*) But the mere fact of "money" being so disposed of (*e.g.*, to one for life, with limitations over), as to necessitate an investment, will not suffice to extend the natural import of the word: *Lowe* v. *Thomas*, Kay, 369; 5 D. M. & G. 315; *Larner* v. *Larner*, 3 Drew. 704; *Williams* v. *Williams*, 8 Ch. D. 789.

(*h*) *Patrick* v. *Yeatherd*, 33 L. J. Ch. 286.

(*i*) L. R. 11 Eq. 232.

(*k*) 25 Ch. D. 154. This decision was followed in *In b. Bramley*, [1902] P. 106. See also *Stratton* v. *Hillas*, 2 Dr. & W. 51; *In b. White*, 7 P. D. 65.

(*l*) In *Re Sutton* (28 Ch. D. 464) a gift of "the whole of the money over which I have a disposing power," was confined to money in the strict sense, but no reasons are given.

Re Buller (*m*) a gift of " all my money " except certain shares was held to pass the general residue, but Stirling, J., expressed some doubt whether *Re Cadogan* did not go too far. On the other hand, in *Hastings* v. *Hane* (*n*), where a testator after revoking " former dispositions of my property," and making various pecuniary and specific bequests, gave " any monies which may remain to my account after payment of the aforesaid sums and my debts," it was held by Shadwell, V.-C., that the words " to my account " prevented the gift of " monies which may remain " from operating as a gift of the general residue. So in *Stooke* v. *Stooke* (*o*), where a testator made various specific and pecuniary bequests, and then gave " the remainder of all my moneys, in whatever it may be, in bonds or consols or anything else," it was held that this passed money invested on any kind of security, including a life policy, but not leaseholds, furniture or other chattels. And in *Nevinson* v. *Lady Lennard* (*p*), where the testatrix, after giving the residue of all her money, referred to it afterwards as " cash," this was held to restrict the meaning of the word to money strictly so called.

Where " money " means general personal estate except part.

It sometimes appears from the context that the testator means by " money," not the whole of his general personal estate, but all except a certain part of it. Thus, in *Barrett* v. *White* (*q*), Kindersley, V.-C., said that the testatrix by " money " meant all her personal estate other than plate, furniture, horses, carriages, etc. *Hart* v. *Hernandez* (*r*) was a similar case. So in *Lloyd* v. *Lloyd* (*s*) a direction to pay debts, etc., out of " money " was held to throw them primarily on the testatrix's personal estate other than the leaseholds and furniture, which were particularly referred to. And in *Re Townley* (*t*) it was held that a gift of " all my moneys " passed the general personal estate other than the furniture; part of the furniture was specifically bequeathed; as to the rest of it there was an intestacy.

" All my money.'

The cases were considered in *In b. Gates* (*u*), when the

(*m*) 74 L. T. 406; followed in *Re Woolley*, [1918] 1 Ch. 33.
(*n*) 6 Sim. 67.
(*o*) 35 Bea. 396.
(*p*) 34 Bea. 487.
(*q*) 24 L. J. Ch. 724. *Glendening* v. *Glendening*, 9 Bea. 324, appears to have been decided on the same principle, but there the testator added the word " goods "; the question was whether the gift of " money and goods " comprised money in the funds, and it was held that it did.
(*r*) 52 L. T. 217. It is not clear whether *Lynn* v. *Kerridge*, West. Rep. t. Hard. 172, was decided on this principle; see the remarks in *Hart* v. *Hernandez*, *supra*.
(*s*) 54 L. T. 841.
(*t*) 53 L. J. Ch. 516. *Re Smith* (42 Ch. D. 302) seems to have been decided on the same principle.
(*u*) 73 Sol. J. 429, reversing, [1928] P. 128, 178; *Re Puttner* 45 T. L. R. 325.

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operative part of the will was "I leave all my money to A." It was held that the word "money" was to be construed strictly. It can hardly be doubted that the strict rule defeated the testator's intention.

"Money" when strictly construed.

But in cases which do not fall within any of the rules above referred to, the word "money" is strictly construed; thus in *Lowe* v. *Thomas* (*x*) a testatrix bequeathed to A "the whole of my money" for his life, at his death to be divided between B and C; then followed trifling specific bequests to B and C, with a final sentence declaring that the longest survivor of them was to become "possessor of the whole money"; it was held that a sum of stock did not pass by this bequest.

So in *Re Gliddon* (*y*) the testatrix bequeathed to her brother and niece all her moneys to be equally divided between them, and to her niece all her household furniture and personal effects. She had a small sum of money at the bank and certain furniture and effects not worth 20s. She was entitled to a moiety of a reversionary interest. It was held that the gift of all her moneys did not constitute a residuary bequest of her personal estate.

Unless forbidden by the context.

And if the context shows that the word "money" is used in its strict sense, it will not receive the more extended construction, merely on the strength of even an expressed intention to dispose of all the estate. Thus, in *Ommanney* v. *Butcher* (*z*), where a testator, after commencing his will in the following form: "I, A. B., considering in what manner I should have my fortune disposed of, in case of my death, do make this my will:"—bequeathed numerous stock and a few money legacies; and after disposing of some books and other specific articles, he directed the remainder of his books, and his jewels, plate and household furniture to be sold; and desired that his clothes and linen might be divided between his servants: he then gave a small pecuniary legacy to his executors, and added, "in case there is any money remaining, I should wish it to be given in private charity." Sir T. Plumer, M.R., was of opinion that the concluding clause did not comprehend the general residue; but was to be considered as applying to the residue of the produce of those articles which the testator had directed to be sold, after providing for the

(*x*) Kay, 369; 5 D. M. & G. 315.

(*y*) [1917] 1 Ch. 174 distinguishing *Re Skillen*, [1916] 1 Ch. 518. In *Re Taylor*, [1923] 1 Ch. 99, the context was held to show that the testatrix's investments were included in the word "money," but not all her personal property.

(*z*) T. & R. 260. Compare *Hastings* v. *Hane*, 6 Sim. 67, *ante*, and *Enohin* v. *Wylie*, 10 H. L. C. 1, where a gift of "the whole of my capital, which shall remain with me after my death in ready money and in bank billets," was held not to pass a sum of stock.

payments which were ordered to be made. A gift of "such money, stocks, funds, or other securities not hereafter specially devised, as I may die possessed of," does not constitute a gift of residue (*a*).

Informal words held to pass general residue.

In *Hutchinson* v. *Hutchinson* (*b*), where the testator gave all his "lands tenements, rights and credits," the opinion was expressed that the words "rights and credits" would have been sufficient by themselves to pass the general personal estate; but the context made the meaning clear.

Other cases may be adduced, in which the general residue of a testator's personal estate has been held to pass under very informal words. As in *Leighton* v. *Bailie* (*c*), where a testatrix made the following indorsement on one of her testamentary papers: "I think there will be something left after the funeral expenses, etc., paid, to give to W. B., now at school, towards equipping him to any profession"; by another testamentary paper she bequeathed the sum of £500 to W. B.; it was held by Leach, M.R., that under the indorsed memorandum, W. B. was the general residuary legatee.

Again, in *Hodgkinson* v. *Barrow* (*d*), a testator, having several children by different marriages, gave his real and personal estate to trustees, upon trusts that did not exhaust the whole interest, but confiding in them to fulfil any memorandum he might leave; he made a codicil by which, after reciting the settlement made on his second marriage, he directed that whatever sums might come to the children of that marriage, or the children of his former marriage, with the exception of such sums as might come in right of their respective mothers, his trustees would take the whole of his real and personal property into their consideration, and have an estimate made, "and my will is to divide to every child its due share and proportion, also taking first into consideration" monies received by the children by way of advancement. Lord Cottenham held, reversing the decision of the V.-C., that the reversionary interest in the real and personal property passed by the codicil.

(*a*) *In b. Aston*, 6 P. D. 203.

(*b*) 13 Ir. Eq. R. 382.

(*c*) 3 My. & K. 267; see *Surtees* v. *Hopkinson*, 18 L. J. Ch. 188; *Wiggins* v. *Wiggins*, 2 Sim. (N.S.) 226; *Duhamel* v. *Ardovin*, 2 Ves. sen. 162; *Bland* v. *Lamb*, 2 J. & W. 399 ("anything I have forgot"); *Fleming* v. *Burrows*, 1 Russ. 276 ("whatever else I may then be possessed of"); *Re Craven*, 99 L. T. 390 ("rest of my investments"); *Re Bradfield*, [1914] W. N. 423 ("belongings").

(*d*) 2 Phill. 578.

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And in *Re Bassett's Estate* (*e*), where legacies were given, and the will then went on, "after these legacies and my funeral expenses are paid, I leave to my sister A. without any power or control of her husband; in case of her death to be equally divided amongst his children or grand-children"; it was held that this was a good gift of the residue. *Chapman* v. *Chapman* (*f*) is another example of an intention to dispose of the residue being inferred from the whole will.

Appointment of "residuary legatee."

As a general rule, an appointment of A "to be my residuary legatee," operates as a bequest of the testator's residuary personal estate to A (*g*). But if there is a formal gift of the residue to another person, this may prevail (*h*).

(*e*) L. R., 14 Eq. 54. Compare *Bowman* v. *Milbanke* and the other cases in which it has been held that words of gift may be too vague to pass the residue; *ante*, p. 430.

(*f*) 4 Ch. D. 800.

(*g*) See *Hughes* v. *Pritchard*, 6 Ch. D. 24 and other cases cited, *ante*, p. 975.

(*h*) *Post*, p. 1004.

CHAPTER XXIX.

OPERATION OF A GENERAL OR RESIDUARY BEQUEST (*a*).

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I.—General and Residuary Bequests.—A general bequest is a gift of the testator's personal property described in general terms, as of "all my personal estate" (*b*). If a testator bequeaths his property by specific description (*e.g.*, "my leaseholds, stocks, funds and securities, money in my house or at my banker's, and debts owing to me"), and it happens that this description includes all his personal property, nevertheless this is a specific and not a general bequest (*c*). The question what expressions will comprise the general personal estate, has been considered in Chapter XXVIII. What is a general bequest.

When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue as so ascertained with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or in the income from any such investment (*d*). Rights of residuary legatee.

In *Robertson* v. *Broadbent* (*e*), the testator, after directing his executors to pay all his just debts and funeral and testamentary expenses and giving pecuniary legacies, gave all his

(*a*) This chapter was written by Mr. C. Sweet for the last edition; except so far as it incorporated those parts of Chap. XXIII. in the preceding editions, dealing with the effect of a residuary bequest, which were added by Mr. Jarman's editors.

(*b*) Roper on Legacies, 242. As to general or residuary bequests by informal expressions, see Chap. XXVIII, *ante*, p. 992.

(*c*) *Roffey* v. *Early*, 42 L. J. Ch. 472. Compare *Richards* v. *Richards*, 9 Price, 219, a case which seems to be not well reported. *Powell* v. *Riley*, L. R., 12 Eq. 175, may be treated as overruled: *Re Ovey*, 51 L. J. Ch. 665. See *post*, p. 1028.

(*d*) *Per* Viscount Cave in *Barnardo's Homes* v. *Special Income Tax Commissioners*, [1921] 2 A. C., at p. 10 (see Finance Act, 1922, s. 30). Compare *Cooper* v. *Cooper*, L. R. 7 H. L. 53. When the estate is cleared the personal representative becomes a trustee: *Re Ponder*, [1921] 2 Ch. 59.

(*e*) 8 A. C. 812, affirming C. A. in *Re Ovey*, 20 Ch. D. 676.

personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, to R absolutely. And he gave and devised all the rest, residue, and remainder of his estate both real and personal to his executors upon certain trusts. It was held that neither the exception of money and securities for money from the gift to R, nor the gift of all the rest, residue, and remainder of the testator's estate both real and personal, was enough to make the bequest to R specific.

Bequest in general terms may be specific.

It is noticed elsewhere that a bequest of part of the testator's personal property may be specific, although described in general terms : as a gift of "all my personal estate at B." (*f*).

Distinction between a specific and general bequest.

The distinction between specific and general bequests is important, because the general estate of a testator is, unless a contrary intention appears, the fund out of which his funeral and testamentary expenses, debts and pecuniary legacies are payable (*g*); if he bequeaths pecuniary legacies and disposes specifically of all his estate, there is no fund out of which the legacies can be paid, and they consequently fail (*h*).

But a testator may indicate an intention that part of his general personal estate is to be primarily liable in exoneration of the rest (*i*).

Residuary bequest.

General bequest.

In most cases a testator, in disposing of his personal property, gives part of it to particular legatees and the rest of it by a general description, and the latter bequest is then called a residuary bequest (*k*). And it is immaterial whether he gives the particular legacies first, or gives them by way of exception : as "I give all my personal estate to A., except my furniture, which I give to B." In the latter case, the bequest to A would be more properly called a general bequest (*l*).

When some specific things are enumerated.

A case which sometimes presents difficulty is where the testator enumerates some of the things in the residuary bequest.

(*f*) Roper, 242; *Sayer* v. *Sayer*, 2 Vern. 688, and other cases cited *post*, p. 1030.

(*g*) Administration of Estates Act, 1925, 1st Schedule, Part II. See *post*, p. 1975.

(*h*) *Roffey* v. *Early*, 42 L. J. Ch. 472. The debts, etc., are payable out of the property specifically bequeathed in proportion to the value of the various bequests : *Re Hamilton*, [1892] W. N. 74.

(*i*) *Robertson* v. *Broadbent*, *supra*; and see *post*, p. 1004 (n. (*t*)).

(*k*) The use of the word "residue" is, of course, not required. As to the technical meaning of the word "residue," see *Re Brook's Will*, 2 Dr. & Sm. 362; *Trethewy* v. *Helyar*, 4 Ch. D. 53. It will be remembered that as between tenant for life and remainder-man "residue" has a special meaning : *Allhusen* v. *Whittell*, L. R. 4 Eq. 295, *post*, p. 1194. As to the time when the executor becomes a trustee of the net residue, see *Re Smith*, 42 Ch. D. 302; *Re Timmis*, [1902] 1 Ch. 176; *Re Ponder*, [1921] 2 Ch. 59.

(*l*) *Lysaght* v. *Edwards*, 2 Ch. D. 513; *Re Spencer*, 34 W. R. 527; *Blight* v. *Hartnoll*, 23 Ch. D. 218.

Apart from other indications of the testator's intention, the following rules appear correct :

(1) A gift of residue, including certain property (as " the residue of my estate, including a certain fund "), does not make the gift of that property specific (*m*).

(2) The mere fact that the testator enumerates some specific things in the gift of residue (as " all my furniture, cattle, sheep and all my other personal estate ") does not make the gift of those things specific (*n*).

(3) If the testator disposes specifically of the bulk of his property (as by giving his Consols to A, his mining shares to B, his leaseholds to C, and so on), and adds to one of these gifts all the residue of his personal estate, that gift is specific so far as regards the property specifically described (*o*). There are also cases in which a gift of residue, followed by an enumeration of specific things, has been held to be specific with regard to them (*p*), but it may perhaps be doubted whether they would be followed at the present day.

It may be noticed that in *Bethune* v. *Kennedy*, in which the doctrine in question appears to have been first laid down, the question was whether the legatees for life were entitled to the income of the funded property in specie (*q*).

In *Re Kendall's Trust* (*r*), the testator bequeathed to his mother " everything I die possessed of, namely," certain money and chattels, and added : " And lest there be any dispute I declare again that I leave everything I die possessed of to my dearest mother for her entire and sole use and benefit as stated above "; it was held that the whole residue passed.

Distinction between general and residuary bequests.

It rarely happens that it is necessary to consider the distinction between general and residuary bequests, for almost every will contains one general residuary bequest, but the question sometimes arises. Thus in *Re Ovey* (*s*), a testator bequeathed

(*m*) *Re Tootal's Estate*, 2 Ch. D. 628; *Macdonald* v. *Irvine*, 8 Ch. D. 101; *Re Lyne's Estate*, L. R. 8 Eq. 482 (fund directed to become part of residuary estate). But if the testator after a gift of " my property " explains that it consists of certain investments, this appears to make it specific : *Hubbard* v. *Young*, 10 Bea. 203, *sed. qu.*; this may be one of those cases where the Courts have overlooked the distinction between a specific bequest and the enjoyment in specie of a residuary bequest. See *post*, p. 1210 *seq.*

(*n*) *Re Green*, 40 Ch. D. 610; *Taylor* v. *Taylor*, 6 Sim. 246; *Sargent* v. *Roberts*, 12 Jur. 429; *Sutherland* v. *Cooke*, 1 Coll. 498; *Fielding* v. *Preston*, 1 De G. & J. 438; *Fairer* v. *Park*, 3 Ch. D. 309; *Tighe* v. *Featherstonhaugh*, 13 L. R. Ir. 401; *Bridges* v. *Bridges*, 8 Vin. Abr. Devise, 295 F, pl. 13.

(*o*) *Hill* v. *Hill*, 11 Jur. (N.S.) 806; *Langdale* v. *Esmonde*, Ir. R. 4 Eq. 576; *Clarke* v. *Butler*, 1 Mer. 304 (revocation of bequest of " residue " held not to apply to specific things bequeathed with it).

(*p*) *Bethune* v. *Kennedy*, 1 My. & C., 114; *Mills* v. *Brown*, 21 Bea. 1.

(*q*) As to this, see *post*, p. 1211.

(*r*) 14 Bea. 608.

(*s*) 20 Ch. D. 676.

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pecuniary legacies, and gave all his personal estate, except money and securities for money, to A absolutely, and gave and devised all the residue of his estate, both real and personal, to his executors upon certain trusts: Lindley, L.J., said that the pecuniary legacies were to be paid primarily out of the money and securities for money, being the residue of the personal estate, and if that was insufficient they would come out of the personal estate generally, namely, that bequeathed to A (*t*).

In *Atkinson* v. *Jones* (*u*), a testator gave a moiety of his residue to each of his two daughters, followed, in the events which happened, by an absolute power of appointment over one half of each moiety, and cross-limitations of the other half between the two daughters; the result was that an infinitely small part of one half of each moiety could not be appointed, but it was held by Wood, V.-C., that this might be disregarded, and that the whole residue was well appointed by the daughters.

Two gifts of residue in same testamentary instrument.

Where a testator, after bequeathing legacies, gives the remainder of his personal property to A, and then appoints B his residuary legatee, the bequest to B does not revoke the bequest to A (*x*), and if the gift to A fails, B takes the benefit. It seems to have been formerly supposed that in such a case any legacies which might lapse would go to B and not to A. Thus in *Re Jessop* (*x*), where the gift of residue was to S, and S and O were appointed residuary legatees, it was held that S and O were entitled to lapsed legacies. And in *Davis* v. *Bennet* (*x*), where the testator gave the residue to A and B, and appointed C residuary legatee, it was suggested by Romilly, M.R., that the second gift might operate on lapsed legacies (*y*). But in *Johns* v. *Wilson* (*z*), where a testator gave all the rest of his estate and effects "not hereinbefore otherwise disposed of, and all securities, bonds, coupons, cash in bank or elsewhere" to A and B, and at the end of his will appointed C S his residuary legatee, it was held that lapsed legacies passed to A and B. And in *Re Isaac* (*a*), where the testator gave the remainder of his property to A, and appointed B his residuary legatee, it was held by Buckley, J., that A took the benefit of

(*t*) It is clear that the funeral and testamentary expenses and debts were payable in like manner: *per* Lord Selborne, L.C., *Robertson* v. *Broadbent*, 8 A. C. 817.

(*u*) Johns. 246.

(*x*) 30 Bea. 226; *Kilvington* v. *Parker*, 21 W. R. 121; *Re Jessop*, 11 Ir. Ch. 424; *Bristow* v. *Masefield*, 31 W. R. 88; *Re Spencer*, 34 W. R. 527, stated *ante*, p. 550.

(*y*) A similar opinion was expressed by the same Judge in *Re Spencer*, *supra*

(*z*) [1900] 1 Ir. R. 342.

(*a*) [1905] 1 Ch. 427.

lapsed legacies : the learned Judge explained the decision in *Re Jessop* as based on the improbability of the testator having intended S and O to take no benefit under the will except in the case of the gift of S failing.

In *Ludlow* v. *Stevenson* (*b*), the testator gave to his daughter all his books, plate, linen, china, wearing apparel, watches, jewels, and money (except money at the banker's, or in the funds, or placed on security), and all other property not otherwise disposed of. And he directed that unless indispensably necessary his funded and other property should remain as it was until the decease of certain annuitants under the will, and on the decease of the annuitants he directed the whole of his personal estate to be invested in Government securities, and one-fourth part to be transferred to the Royal Society, and the other three parts to other specified public institutions. Lord Cranworth held that the daughter was not entitled to railway shares, foreign securities, or other investments forming part of the testator's personal estate, but that these descriptions of property passed under the bequest to the public institutions named in the will.

In *Barrett* v. *White* (*c*), a testatrix after bequeathing pecuniary legacies, etc., gave " whatever money remains " to A and B, and then after making various specific bequests concluded her will with the words : " If I have omitted naming anything, I leave it to X and Y." It was held by Kindersley, V.-C., that the gift to A and B passed the general personal estate, and that the gift to X and Y was not a true residuary clause.

Where there are two residuary bequests in the same will, it may appear that the latter was inserted, or allowed to remain, in error (*d*).

One residuary gift in will and another in codicil.

A residuary gift in a codicil seems, as a general rule, to operate as a revocation of a residuary gift contained in the will (*e*).

Unlimited gift of income may pass capital.

In accordance with the general principle of construction, referred to in another chapter, an unlimited gift of the income of a testator's residuary estate will pass the capital, unless a contrary intention appears (*f*).

(*b*) 1 De G. & J. 496.
(*c*) 24 L. J. Ch. 724; *Re Capel*, 59 Sol. J. 177.
(*d*) *Re Spencer*, 54 L. T. 597, stated *ante*, p. 550.
(*e*) *Hardwicke* v. *Douglas*, 7 Cl. & F. 795; *Re Stoodley*, [1916] 1 Ch. 242.
(*f*) *Coward* v. *Larkman*, 60 L. T. 1, and other cases cited *post*, p. 1154.

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General residuary bequest.

II.—Operation of a General Residuary Bequest.—A general residuary bequest is a gift of all the personal property (*g*) of the testator not otherwise disposed of by the will. The testator may begin by making bequests to A, B, and C, and then give the residue to D, or he may say : " I give to D all my personal estate, except my gold watch, which I give to A, and my leasehold house which I give to B, and a legacy of £100 which I give to C " (*h*). So if a testator gives legacies, etc., and then says : " I appoint D my residuary legatee," this operates as a bequest of the residue to D (*i*). A residuary bequest may also be implied from more ambiguous expressions : thus, an appointment of A and B as executors may operate as a gift of the residue to them beneficially, if an intention to that effect appears from the will (*k*).

Gift of " small remainder."

In *Att.-Gen.* v. *Johnstone* (*l*), it was held that a gift which was in terms a general residuary bequest did not take effect in that way. But the case is very exceptional.

Residuary bequest includes after-acquired property.

The presumption is that if a testator professes to dispose of all his property in general terms, he does not mean to die intestate as to any part of it : consequently a residuary bequest, even under the old law, would, in the absence of words showing a contrary intention, pass not only the personal estate which the testator had at the time of making his will, but what he aferwards acquired and died possessed of (*m*). A residuary bequest has the same effect under the present law (*n*). And if a testator makes a future or contingent specific bequest in such a way as not to entitle the legatee to the intermediate income of and accretions to the property, they pass under the residuary bequest (*o*).

Interim income of residue.

A residuary bequest which is deferred or contingent in its terms, carries the income which accrues before it vests in

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(*g*) Including, of course, real estate constructively converted into personalty, but not money constructively converted into realty. Arrears of rent of real estate and an apportioned part of the current quarter's rent up to the testator's death, are also personalty (Williams, Ex. 11th ed., pp. 630 *seq.*, Apportionment Act, 1870) and therefore pass under a residuary bequest (*Constable* v. *Constable*, 11 Ch. D. 681) unless specifically bequeathed, *post*, p. 1045. See Chap. XXV., *ante*, p. 918.

(*h*) See *per* Jessel, M.R., in *Blight* v. *Hartnoll*, 23 Ch. D. at p. 222.

(*i*) *Doe* d. *Roberts* v. *Roberts*, 7 M. & Wels. 382; *Re Methuen and Blore's Contract*, 16 Ch. D. 696, and cases there cited. See *ante*, p. 975.

(*k*) *Harrison* v. *Harrison*, 2 H. & M. 237; *Fuge* v. *Fuge*, 27 L. R. Ir. 59, *ante*, p. 697.

(*l*) Amb. 577, stated *post*, p. 1009.

(*m*) *Bland* v. *Lamb*, 2 Jac. & W. 399, *post*, p. 1011, n. (*u*).

(*n*) Wills Act, s. 24.

(*o*) *Wyndham* v. *Wyndham*, 3 Bro. C. C. 58; *Shawe* v. *Cunliffe*, 4 Bro. C. C. 144; *Guthrie* v. *Walrond*, 22 Ch. D. 573; *Re Judkin's Trusts*, 25 Ch. D. 743. For the rules as to future and contingent bequests carrying intermediate income, see *post*, p. 1077, and section 175 of the Law of Property Act, 1925.

possession (*p*). And it makes no difference that the personalty is to be laid out in realty (*q*). So if the interim income is directed to be accumulated, and no disposition is made of the accumulations during the period allowed by law, they go with the residue (*r*).

General bequest of leaseholds.

Before 1925, if a testator gave all his real estate and all his chattels real upon the same contingent trusts, the interim rents of the real estate went to the heir at law, and those of the chattels real went to the person in whom the property eventually vested (*s*).

Lapsed legacies.

In addition to carrying everything not in terms disposed of, a general residuary gift of personal estate carries all personal property which the testator has attempted to dispose of, but which, in the event, turns out to be not well disposed of. A presumption arises for the residuary legatee against every one except the particular legatee; for a testator is supposed to give his personalty away from the former only for the sake of the latter (*t*). It has been said, that, to prevent a bequest of the residue from having this sweeping effect, very special words are required (*u*), and accordingly a residuary bequest of property "not specifically given," following various specific and general legacies, will include lapsed specific legacies (*x*).

Property excepted from general bequest.

On the same principle, a gift of all a testator's personal estate, except certain specific sums of stock and money, followed by a bequest of those particulars, was held, in *Evans* v. *Jones* (*y*), to include some of the specific legacies which had failed. And

(*p*) *Green* v. *Ekins*, 2 Atk. 473; *Trevanion* v. *Vivian*, 2 Ves. sen. 430; *Re Drakeley's Estate*, 19 Bea. 395; *Re Sanderson's Trust*, 3 K. & J. 497; *Re Lindo*, 59 L. T. 462. The income is accumulated in the meantime until it is stopped by the law; thenceforth it goes to the next-of-kin: *Bective* v. *Hodgson*, 10 H. L. C. 656; *Talbot* v. *Jevers*, L. R. 20 Eq. 255; *Wade-Gery* v. *Handley*, 1 Ch. D. 653, 3 *ib.* 374; *Re Taylor*, [1901] 2 Ch. 134, not following *Re Love* (*Green* v. *Tribe*), 47 L. J. Ch. 783. As to the rights of the tenant for life and remainderman where the residue is settled, see *Re Mellor*, [1922] 1 Ch. 312.

(*q*) *Bective* v. *Hodgson*, 10 H. L. C. 656.

(*r*) *Re Travis*, [1900] 2 Ch. 541.

(*s*) *Hodgson* v. *Bective*, 1 H. & M. 376. See now section 175 of the Law of Property Act, 1925.

(*t*) *Per* Sir W. Grant, *Cambridge* v. *Rous*, 8 Ves. at p. 25. See also *Leake* v. *Robinson*, 2 Mer. at p. 393; *Reynolds* v. *Kortright*, 18 Bea. at p. 487. Where a testator gives his residuary personal estate in trust for a tenant for life and remainderman, questions sometimes arise from the fact that the residue varies from time to time: see *Re Drakeley's Estate*, 19 Bea. 395; *Bevan* v. *Waterhouse*, 3 Ch. D. 752. The rule in *Allhusen* v. *Whittell* (L. R. 4 Eq. 295), also has to be borne in mind: *post*, p. 1194.

(*u*) *Per* Lord Eldon, *Bland* v. *Lamb*, 2 J. & W. 406; *post*, p. 1011 n. (*u*). See also *Cunningham* v. *Murray*, 1 De G. & S. 366, rev. on app. 12 Jur. 547.

(*x*) *Roberts* v. *Cooke*, 16 Ves. 451. See also *Clowes* v. *Clowes*, 9 Sim. 403; *Re Spooner's Trust*, 2 Sim. (N.S.) 129 (lapsed appointed share).

(*y*) 2 Coll. 516. See also *Torrens* v. *Millington*, 26 W. R. 753; *Wingfield* v. *Newton*, 2 Coll. 520, n; *Blight* v. *Hartnoll*, 23 Ch. D. 218 (stated *post*), and *Re Powell*, 83 L. T. 24.

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in *James* v. *Irving* (*z*), where the bequest was of "everything real and personal, etc., except the S shares, which were not to be sold until after the death of A," Lord Langdale, M.R., held, that the exception of the shares was only for the purpose of postponing the sale, and that they passed by the bequest. So, in *Markham* v. *Ivatt* (*a*), a testatrix bequeathed certain leaseholds to A for life, and directed that after her decease they should form the residue of her leasehold estates thereinafter bequeathed. She then bequeathed all the residue of her leaseholds whatsoever and wheresoever upon certain trusts: it was held that other leaseholds, not comprised in the bequest to A, passed by the residuary bequest. The question in such a case is whether the property is excepted in order to take it away under all circumstances and for all purposes from the persons to whom the residue is given (*b*), or whether it is excepted merely for the purpose of giving it to some one else; in the latter case, if the specific gift fails, the property passes to the residuary legatee (*c*).

Where a testator bequeathed all his property not included in his marriage settlement, this bequest was held to include a moiety of the settled funds, which under the ultimate trust eventually became his absolute property (*d*).

Effect of disclaimer

It is clear, on principle, that if a legatee disclaims a bequest it falls into residue: the effect of disclaimer is that the bequest does not take effect (*e*).

Erroneous recital.

An erroneous statement or recital in a will that certain property of the testator has been settled or disposed of by him, will not exclude it from the residuary bequest (*f*).

"Due course of administration."

In *Scott* v. *Moore* (*g*), a testator gave a fund upon certain trusts for E. B. and her children, and in the event of her dying without leaving a child, he directed that the fund should be considered as part of his personal estate, and be disposed of in a due course of administration, and he gave his residue to E. B.: it was contended, that on the death of E. B. without leaving a child, the fund was to be disposed of according to the Statute

(*z*) 10 Bea. 276. See also *Dobson* v. *Banks*, 32 Bea. 259; *Read* v. *Hodgens*, 7 Ir. Eq. Rep. 17; *Sheffield* v. *Lord Orrery*, 3 Atk. at p. 286; *Thompson* v. *Whitelock*, 4 De G. & J. 490; *Re Jupp*, 87 L. T. 739.

(*a*) 20 Bea. 579.

(*b*) Instances of this kind are referred to, *supra*.

(*c*) *Per* Wood, V.-C., in *Bernard* v. *Minshull*, Johns. at 299.

(*d*) *Re Green* (*Walsh* v. *Green*), 31 L. R. Ir. 338. Compare the cases on reversions, etc., *ante*, p. 931.

(*e*) *Ante*, p. 530.

(*f*) *Re Bagot*, [1893] 3 Ch. 348, overruling *Circuitt* v. *Perry*, 23 Bea. 275: *Harris* v. *Harris*, Ir. R. 3 Eq. 610; *Hawks* v. *Longridge*, 29 L. T. 449; *Clibborn* v. *Clibborn*, 9 Ir. Jur. 381, as far as *contra*.

(*g*) 14 Sim. 35. The V.-C. thought that *Masters* v. *Hooper*, 4 Bro. C. C. 207, was wrongly decided.

of Distribution, because, otherwise, the will would be senseless (*h*); however, Shadwell, V.-C., held that it fell into residue, and belonged to E. B.'s estate.

III.—Limited Residuary Bequest.—If the words of the will show that the testator intended the residuary bequest to have a limited effect, the presumption in favour of the residuary legatee will, of course, be effectually rebutted (*i*); the difficulty in these, as in most other cases, being not in discovering the principle but in applying it to particular wills.

What will suffice to exclude any portion of the personalty from a residuary bequest.

In *Davers* v. *Dewes* (*k*), a testator gave part of his plate to A, and declared that he intended to dispose of the residue thereof, and of the goods and furniture in C house, by a codicil; he then bequeathed the residue of his personal estate whatsoever not before disposed of, or reserved to be disposed of by his codicil, to A. He made two codicils without disposing of the reserved articles; but Lord King held that, being expressly reserved to be disposed of by a codicil, those articles could not pass by the devise of the residuum by the will.

Davers v. *Dewes.*

Again, in *Att.-Gen.* v. *Johnstone* (*l*), where, after giving legacies to a considerable amount, the testator gave to a hospital £100, "that is, if there remains enough of my personal estate to satisfy it; but if not, or in case there remains but little, then the £100 to the hospital shall not be paid; and the small remainder of my personal estate shall be left to my executor," in trust for charity schools; "so as it is likewise my will that if my personal estate shall sufficiently reach towards satisfying all the legacies by me bequeathed and above mentioned, that my said executor shall also dispose of the remainder in favour of" the charity schools. Lord Camden held that legacies to a large amount which had lapsed did not pass by the residuary bequest. "I look upon the bequest to be specific, contingent, and conditional; that is, 'In case my estate turns out to pay all my other legacies (which it has not), and there should be a little more, then I give that little.'"

Att.-Gen. v. *Johnstone.*

Green v. *Pertwee* (*m*) was decided on the same principle.

(*h*) In *Jennings* v. *Gallimore*, 3 Ves. 146, the wording was different, but the argument was similar, and it prevailed. As to the meaning of the words "in due course of administration," see also *Briggs* v. *Upton*, L. R. 7 Ch. 376.

(*i*) In such a case there is no true residuary gift, *per* Jessel, M.R.; *Blight* v. *Hartnoll*, 23 Ch. D. 222.

(*k*) 3 P. W. 40. The case of *Simmons* v. *Rudall*, 1 Sim. (N.S.) 115, stated *ante*, p. 611, n. (*f*), illustrates the same principle.

(*l*) Ambler, 577. As to this case, see *ante*, p. 1006; and as to the word "small," see *Page* v. *Young*, L. R. 19 Eq. 501, stated, *post*, p. 1012.

(*m*) 5 Ha. 249.

And in *Wainman* v. *Field* (*n*), a testator bequeathed to trustees all his personal estate (except such parts as were particularly disposed of, " and also except such leasehold estates as he should be entitled to at his decease; which leasehold estates he declared it to be his intention to exonerate from the payment of his debts and legacies ") upon trust to pay debts, funeral expenses, and legacies; " and in case there should be any residue of his said personal estate (except as aforesaid) beyond what should be sufficient for the payment of his said debts and legacies," he gave the same to A. The will then contained a devise of the testator's freehold estates, and a bequest of his leaseholds which was void for remoteness: and the question being whether the leaseholds passed by the residuary bequest, Sir W. P. Wood, V.-C., held that they did not.

In *Blight* v. *Hartnoll* (*o*), a testatrix gave to A all her personal property, except a leasehold wharf, which she bequeathed upon trusts which failed for remoteness: it was held by Fry, J., and by the Court of Appeal, that the wharf passed by the residuary bequest to A.

The rule in all these cases, as already stated (*p*), is that if the testator excepts a particular part of his property from a general bequest for all purposes, and does not dispose of it by the will, there is an intestacy as regards it. In *Re Fraser* (*q*), a testator bequeathed all his personal estate, except chattels real, upon certain trusts, and bequeathed his chattels real to his brother; the brother predeceased him; after his brother's death the testator made a codicil by which he confirmed his will, and in which he referred to his brother's death, but did not revoke the bequest of the leaseholds to him: it was held that, reading the will and codicil together, it could not be taken that the testator had excepted chattels real from the general bequest merely for the purpose of giving them to his brother, but that they were excepted for all purposes, and that they consequently did not pass under the general bequest (*r*).

In *Walsh* v. *Green* (*s*), the testator confirmed a personalty settlement and bequeathed all his property not included in the settlement; this was held to pass a reversion reverting to the testator under the settlement.

(*n*) Kay, 507. See also *Russell* v. *Clowes*, 2 Coll. 648. But see *Blight* v. *Hartnoll*, 23 Ch. D. 218, 223, where Jessel, M.R., intimated that he did not agree with the construction placed by Wood, V.-C., on the will in *Wainman* v. *Field*.

(*o*) 23 Ch. D. 218.

(*p*) *Ante*, p. 1007.

(*q*) [1904] 1 Ch. 726.

(*r*) Compare *Re Sinclair*, [1903] W. N. 113; *Re Taylor*, [1909] W. N. 59.

(*s*) 31 L. R. Ir. 338.

Construction of "residue," "remainder," etc.

IV.—Particular Residuary Bequest.—When a testator, after disposing of part of his personal property, makes a gift of the "residue," or "remainder," or "what remains," etc., the question may arise whether he refers to his general personal estate, or to the undisposed-of portion of a certain property or fund which he had just before made applicable to specific and partial purposes. There is no rule of construction on this point. In *Crooke* v. *De Vandes* (*t*), the words "what remains to go to my grandson" at the end of a clause dealing with certain cash, stock, and securities, were held to be a bequest of the general residue. Another case of this nature is *Boys* v. *Morgan* (*u*). On the other hand, in *Ommanney* v. *Butcher* (*x*), the testator, after making various specific dispositions of parts of his property, and directing his books and furniture, etc., to be sold, gave some small legacies, and concluded his will thus: "In case there is any money remaining, I should wish it to be given in private charity:" it was held that this referred to the money arising from the sale of the books, etc. And in *Say* v. *Creed* (*y*), "residue" was held to pass only the proceeds of sale of real estate. So in *Wilde* v. *Holtzmeyer* (*z*), where the will was inconsistent and inaccurate, the words "all I am possessed of" were construed to refer only to a particular fund of bank annuities; in *Wilson* v. *Wilson* (*a*), the word "remainder" following a gift of furniture and linen was held to refer only to furniture and linen, and not to a general residuary gift; in *Holford* v. *Wood* (*b*), the words "personal estate" received a restricted construction; in *Att.-Gen.* v. *Goulding* (*c*), the words "what is

(*t*) 9 Ves. 197, 11 Ves. 330.

(*u*) 3 Myl. & Cr. 661. See also *Newman* v. *Newman* (*No.* 1), 26 Bea. 218, where "surplus money" was held to mean the residue of two sums of stock: *ante*, p. 989. In *Bland* v. *Lamb*, the testator began his will by expressing his intention of disposing of his "small property," and proceeded to enumerate investments amounting to over £60,000, and to dispose of them; he also made various specific bequests, and concluded: "Anything I have forgot I leave at the disposal of Mrs. B." By a codicil he directed that if he had forgotten anything, he wished it "thrown into the lump for the benefit of the legatees." Mrs. B. died a few hours before the testator, having by her will left him over £20,000. The main question was whether the testator intended to make a residuary gift, or whether the gift was in the nature of a specific bequest of the actual items that formed the personal estate of the testator at the time he made his will and codicil, or whether it was confined to such personal estate as the testator referred to in his will. Leach, V.-C., decided that the gift was a true residuary bequest (5 Madd. 412). Lord Eldon inclined to the same view (2 Jac. & W. 399), but the case was compromised before judgment was given. Compare *Scott* v. *Moore*, 14 Sim. 35, stated *ante*, p. 1008.

(*x*) T. & R. 260.

(*y*) 5 Hare, 580.

(*z*) 5 Ves. 811.

(*a*) 11 Jur. 793.

(*b*) 4 Ves. 76.

(*c*) 2 B. C. C. 428.

left" were held not to carry the general residue; and a gift of "such money, stocks, funds, or other securities not hereafter specifically devised as I may die possessed of" has been held by the Court of Probate not to constitute a gift of residue (*d*).

Where in a will divided into paragraphs, each dealing with particular items, one paragraph directed debts and funeral expenses to be paid out of specified funds, "the remainder to be equally divided to my children," it was held by Malins, V.-C., that, as a general rule, where a will disposes of a variety of property, and winds up with a gift of the remainder or residue, it is a gift of the general residue, but that here the form of the will showed that the testator meant to give only the remainder of the particular funds with which he was dealing in that paragraph (*e*).

In *Gibson* v. *Hale* (*f*), a testator gave the whole of his personal property to his son, and if his son should die under twenty-one, "then it is my wish to bequeath the sum of £500 each to my brothers and sister, and any further surplus to be equally divided between these"; the son died under twenty-one; one of the testator's two brothers predeceased him, and it was held by Shadwell, V.-C., that "further surplus" meant what remained after the subtraction of the three sums of £500, and that there was consequently an intestacy as to the £500 bequeathed to the deceased brother. No reasons are given for the decision.

Operation of particular residuary bequest.

It is clear that a general bequest of chattels of a particular species carries all the chattels of that kind which the testator is possessed of at the time of his death; as, mortgages, stocks or furniture (*g*). Thus, a gift of "any small sum remaining in the bank after my funeral expenses have been paid," was held to carry the testatrix's balance at her banker's at the time of her death, although, in the meantime, it had increased from £480 to £1,370, and notwithstanding the word "small" (*h*). In the fluctuating character of the property comprised in it, such a bequest resembles a general bequest of all the personal estate, but the analogy of such bequests to general residuary gifts is imperfect, since the universality, upon which the sweeping character of

(*d*) *In b. Aston*, 6 P. D. 203 (in this case the testator went on to refer to the stocks, etc., as a "portion of my capital"; it does not appear whether this influenced the construction; see *ante*, p. 999); *Legge* v. *Asgill* T. & R. 265, n.; *Wrench* v. *Jutting*, 3 Bea. 521; *Jull* v. *Jacobs*, 3 Ch. D. 703; some of them are stated *ante*, p. 983.

(*e*) *Jull* v. *Jacobs*, 3 Ch. D. 703 See also *Clifford* v. *Arundell*, 1 D. F. & J. 307, where in a deed "other moneys in the hands of the trustees" was upon the context confined to income exclusive of principal moneys.

(*f*) 17 Sim. 129.

(*g*) See *Bothamley* v. *Sherson*, L. R. 20 Eq. 304, and the other cases referred to in Chap. XXX, as to specific bequests of chattels, etc.

(*h*) *Page* v. *Young*, L. R. 19 Eq. 501. See also *Re Douglas*, [1905] 1 Ch. 279 ("any little money left").

the latter mainly depends, is wanting in the former; and it would be unsafe to attribute a corresponding character to a gift of a particular residue.

Gift of particular residue, when specific.

For example, if a testator bequeaths a particular piece of furniture to A, and the "rest" or "residue" of his furniture to B, or his consols to A, and the "rest" or "residue" of his government stocks to B, and A dies before the testator, the property bequeathed to A will not go to B, but fall into the general residue (*i*).

Effect of gift of residue of a sum treated as definite.

Again, when a testator is dealing with a particular fund, he sometimes uses the word "residue" to refer to a definite portion of the fund, and does not mean true residue. Thus, if a testator dealing with £300 consols, says: "I give £100 to A, £100 to B, and the residue to C," it is just as if he had said: "I give £100 to A, £100 to B, and £100 to C," and consequently if A predeceases the testator the £100 does not go to C," but is either undisposed of or passes by the general residuary bequest (*k*). The point in all such cases is to see whether the testator treated the particular fund as being a definite ascertained amount, or an indefinite amount. The leading instance of this type of cases is *Page* v. *Leapingwell* (*l*), where the testator devised some real property upon trust to sell, but not for less than £10,000, and to pay several sums amounting to £7,800 out of it, and then provided, "and after payment of the legacies above mentioned, I hereby order and direct my trustees to lay out and invest all the overplus monies arising from the sale of the said messuage, lands, and tenements in the public funds, and do, and shall pay, and apply the interest and dividends arising from the same to A and B." Sir W. Grant, M.R., said that the question was whether the testator did not assume that he had £10,000 to distribute, and conceived the true intention of the testator to have been that these persons should take as specific legatees. The property produced less than £7,000, and consequently the legacies abated, and two void charitable legacies sank in the general residue and did not pass to A and B (*m*). This is a very strong case, because it assumes that the testator expected the property to fetch exactly £10,000, and not more, although he

Page v. *Leapingwell.*

(*i*) *Patching* v. *Barnett*, 28 W. R. 886, where the difference in their operation between the particular residuary gift and the general residuary gift was emphasised by the fact that they were in almost identical words. See *Springett* v. *Jenings*, L. R. 6 Ch. 333; *per* Rigby, L.J., in *Re Mason*, [1901] 1 Ch. at p. 627.

(*k*) See *Easum* v. *Appleford*, 5 My. & Cr., at p. 61; *Lakin* v. *Lakin*, 13 W. R. 704; *Fee* v. *McManus*, 15 L. R. Ir. 31. Compare *Hill* v. *Hill*, 11 Jur. (N.S.) 806, and other cases on specific bequests, *post*, p. 1029.

(*l*) 18 Ves. 463.

(*m*) Had the fund been given under a power of appointment, these void charitable legacies would have gone to prevent abatement: *Eales* v. *Drake*, 1 Ch. D. 217.

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said not less than £10,000, and if it had fetched £20,000 all the legacies would, on Sir W. Grant's construction, have been doubled (*n*). Such cases very frequently arise when a testator is distributing a fund over which he has a power of appointment (*o*).

True residue.

But the testator may by the context show that he uses the word "residue" to denote a residue in the full sense of the word, and then it is held to include all of the particular kind which in the event is not otherwise disposed of (*p*). Thus, in *De Trafford* v. *Tempest* (*q*), where a testator gave to his widow certain chattels which, at his decease, might be in or about his house at T, and bequeathed to his son all his household and other furniture, plate, and chattels, not thereinbefore otherwise disposed of, which at his decease might be in or about his said house; and afterwards bequeathed his residuary estate to other persons: the widow died before the testator, and it was held by Sir J. Romilly, M.R., that the chattels, whereof the bequest to the widow had lapsed, fell into the particular residue, and passed to the son.

So in *Cook* v. *Oakley* (*r*), where the testator (a sailor) bequeathed certain specified articles to his mother, who died before him, it was held that a bequest of "all things not before bequeathed," which on the construction of the will was confined to things on board ship, included the articles comprised in the lapsed gift.

In these cases the expression "not otherwise bequeathed," or "not otherwise disposed of," is taken to mean "not effectually bequeathed or disposed of" (*s*).

Bequest of residue "subject to" prior bequests.

On the same principle, if a testator makes various bequests out of a fund, and bequeaths the residue of the fund to A, "subject to" or "after payment of," or "after deducting" the previous bequests, any of these bequests which fail pass under the gift of the residue to A (*t*).

(*n*) Cases in which *Page* v. *Leapingwell* has been applied are, *Wright* v. *Weston*, 26 Bea. 429; *Haslewood* v. *Green*, 28 Bea. 1; *Elwes* v. *Causton*, 30 Bea. 554; *Walpole* v. *Apthorp*, L. R. 4 Eq. 37; *Re Margetts*, [1906] W. N. 44.

(*o*) See Chap. XXIII, and *Re Jeaffreson's Trust*, L. R. 2 Eq. 276; *Falkner* v. *Butler*, Amb. 514; *Petre* v. *Petre*, 14 Bea. 197; *Miller* v. *Huddlestone*, L. R. 6 Eq. 65; *Re Cruddas*, [1900] 1 Ch. 730.

(*p*) As to the payment of estate duty out of a particular residue where the general residue is insufficient, see *De Quetteville* v. *De Quetteville*, 93 L. T. 579.

(*q*) 21 Bea. 564; and see *Hunt* v. *Berkley*, Mos. 47; *Champney* v. *Davy*, 11 Ch. D. 949; *M'Kay* v. *M'Kay*, [1900] 1 Ir. R. 213, *post*, p. 1016.

(*r*) 1 P. W. 302, *ante*, p. 982.

(*s*) *Per* Rigby, L.J., in *Re Mason*, [1901] 1 Ch., at p. 626.

(*t*) *Malcolm* v. *Taylor*, 2 R. & Myl. 416; *Aston* v. *Wood*, 43 L. J. Ch. 715; *Re Larking*, 37 Ch. D. 310. See also *Carter* v. *Taggart*, 16 Sim. 423,

Uncertain amount.

Again, if a testator is disposing of a fund of unascertained amount, and gives a fixed sum of money out of it to A and the residue to B, or if he is disposing of a fund of ascertained amount, and gives an unascertained part of it to A and the residue to B, in either of these cases the general rule is that the gift to B is a true residue: in other words, B takes the fund subject to what is given to A (*u*). Consequently, if the gift to A fails, B takes the whole fund, and if the fund is not sufficient to satisfy the gift to A, then B gets nothing (*x*).

Legacies out of invested fund.

Hence it would seem that whenever there is a gift of money legacies out of a specified sum of stock, followed by a gift of the "residue," this will be a true residue, the amount of it being necessarily uncertain until the stock is actually sold (*y*).

Charge of debts.

So if the amount of the fund is rendered uncertain by the fact that it is subject to a charge of debts (*z*).

Other examples of particular residues.

If a testator gives "all the residue and remainder" of a certain fund, after payment thereout of his debts and funeral and testamentary expenses, this, it is hardly necessary to say, is a true residue (*a*). And if a testator erroneously states that he has disposed of part of a fund, and gives the residue to A, A takes the whole (*b*).

Powers of appointment.

"I do not think there is any sound distinction between cases of lapsed and cases of invalid disposition, whether the disposition be under a power of appointment, special or general, or in exercise of ownership; nor do I think that the construction of a particular residuary gift is affected by the presence or absence of a general residuary gift" (*c*).

Charitable gifts.

The effect of the gift of the residue of a particular fund often becomes important with reference to charitable gifts, where a fund (or the income of it) is given primarily for some object

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and *Re Harries' Trusts*, Johns. 199, which are authorities for the proposition stated in the text; *Champney* v. *Davy*, 11 Ch. D. 949.

(*u*) In *Corballis* v. *Corballis*, 9 L. R. Ir. 309, the testator, after reciting that he was entitled to a policy for £2,000, bequeathed various sums, "parts thereof" to different people, and "the residue" to A; considerable sums by way of bonus were added to the policy: it was held that A took the net residue of the whole proceeds of the policy.

(*x*) *Champney* v. *Davy*, 11 Ch. D. 949; *Re Tunno*, 45 Ch. D. 66. See *Mitchell* v. *McIsaac*, 18 Jur. 672. Most of the authorities are cases arising on appointments under powers: see *Falkner* v. *Butler*, Amb. 514; *Petre* v. *Petre*, 14 Bea. 197; *Harley* v. *Moon*, 1 Dr. and Sm. 623; and the other cases cited *ante*, p. 1014. In *Champney* v. *Davy*, Hall, V.-C., said that there was no distinction between appointments and bequests.

(*y*) See *Vivian* v. *Mortlock*, 21 Bea. 252; *De Lisle* v. *Hodges*, L. R. 17 Eq. 440 (appointment by deed, where stress was laid on repeated references to the investments).

(*z*) *Baker* v. *Farmer*, L. R. 3 Ch. 537. See the cases on appointments under powers, *ante*, p. 1014, n. (*o*).

(*a*) *Higgins* v. *Dawson*, [1902] A. C. 1, reversing the decision of the C. A. in *Re Grainger*, [1900] 2 Ch. 756, *post*, p. 1033.

(*b*) *Langan* v. *Bergin*, [1896] 1 Ir R. 331.

(*c*) *Per* Hall, V.-C., in *Champney* v. *Davy*, 11 Ch. D. at p. 958.

which is illegal, or is void for uncertainty, and the residue is given for some charitable purpose: the question then arises whether the charity takes the whole, or whether the gift fails altogether (*d*).

Gift to a class: revocation as to one member.

In *M'Kay* v. *M'Kay* (*e*) the testator disposed of a particular class of property, partly by way of specific bequests, and partly by a residuary bequest, in favour of a class; by a codicil he revoked the gift of the residue as to a particular member of the class; another member of the class, and all the specific legatees, died in the testator's lifetime: it was held (first) that the specific bequests fell into the particular residue, and (secondly) that the share of that residue which failed by lapse, and the share the gift of which was revoked, both went to the other members of the class.

Failure of a share of residue.

V.—Partial Failure of General Residuary Bequest.—Where a testator makes a residuary bequest of all his personal estate, the general rule is that if a gift of a share of the residue fails, it does not accrue to the other shares, but goes to the next-of-kin. Thus, where a residue is bequeathed to four persons as tenants in common, and one of them predeceases the testator, there is an intestacy as to his fourth share (*f*). So if the bequest to one of them is revoked by a codicil (*g*).

In a simple case of this kind, the rule carries out the intention of the testator, for where there is a gift of one half of the residue to A, and of the other half to B, the fact that A dies in the testator's lifetime, or that the gift to A is revoked, cannot, without more, be taken to alter the testator's intention that B is only to have half the residue. It is not an implied gift of A's half to B (*h*). But several of the older cases treated the rule as an artificial one, with the application of which the intention of the testator had little or nothing to do. Thus, in *Skrymsher* v. *Northcote* (*i*), the rule was applied to a pecuniary legacy, which the testator directed to be paid out of a particular share of residue, instead of allowing it to be paid out of the general

Skrymsher v. *Northcote.*

(*d*) *Ante*, p. 217.

(*e*) [1900] 1 Ir. R. 213. Compare *Re Dunster*, [1909] 1 Ch. 103, *post*, p. 1020.

(*f*) *Bagwell* v. *Dry*, 1 P. W. 700; *Page* v. *Page*, 2 P. W. 489. The testator's debts and funeral and testamentary expenses, etc., are payable out of the residue generally, and not primarily out of the lapsed share: *Trethewy* v. *Helyar*, 4 Ch. D. 53, overruling dictum in *Gowan* v. *Broughton*, L. R. 19 Eq. 77.

(*g*) *Cresswell* v. *Cheslyn*, 2 Ed. 123; *Sykes* v. *Sykes*, L. R. 3 Ch. 301, *post*, p. 1019.

(*h*) See *per* Plumer, M.R., in *Skrymsher* v. *Northcote*, 1 Sw., at p. 571.

(*i*) 1 Sw. 566. See also *Lloyd* v. *Lloyd*, 4 Bea. 231; *Green* v. *Pertwee*, 5 Hare, 249; *Gibson* v. *Hale*, 17 Sim. 129; *Simmons* v. *Rudall*, 1 Sim. (N.S.) 115.

personal estate. In that case the testator gave his residuary estate equally between his two daughters; but in the event (which happened) of either of them dying and leaving no children, then out of the moiety of the one so dying he gave £500 to H, and "the remainder of that moiety" to the other sister. The testator revoked the gift of £500 without making any fresh disposition of it, and Sir T. Plumer, M.R., held that it went to the next-of-kin. "Residue," he said, "means all of which no effectual disposition is made by the will, other than the residuary clause, but when the disposition of the residue itself fails, to the extent to which it fails, the will is inoperative." It is obvious that the intention of the testator was that the surviving daughter should take the whole residue subject to the payment of the £500 to H, and that by revoking the gift of the £500 he meant to make the gift of the residue absolute. In *Humble* v. *Shore* (*k*), the testator's intention was equally obvious. In that case there was a gift of one-sixth of the residue to S W; by a codicil the testatrix directed her trustees to hold the same one-sixth upon trust for S W for life, and after her death upon trust as to a sum of £2,000 for S W's son, and that the remainder of the one-sixth should sink into the residue and be disposed of accordingly. Wigram, V.-C., said that he was unable to find any gift to the residuary legatees in these words, and held that subject to the express provisions of the codicil, the one-sixth share was undisposed of. This decision was upheld by Lord Cottenham, and was for some time followed in all cases which were indistinguishable from it (*l*). On the other hand, in *Evans* v. *Field* (*m*), a testatrix directed her executors to stand possessed of her residuary personal estate after satisfying legacies, and also of so much of her personal estate the trusts whereof should fail, upon trust for division in elevenths, one share being separately given to each one of eleven named persons. One of these died before the testatrix, and it was held by Shadwell, V.-C., that the whole residue went to the other ten. He said the gift of the residue was in the first place among the eleven; but then the testatrix directed that so much of her personal estate, the trusts whereof should fail, should be disposed of according to the same trusts; and one share having lapsed, he thought the necessary effect of that direction was to make the residue divisible into ten parts instead of eleven (*n*).

Humble v. *Shore.*

(*k*) 7 Hare, 247; 1 H. & M. 550, n.

(*l*) *Lightfoot* v. *Burstall* 1 H. & M. 546; *Re Barker's Estate*, 15 Ch. D. 635; *Re Savage's Trusts*, 50 L. J. Ch. 131; *Re Bevis's Trusts*, 20 W. R. 359; *Homfray* v. *Darby*, referred to in 15 Ch. D. at p. 637.

(*m*) 8 L. J. Ch. 264.

(*n*) Compare *Atkinson* v. *Jones*, Johns. 246, *ante*, p. 1004.

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In *Crawshaw* v. *Crawshaw* (*o*), Jessel, M.R., pointed out the fallacy underlying the decision in *Humble* v. *Shore*, and declined to follow it on the ground that the words in the case before him were not precisely similar. Bacon, V.-C. (*p*), Kay, J. (*q*), and Chitty, J. (*r*), also took advantage of minute differences to avoid the necessity of following *Humble* v. *Shore*, and finally in *Re Palmer* (*s*), the Court of Appeal overruled it, and held that a direction in a codicil that upon the death of a person to whom a share of the residue had been given by the will, that share shall fall into and form part of the testator's residuary estate, operated as a gift of it to the other residuary legatees. The same rule applies where the will itself contains an accruer clause in the shape of a direction that, in the event of the trusts concerning any particular share failing, it shall fall into residue (*t*).

Re Palmer.

Subdivision of residue.

In *Re Wand* (*u*), a testator gave his residue as to 3-7th parts in trust for a class of persons (class A) as tenants in common, and as to 4-7th parts in trust for another class of persons (class B) as tenants in common; he provided that if a certain event should happen in his lifetime (as it did), the share of X, a member of class A, "shall lapse and form part of my residuary personal estate." Class A comprised three members (including X), and class B four members. It was held that 1-7th part was divisible in the proportion of 3-7ths to class A, and 4-7ths to class B, so that the two members of class A took 17-49ths between them, and the four members of class B took 32-49ths.

Skrymsher v. *Northcote* no longer law in cases where there is a gift over.

The downfall of *Humble* v. *Shore* seems necessarily to involve that of *Skrymsher* v. *Northcote* (*x*), and accordingly in *Re Parker* (*y*), where a testator gave one-third of his residuary estate upon trust as to £2,250 for A if he should attain twenty-one, as to £2,250 for B if he should attain twenty-one, and as to the remaining part of the one-third share upon trust for such of A, B, C, and D as should attain twenty-one, with a gift over of the said one-third share in default, it was held by Farwell, J., that A having died under twenty-one, his £2,250 went to B, C, and D, all of whom attained twenty-one. Farwell, J., remarked that in *Skrymsher* v. *Northcote* there was also a gift over, and that although that case might have been well decided "as the law then stood, I am nevertheless bound by the modern course of authority to attach great weight to the gift over, which shows

(*o*) 14 Ch. D. 817.
(*p*) In *Re Rhoades*, 29 Ch. D. 142.
(*q*) In *Re Ballance*, 42 Ch. D. 62.
(*r*) In *Re Owen*, 36 Sol. J. 539; *Holgate* v. *Jennings*, 37 Sol. J. 303.
(*s*) [1893] 3 Ch. 369.
(*t*) *Re Allan*, [1903] 1 Ch. 276.
(*u*) [1907] 1 Ch. 391.
(*x*) *Ante*, p. 1016.
(*y*) [1901] 1 Ch. 408.

that the testator intended that no part of the principal gift should fail unless all the children [A, B, C, and D] died without attaining vested interests."

What words will carry share to other legatees.

In some cases the Court has seized upon other expressions showing an intention that in the event of the trusts concerning a particular share of residue failing, it shall go to the other residuary legatees (*z*). Thus in *Vaudrey* v. *Howard* (*a*) a testator gave 6-7ths of his residuary estate in equal shares to six persons, but in a certain event, in order to secure to all an equal participation in the property, A and B (two of the six) were not to receive any share : it was held that upon the happening of the event the 6-7ths became divisible among the other four. So in *Re Radcliffe* (*b*) there was a gift of residue to A, B, C, and D as tenants in common, " and if only one of them shall survive me, then to such one absolutely " ; D died in the testatrix's lifetime, and by a codicil referring to the death of D she revoked " whatever interest " D had in her will : it was held that A, B, and C took the whole.

Legacy given in lieu of share of residue.

If a testator gives his residue to A, B, and C in shares as tenants in common, and by a codicil revokes the gift to A and in lieu thereof bequeaths a legacy, this legacy is payable out of the whole residuary estate, and not out of the share originally bequeathed to A (*c*), unless there is an express direction to that effect (*d*).

But although the mere revocation in a codicil of a share of residue does not give the share to the other residuary legatees, slight indications are sufficient to show that this is the intention (*e*). In *Re Powell* (*f*) the testator in effect bequeathed one moiety of his residuary estate to himself. It was held that he died intestate as to this.

In *Re Whitrod* (*g*) the testator gave nine-tenths of his residue in aliquot tenths or twentieth parts to certain persons. He also gave an annuity and two legacies " to non-con. ministers of Diss in equal shares." The annuity, one of the legacies and some

(*z*) See *Evans* v. *Field*, 8 L. J. Ch. (N.S.) 264.

(*a*) 2 W. R. 32. Compare *Harris* v. *Davis*, 1 Coll. 416, where there was a complete gift of residue in shares, followed by a gift of part one of the shares to another person (apparently an afterthought); this latter gift was revoked by codicil, and it was held that the will was to be read as if the gift had never been contained in it.

(*b*) 51 W. R. 409.

(*c*) *Sykes* v. *Sykes*, L. R. 3 Ch. 301.

(*d*) *Re Wood's Will*, 29 Bea. 236. In *Walsh* v. *Walsh*, Ir. R. 4 Eq. 396, the testator revoked the gift of one share of the residue and gave pecuniary legacies to the legatees of the other shares : it was held that these legacies were payable out of the share the gift of which was revoked.

(*e*) *Re Whiting*, [1913] 2 Ch. 1; *Re Wilkins* [1920], 2 Ch. 63. See *Re Donaldson*, [1915] 1 Ir. R. 63.

(*f*) [1918] 1 Ch. 407; *Re Currie's Settlement*, [1910] 1 Ch. 329.

(*g*) [1926] Ch. 118.

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of the undivided shares lapsed. Held, that the ministers took only one-tenth of the residue less the legacy which had not lapsed, and that there was an intestacy as to the undivided shares of those persons who had predeceased the testator.

Residuary bequest to class : revocation as to one share.

Where the residue is given to a class, and by a codicil the testator revokes the gift so far as concerns a particular member of the class, this enures for the benefit of the other members (*h*).

Doctrine of *Lassence* v. *Tierney*.

It is hardly necessary to say that the doctrine of *Lassence* v. *Tierney* (*i*) applies to gifts of residue (*j*).

VI.—Powers of Appointment.—The cases in which a general bequest operates as an exercise of a power of appointment, have been already discussed (*k*).

(*h*) *Re Dunster*, [1909] 1 Ch. 103 (not following *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129). Compare *M'Kay* v. *M'Kay* [1900] 1 Ir. R. 213, *ante*, p. 1016. See also *Re Donaldson*, [1915] 1 Ir. R. 63.

(*i*) 1 Mac. & G. 551.

(*j*) *Hancock* v. *Watson*, [1902] A. C. 14.

(*k*) As to general powers, *ante*, pp. 780 *seq.*; as to special powers, pp. 860 *seq.*

CHAPTER XXX.

LEGACIES.

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I.—Definition.—A legacy is a gift of personalty by will or other testamentary instrument (*a*). In *Windus* v. *Windus* (*b*) Lord Cranworth said: "In the first place, the words 'legacy' and 'residuary legatee' *prima facie* have reference to personal estate only. There is, indeed, no magic in the words themselves, and if they are so used by a testator they may no doubt be construed as referring to real estate. Any man may use his own nomenclature if he only expresses what he means. I have not, however, been able to discover any case which satisfies my mind that independently of context you can understand 'legacy' or 'legatee' or 'residuary legatee' as applying to anything but personal estate." Definition of legacy—a gift of personalty;

(*a*) It is hardly necessary to point out that this definition involves an intention of bounty on the part of the testator, although actual words of gift are not necessary: *Re Barrance*, [1910] 2 Ch. 419, not following *Re Campsill*, 128 L. T. J. 548. In *Wilson* v. *Morley* (5 Ch. D. 776) a testator directed his debts to be paid, "including a debt of £300 owing from me to my daughter"; in fact he owed his daughter £150 only, and it was held that the direction did not amount to a legacy of £150 in addition to the debt. But a direction to pay a supposed debt may amount to a legacy by implication: *Re Rowe*, [1898] 1 Ch. 153, and other cases cited *ante*, p. 600. So the "forgiveness" of a debt which is extinguished may be an implied legacy: see *post*, p. 1085.

(*b*) 6 De G. M. & G. 549; *Re Gibbs*, [1907] 1 Ch. 465; *Ellard* v. *Phelan*, [1914] 1 Ir. R. 76.

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Therefore "legacy" would *prima facie* not include a bequest of the proceeds of land devised upon trust for sale (*c*). But if real estate is directed to be sold, and a sum of money is bequeathed out of the proceeds, that is a demonstrative legacy (*d*).

but may extend to realty.

Moreover, as explained in another chapter (*e*), there are many cases in which by force of the context words properly descriptive of personalty only are held to pass real estate, and in that place instances have been given of the words "legacy" and "residuary legatee" being used in reference to real estate (*f*).

A gift of residue is not a legacy, apart from other indications of the testator's intention.

A gift of residue is not a legacy in the ordinary sense of the term (*g*), though the person taking it is called a residuary legatee, and a direction by the testator as to his legacies *prima facie* applies only to legacies in the strict sense of the term, and not to shares of residue (*h*). But from other parts of the will the testator's intention may be gathered that he used the word "legatee" to include the residuary legatee, and "legacy" to include the residuary gift. Thus in *Ward* v. *Grey* (*i*) the testator's fourth codicil was as follows: "Whereas the last legacy of Nelson to his country has been so ungratefully ignored, and whereas I have done my humble best to carry it out in my lifetime, I hereby desire that every legatee under this my last will and codicils shall also contribute £1 per cent. out of their legacies to Mrs. Horatia Ward and her children, nor will they grudge it, if they read the life and deeds of Nelson, without whom they would never have the other ninety-nine parts to enjoy"; it was held by Romilly, M.R., that the residuary legatee was bound to contribute.

Annuities are legacies,

Gifts of annuities are legacies, and annuitants are legatees. If, therefore, a testator gives legacies and annuities, and then makes further provision as to his "legacies" or "legatees," the provision will *prima facie* apply to the annuities as well as to the legacies (*k*). But not if the testator himself distinguished

(*c*) *White* v. *Lake*, L. R. 6 Eq. 188.
(*d*) *Hodges* v. *Grant*, L. R. 4 Eq. 140, *post*, p. 1032, n. (*c*).
(*e*) Chap. XXVII.
(*f*) The word "bequest" may similarly be held to mean "devise," as in *Jackson* v. *Hosie*, 27 L. R. Ir. 450, although in that case the testator had used "devise" in its technical sense.
(*g*) A gift of residue is a legacy within the Real Property Limitation Act, 1874: *Re Davis*, [1891] 3 Ch. 119. If the testator creates a secret trust of a specific part of his residue, that is equivalent to a specific bequest: *Re Maddock*, [1902] 2 Ch. 220.
(*h*) *Re Aiken*, [1898] 1 Ir. R. 335; *Re Elcom*, [1894] 1 Ch. 303 ("pecuniary legacies").
(*i*) 26 Bea. 485. *Re Smith*, [1916], 1 Ch. 523 (provision against lapse; the appeal, [1916] 2 Ch. 427, did not relate to this point).
(*k*) *Sibly* v. *Perry*, 7 Ves. 522; *Bromley* v. *Wright*, 7 Ha. 334; *Heath* v. *Weston*, 3 D. M. & G. 601.

between them (*l*). For instance, when the testator used the words "legacies and annuities" and "legatees and annuitants" in various clauses in his will, and then directs certain moneys to be divided amongst the legatees in proportion to their several legacies, annuitants will not take under the latter bequest (*m*). unless the testator makes a distinction.

The rule that before 1926 legacies were payable primarily out of the general personal estate unless a contrary intention appeared from the will, applies also to annuities (*n*). And the same general principles as to the construction of words showing such a contrary intention, and as to contribution by several distinct properties, or out of a mixed fund, which apply to legacies apply to annuities (*o*). But in some respects annuities are subject to special rules (*p*). Annuities primarily payable out of personal estate before 1926.

In the case of wills coming into operation after 1925 legacies are primarily payable out of the general real and personal estate by virtue of Part II of the First Schedule to the Administration of Estates Act, 1925. See Chapter LIV. New law.

In *Creed* v. *Creed* (*q*) the annuities bequeathed by the will were held to have priority over the legacies as regards the real estate on the ground that the annuities were specific gifts out of the real estate, and that the legacies were merely charged on it. The same result would have followed if the annuities had been in the nature of demonstrative legacies payable primarily out of the real estate (*r*). Annuities charged on or payable out of land.

Another example of a demonstrative annuity is where it is made payable out of the income of a particular fund of stock or other personalty (*s*) Demonstrative annuity.

Under section 58 of the County Courts Act, 1888 (*t*), the amount or part of the amount of a distributive share under an intestacy or of any legacy under a will not exceeding £50 can be recovered in the County Court, and questions have arisen as to the meaning of the word "legacy" within this section and the corresponding section of the County Court Act, 1846 (*u*). It seems that a legacy given in trust is Meaning of legacy in the County Courts Act.

(*l*) *Gaskin* v. *Rogers*, L. R. 2 Eq. 284.

(*m*) *Nannock* v. *Horton*, 7 Ves. 391.

(*n*) *Boughton* v. *Boughton*, 1 H. L. C. 406; see *post*, p. 1975.

(*o*) *Ib.* As to the manner in which the values of the contributory properties are ascertained, see *Fielding* v. *Preston*, 1 De G. & J. 438; *Ley* v. *Ley*, L. R. 6 Eq. 174 (deed).

(*p*) *Falkner* v. *Grace*, 9 Ha. 280; *Howard* v. *Dryland*, 38 L. T. 24. *See post*, p. 1100.

(*q*) 11 Cl. & F. 491.

(*r*) *Re Briggs*, 45 L. T. 249.

(*s*) *Attwater* v. *Attwater*, 18 Bea. 330; *Smith* v. *Pybus*, 9 Ves. 566; *Vickers* v. *Pound*, 6 H. L. C. 885; *Creed* v. *Creed*, 11 Cl. & F. 491, cited *post*, p. 1031.

(*t*) 51 & 52 Vict. c. 43.

(*u*) 9 & 10 Vict. c. 95, s. 1, extended by 13 & 14 Vict. c. 61, s. 1.

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not within the section (*x*). And an annuity or periodical sum to be paid by a devisee is apparently not a legacy for this purpose (*y*). And a legacy settled on A for life, with remainder to B, does not, it would seem, even after A's death, fall within the section (*z*).

Technical words not required.

It is hardly necessary to say that no particular form of words is required for the gift of a legacy (*a*). A bequest of money in the form of a legacy may take effect as an appointment under a power, and *vice versa* (*b*).

Three kinds of legacies.

II.—General, Specific and Demonstrative Legacies.—Legacies are of three kinds: (1) general or pecuniary (*c*), (2) specific, (3) demonstrative. It is not always easy to determine to which of these classes a given legacy belongs, but the distinction between them is of great importance, because of the different properties of the different kinds of legacies.

General legacy.

A general legacy is a gift of something to be furnished out of the testator's general personal estate; it need not form part of the testator's property at the time of his death. Thus, if I bequeath to A "the sum of £100" or "£100 2½ per cent. Consols," or "a gold watch," these are general legacies.

Specific legacy.

A specific legacy is a gift of a particular part of the testator's personal property belonging to him at his death. Usually the subject matter of a specific legacy belongs to the testator at the date of the will, as where he gives to A "my gold watch" or "the Consols now standing in my name." But the subject matter of a specific legacy may fluctuate between the date of the will and the death: as where a testator gives to A "all the furniture which shall be in my house at the time of my death" (*d*) or "my stock in the L. W. Company" (*e*).

(*x*) *Pears* v. *Wilson*, 6 Ex. 833; *Hewston* v. *Phillips*, 11 Ex. 699.

(*y*) *Longbottom* v. *Longbottom*, 8 Ex. 203. As to a conditional legacy, see *Fuller* v. *Mackay*, 2 E. & B. 573.

(*z*) *Beard* v. *Hine*, 10 W. R. 45.

(*a*) As to bequests by implication, see *Smith* v. *Fitzgerald*, 3 V. & B. 2, cited *ante*, p. 605. In *Medlicot* v. *Bowes*, 1 Ves. sen. 207, a testator by codicil desired his sister out of the money given her by his will to leave £500 at her death to A., who survived the testator, but died before the sister; it was held that this amounted to a legacy from the testator, and that it consequently did not lapse.

(*b*) See Chap. XXIII.

(*c*) The words "general" and "pecuniary" as applied to legacies are not infrequently used as synonymous terms. As will be seen later, all general legacies are not pecuniary, and all pecuniary legacies are not general, but as most general legacies are pecuniary and most pecuniary legacies are general, it is not often necessary to distinguish between them.

(*d*) *Re Ovey*, 51 L. J. Ch. 665: *post*, p. 1028.

(*e*) *Re Slater*, [1907] 1 Ch. 665. The doubt expressed in *Parrott* v. *Worsfold*, 1 J. & W. 594, is unfounded. Bequests of stock are discussed more in detail in a later part of this chapter. In *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391, the Court of Appeal seem to have felt some

Demonstrative legacy.

A demonstrative legacy is a legacy which is in its nature general, but which is directed to be satisfied out of a specified fund or part of the testator's property : thus, " I give A £100 out of the Consols now standing in my name " is demonstrative (*f*).

These rough definitions (*g*) will now be expanded and exemplified by a consideration of some of the leading cases on the subject.

First, as to general legacies.

Pecuniary legacy.

The commonest form of a general legacy is a gift of a sum of money : " I give A 100*l*." This is sometimes called a pecuniary legacy.

General legacies payable out of general estate.

The essence of a general legacy is that it is payable out of the general estate. Consequently, a pecuniary legacy payable exclusively out of real estate is not a general legacy (*h*). But a general legacy may be charged on the testator's real estate, and then the question arises whether the real estate or the personal estate is primarily liable (*k*).

General legacy operating as appointment.

The mere fact that a testator bequeaths a sum of money or stock to a person does not conclusively show that it is a general legacy. It may appear from the context or the surrounding circumstances that the legacy was meant to take effect, either primarily or absolutely, out of property over which the testator had a power of appointment (*l*).

Legacy payable out of share of residue.

A legacy may be made payable out of a part of the general personal estate : as where a testator by codicil gives a legacy payable out of a share of residue the gift of which has lapsed or been revoked (*m*). But without such a direction a legacy given in lieu of a share of residue is payable out of the whole personal estate (*n*).

Personal liability of devisee.

Where land is devised subject to or charged with a legacy, this does not, as a general rule, impose any personal liability on

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difficulty in deciding whether a bequest of " all my leasehold messuages, etc.," was specific or general : the reporter had no such difficulty (see headnote). As to what passes by a specific bequest of " rights in connection with a play," see *Re Bancroft*, 43 T. L. R. 591.

(*f*) See *Tempest* v. *Tempest*, 7 D. M. & G. 470, where Lord Cranworth said that a pecuniary legacy out of the pure personalty in priority to other legacies was " in the nature of a demonstrative legacy."

(*g*) Other definitions are given by Pearson, J., in *Re Young*, 52 L. T. 754.

(*h*) *Hancox* v. *Abbey*, 11 Ves. 179; *Dickin* v. *Edwards*, 4 Ha. 273, and other cases cited p. 2007 *seq.*

(*k*) See *post*, p. 1992 *seq.*

(*l*) *Walker* v. *Laxton*, 1 Y. & J. 557; *Re Young*, 52 L. T. 754; *Disney* v. *Crosse*, L. R. 2 Eq. 592; *Brennan* v. *Brennan*, Ir. R. 2 Eq. 321; *Davies* v. *Fowler*, L. R. 16 Eq. 308, and other cases cited in Chap. XXIII.

(*m*) *Re Wood's Will*, 29 Bea. 236.

(*n*) *Sykes* v. *Sykes*, L. R. 3 Ch. 301. Since 1925 the legacy is payable out of the real estate or personal. Part II of First Schedule to the Administration of Estates Act, 1925.

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the devisee, although, of course, if he sells the property before the legacy is paid, he can only sell subject to the charge (*o*). On the other hand, the testator may so express himself as to impose a personal liability on the devisee in the event of his accepting the devise (*p*).

General legacies of chattels, stock, etc.

It has already been mentioned that a gift of a particular chattel or other personal property, such as stock, may be a general legacy: as a gift of "a gold watch" or "£500 Consols" (*q*). In such a case, if the testator's estate at the time of his death does not include a chattel or sum of stock answering the description, the value must be made good out of the testator's personal estate (*r*), provided the value can be ascertained. If the value cannot be ascertained, it seems that the gift fails (*s*).

(*o*) *Jillard* v. *Edgar*, 3 De G. & S. 502, where the case of *Newman* v. *Kent*, 1 Mer. 240, is referred to.

(*p*) See *Messenger* v. *Andrews*, 4 Russ. 478, and other cases cited, *post*, p. 1435.

(*q*) A gift of "my gold watch" would be specific: Roper, 193.

(*r*) See *Macdonald* v. *Irvine*, 8 Ch. D. 101.

(*s*) As to stock, see *Re Gray*, 36 Ch. D. 205, *post*, p. 1043. It is submitted that a general legacy of a chattel to be furnished out of the testator's estate must be of a thing which is of such a nature that its approximate value can be ascertained. There is very little authority on this subject, but in *Purse* v. *Snaplin*, 1 Atk. p. 417, the following passage from Domat (Vol. II. 159, s. 21) is quoted in a footnote: "When a testator bequeaths a certain thing, which he specifies as being his own, the legacy will not have its effect, unless that thing be found extant in the succession. For example, if he had said, 'I bequeath to such a one my watch, or my diamond ring,' and that there were not found in the succession either diamond ring or watch, the legacy would be null. But if he had said, 'I bequeath a diamond ring, or a watch,' the legacy would be due, and would have its effect."

There does not appear to be any case in the books in which a legacy of (say) a diamond ring without specifying either the kind or value of the diamond ring has been held to be good, and it is submitted that such a gift would fail for uncertainty: see *Re Gray*, *supra*. Swinburne (13th edition, Part III., s. v. p. 246) says that a legacy of a horse or yoke of oxen is a good general legacy though the testator have neither horse nor ox of his own, and that it must be determined from the terms of the will whether the legatee or the executor is to choose it: he adds that the person who has the selection must not be unreasonable, "otherwise the legatory might make choice of the best horse, and the executor of the worst in the country, contrary to the meaning of the deceased." *Sed quære*, whether these refinements would now be regarded.

It is noticeable that Roper (4th ed., p. 193) in discussing when legacies of individual personal chattels are or are not specific, after giving illustrations of specific legacies of a horse or a brooch, says: "But if it be uncertain from the description whether any particular horse or brooch was intended, so that the bequest may be satisfied by delivery of something of the same species as that mentioned, the legacy will not be specific. Thus if A having many horses or brooches bequeath 'a brooch' or 'a horse' to B, in these and in such cases the legacies will not be specific but general." It is evident that if the legacy is to be general it is not necessary that A should have a brooch or a horse amongst his assets, but possibly Mr. Roper means to imply that having the brooches or horses makes a sufficiently definite class of horses or brooches to prevent the legacy failing on the ground of uncertainty, and that a mere gift of a brooch or a horse or a diamond ring would probably fail for uncertainty. It is difficult to state exactly what

Secondly, as to specific legacies.

Nature of a specific legacy.

In the earlier cases definitions of "specific legacy" have been given which in the light of more recent authorities are found to be incomplete or inaccurate (*t*). These definitions were criticised by Lord Cranworth in *Fielding* v. *Preston* (*u*), where he observed: "There have been attempts in various cases to determine the meaning of a specific legacy and what is the test whereby such legacies may be distinguished from general bequests. There are objections to most of the definitions, but I think we are quite safe in treating that as a specific bequest which the testator directs to be enjoyed in specie." But this is not the test: a testator may give his residuary personalty to be enjoyed in specie, but that does not make the bequest specific (*x*).

Sir G. Jessel's definition, *Bothamley* v. *Sherson*.

In 1875, in the case of *Bothamley* v. *Sherson* (*y*), Jessel, M.R., delivered a most valuable judgment, in which, after referring to Lord Cranworth's observations, he applied himself to determine what a specific bequest is in the following words: "In the first place, it is a part of the testator's property. A general bequest may or may not be a part of the testator's property. A man who gives £100 money or £100 stock may not have either the money or the stock, in which case the testator's executors must raise the money or buy the stock; or he may have money or stock sufficient to discharge the legacy, in which case the executor would probably discharge it out of the actual money or stock. But in the case of a general legacy it has no reference to the actual state of the testator's property, it being only supposed that the testator has sufficient property which on being realised will procure for the legatee that which is given to him, while in the case of a specific bequest it must be of a part of the testator's property itself. That is the first thing. In the next place it must be a part emphatically, as distinguished from the whole. It must be what has been sometimes called a severed or distinguished part. It must not be the whole, in the meaning of being the totality of the testator's property or the totality of the general residue of his property after having given legacies out of it. But if it satisfy both conditions, that it is a part of the testator's property itself and is a part as distinguished, as I said before, from the whole or from the whole of the residue,

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degree of particularity in the description is essential; it is assumed that a gift to a servant of a mourning suit, or to a friend of a mourning ring, would probably be sufficiently definite.

(*t*) *E.g.*, *Hinton* v. *Pinke* (1719), 1 P. W. 539, *per* Lord Chancellor Parker. *Purse* v. *Snaplin* (1738), 1 Atk. at p. 417, *per* Lord Hardwicke.

(*u*) 1 De G. & J. 438.

(*x*) See *post*, p. 1212, where the rule in *Howe* v. *Lord Dartmouth* is discussed.

(*y*) L. R., 20 Eq. 304.

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then it appears to me to satisfy everything that is required to treat it as a specific legacy."

Robertson v. *Broadbent.*

But even this definition proved to be capable of misapprehension, and the M.R. explained it in *Re Ovey* (*z*), a case in which the Court of Appeal overruled Fry, J., and the House of Lords approved the decision of the Court of Appeal (*a*). In that case the testator, after directing his executors to pay all his just debts and funeral and testamentary expenses, and giving pecuniary legacies to individuals and to charities, gave all his personal estate and effects of which he should die possessed and which should not consist of money or securities for money to A absolutely; and he gave and devised all the rest, residue and remainder of his estate, both real and personal, to his executors upon certain trusts, all the legacies to be free of legacy duty; the legacies for charitable purposes to be paid exclusively out of such part of his personal estate as might lawfully be appropriated to such purposes, and preferably to any other payment thereout. It was held that A's legacy was not specific. Lord Blackburn said the bequests to A and the executors together constituted one residuary bequest. Lord Fitzgerald thought that the will was to be read as a bequest to the executors of the testator's money and securities for money, and of all the residue of his personal estate to A. Lord Selborne in his speech defined a specific legacy as something "which a testator, identifying it by a sufficient description and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate" (*b*).

Definition in *Robertson* v. *Broadbent.*

This definition and that of Sir G. Jessel may be taken as authoritative, but they are not very easy to apply to the facts in some cases (*c*), and it must never be forgotten that it is unsafe to trust to decisions on the effects of gifts in certain words without carefully considering the context and any indications of the testator's intention on a perusal of the whole will. For this reason a minute consideration of the cases, which are

(*z*) 20 Ch. D. 676, better reported in 51 L. J. Ch. 665.

(*a*) Sub nom. *Robertson* v. *Broadbent*, 8 A. C. 813.

(*b*) See also *per* Kekewich, J., in *De Quetteville* v. *De Quetteville*, 92 L. T. at p. 762.

(*c*) A curious question arose in *Shepheard* v. *Beetham* (6 Ch. D. 597), where a testatrix bequeathed to a hospital all her household furniture and other things in her dwelling-house, and also all her ready money, money at the banker's, and money in the public stocks or funds of Great Britain, and also all other of her personal estate and effects which she could by law bequeath to such an institution, and she appointed executors, but made no further disposition of her property; it was held by Malins, V.-C., that the charitable bequest was specific. The decision seems erroneous. The decision of the same Judge in *Powell* v. *Riley*, L. R. 12 Eq. 175, is also bad law (*per* Jessel, M.R., in *Re Ovey*, 51 L. J. Ch. at p. 667).

very numerous, has not been inserted here. The reader who wishes to acquaint himself with the earlier cases on specific legacies may be referred to Mr. Cox's notes to *Hinton* v. *Pinke* (1 P. W. 539) and *Rider* v. *Wager* (2 P. W. 328), Mr. Raithby's note to *Brown* v. *Allen* (1 Vernon, 31), Mr. Sanders' note to *Purse* v. *Snaplin* (1 Atk. 414), and Mr. Fonblanque's note, Treat. Eq. 369 (*d*).

The Court leans against specific legacies.

But in construing wills the Court leans very strongly against specific legacies, so that in a case of doubt the more probable view is that the legacy is not specific (*f*).

Bequest may be general or specific according to the event.

In *Fielding* v. *Preston* (*g*) a testator gave all his real and personal property upon trust for his son for life, and after his death (in the events which happened) he gave his leaseholds to one daughter and all his funded property and other personal estate to another daughter : it was held that on the death of the son the gift of the leaseholds to the one daughter was specific, but that the gift of the funded property to the other was not.

Bequest of part of a specific fund is specific.

If a testator directs a specific chattel to be divided, part to go to A and part to B, the gifts are clearly specific, and similarly bequests of parts of a specific fund are specific (*h*). And where a testator devised his property in trust for sale, but not for less than £10,000, and to pay several sums amounting to £7,800 and the overplus moneys to A, and on a sale the produce was less than £7,000, Sir W. Grant, M.R., considered the true intention to have been that the different persons should take as specific legatees, and therefore must abate among themselves (*i*).

In another case the bequest was : " The pink coupons in the pigeon-hole are for £3,666; send those to Irving & Slade, of 1 Copthall Court, and he is to pay to Ellen Tomkins £2,500, the rest for Archdeacon Giles for Bess and Edie." The gift of £2,500 was held to be specific (*k*).

Bequests of stock.

Specific bequests of money or stock are considered in a later part of this chapter under those headings.

Accessories, etc.

The question what accessories pass by the bequest of a specific chattel, real or personal, is referred to *post*, p. 1038 and p. 1045.

Specific bequest may fluctuate.

It has already been pointed out that a bequest may be specific

(*d*) See *Apreece* v. *Apreece*, 1 V. & B. 364; *Gillaume* v. *Adderley*, 15 Ves. 384.

(*f*) *Kirby* v. *Potter*, 4 Ves. at p. 752; *Innes* v. *Johnson*, 4 Ves. 568; *Webster* v. *Hale*, 8 Ves. 413; *Ellis* v. *Walker*, Amb. 309; *Sayer* v. *Sayer*, 7 Ha. 377 (see 3 M. & G. 606); *Williams* v. *Hughes*, 24 Bea. 474; *Chaworth* v. *Beech*, 4 Ves. 555.

(*g*) 1 De G. & J. 438.

(*h*) *Nelson* v. *Carter*, 5 Sim. 530; *Ford* v. *Fleming*, 2 P. W. 469; *Oliver* v. *Oliver*, L. R., 11 Eq. 506; *Re Sayer*, 53 L. J. Ch. 832. As to appointments under powers, see p. 834 *seq.*

(*i*) *Page* v. *Leapingwell*, 18 Ves. 463, *ante*, p. 1013; *Boyd* v. *Boyd* (*Re Boyd*), [1928] N. Ir. 14.

(*k*) *Re Jeffery's Trusts*, L. R., 2 Eq. 68.

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although the property comprised in it is described in general terms, so that the subject-matter of the bequest may fluctuate between the date of the will and the death of the testator. Thus a bequest of "all my stock in trade of wines and spirituous liquors which I shall be possessed of at the time of my death" is specific (*l*). So a gift of property of a certain kind in a particular locality is specific (*m*). But a bequest of personal property is not made specific merely because it is followed by a partial enumeration of specified things included in it (*n*).

Where personalty is exonerated from debts and legacies.

Where a testator makes his real estate liable for debts, legacies, etc., in exoneration of his general personal estate, and gives all his personal estate to A, the result is practically the same as if the bequest to A were specific, and this appears to be the reason why in some of the cases such a bequest is treated as specific (*o*). These cases are considered in a subsequent chapter (*p*). That such a bequest is really general is shown by the test suggested by Lord Selborne in *Robertson* v. *Broadbent* (*q*), namely, that it is subject to the rule in *Howe* v. *Lord Dartmouth*.

Alternative legacies.

In *Mullins* v. *Smith* (*r*) a testator bequeathed specific legacies of Consols to various persons, and if he should not at his death be possessed of the stock he bequeathed to each legatee a money legacy of equivalent amount: Kindersley, V.-C., said that as the testator had stock to answer the bequests, the legacies were specific, but that if he had not had the stock they would have been general legacies.

Re White.

In *Re White* (*s*) the testator bequeathed ordinary shares in a private company to his son, but if any provision in the Articles of Association should prevent the specific bequest taking effect, then in lieu thereof he bequeathed to his son a legacy equal to the purchase money of so many of his (the testator's) ordinary shares as the son would be entitled to be paid under one of the Articles of Association. Held that this was not a specific legacy, but a gift of money to buy the shares.

(*l*) *Stewart* v. *Denton*, 4 Doug. 219, *post*, p. 1037.

(*m*) *Sayer* v. *Sayer*, 2 Vern. 688; *Nisbett* v. *Murray*, 5 Ves. 149; *Green* v. *Symonds*, 1 Bro. C. C. 129, n.; *Moore* v. *Moore*, *ib.* 127; *Gayre* v. *Gayre*, 2 Vern. 538, and other cases cited Roper, 243.

(*n*) *Fairer* v. *Park*, 3 Ch. D. 309. See *ante*, p. 1003.

(*o*) See *Tower* v. *Rous*, 18 Ves. 132; *Ouseley* v. *Anstruther*, 10 Bea. 453; *Jones* v. *Bruce*, 11 Sim. 221; *Gilbertson* v. *Gilbertson*, 34 Bea. 354; *Powell* v. *Riley*, L. R., 12 Eq. 175.

(*p*) *Post*, p. 2030 *seq.*

(*q*) 8 A. C. at p. 816. See also the comment of Jessel, M.R., on *Powell* v. *Riley*, in *Re Ovey*, 51 L. J. Ch. at p. 667.

(*r*) 1 Dr. & Sm. 204.

(*s*) [1913] 1 Ch. 231.

Specific legacy as a general legacy.

In *Re Compton* (*t*) the testator gave specific legacies "as a general and not as a specific legacy." It was held that these legacies must abate with the general legacies, that they must be taken as of their value at the expiration of a year from the testator's death, and that no income of the property given was payable to the legatee in the interval.

Thirdly, as to demonstrative legacies.

Demonstrative legacies.

Although it is usual to classify legacies into the three classes of general, specific and demonstrative, it must be remembered that a demonstrative legacy is from most points of view a general legacy, and that the more logical classification is to divide legacies into specific and general, and then to sub-divide general legacies into the two sub-classes of demonstrative and non-demonstrative. In many of the cases the only question is whether the legacy is specific or not; such cases are, for instance, those where the problem is to determine whether or no a legacy has been adeemed. The cases where it is necessary to determine whether a legacy is demonstrative or not depend on the question of priority and not of ademption (*u*). But nevertheless many of the cases above referred to in the discussion of specific legacies are also in fact decisions on the nature of demonstrative legacies, so that we cannot separate off two classes of decisions (1) on specific legacies, (2) on demonstrative legacies; and the reason for this is clear when we consider the nature of the three kinds of legacies, for the problem is not to distinguish the two classes, specific on the one hand and demonstrative and general on the other, but rather in the first place to determine whether the legacy is or is not specific, and if not specific then whether a particular fund or estate is pointed out as that which is to be primarily liable. But unless there is a particular fund there is generally no reason for supposing that a legacy is specific, consequently in fact most of the decisions on specific legacies determine that a certain legacy is specific or is demonstrative, although very often the word demonstrative is not used, and the point decided is that a certain legacy fell into the class of specific legacies or of general legacies as the case may be; the word "general" being used to include both the demonstrative and non-demonstrative sub-classes.

Definition of Page Wood, V.-C.

The cases on demonstrative legacies were considered by Lord Cottenham in *Creed* v. *Creed* (*x*) and by Sir W. Page

(*t*) [1914] 2 Ch. 119. Sargant, J., quotes Hawkins on Wills (1st ed. p. 300, 3rd ed. p. 349) on the difference between a specific and a general legacy.

(*u*) As to the abatement of demonstrative legacies, see *post*, p. 2017.

(*x*) 11 Cl. & F. 491.

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Wood V.-C., in *Paget* v. *Huish* (*y*). The Vice-Chancellor stated the law as follows: "The question on this special case is one which very frequently arises, whether certain annuities are given only out of particular property, or whether, though they be charged primarily on that, the personal estate of the testator is liable to make good any deficiency. There is also a further question whether the annuities are payable out of corpus or only out of income. As to the first point, the authorities may be ranged under three heads, the distinctions being perfectly clear, though there is often much difficulty in applying them to a particular will. The first class is where you have a simple gift of a legacy or annuity, with a mere charge upon real estate; and there the personal estate is not only not exonerated, but remains primarily liable; just as in the case of a charge of debts. Another class is where the legacy or annuity is a specific gift out of real estate, which is assumed to be sufficient to cover the amount. There the personal estate is in no way liable, and if the specific fund fails, the gift must fail with it (*z*). The third class is intermediate to these, where a legacy or annuity is, as it is termed, demonstrative, there being a clear general gift, but a particular fund pointed out as that which is to be primarily liable, on failure of which the general personal estate remains liable (*a*). . . . The point in all these cases is, to ascertain whether the testator has merely pointed out a particular fund which he desires to have applied in paying the legacy, or whether the legacy itself is given only as a portion of the specified fund" (*b*).

Other cases on demonstrative legacies are collected in the footnote (*c*).

Where a testator has property of his own, and also a power of appointment over a settled fund, and bequeaths legacies in

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(*y*) 1 H. & M. 663.

(*z*) *Patching* v. *Barnett*, 51 L. J. Ch. 74, was a case of this kind.

(*a*) *Lamphier* v. *Despard*, 2 Dr. & W. 59 (stated *post*, Chap. LIV), appears to have been a case of this kind, although Sugden, C., said it was not a question of demonstrative legacies. In *Dawson* v. *Reid*, 113 L. T. 52, the words "I prefer" were held to be imperative and to make a legacy demonstrative.

(*b*) As in *Re Sayer*, 53 L. J. Ch. 832. See also the remarks of Lord Hardwicke in *Ellis* v. *Walker*, Amb. 309, which do not seem quite accurate, on the question of construction; the bequest was not one of a doubtful or contingent debt.

(*c*) *Acton* v. *Acton*, 1 Mer. 178; *Fowler* v. *Willoughby*, 2 S. & St. 354; *Willox* v. *Rhodes*, 2 Russ. 452; *Bevan* v. *Att.-Gen.*, 4 Giff. 361; *Roberts* v. *Pocock*, 4 Ves. 150; *Smith* v. *Fitzgerald*, 3 V. & B. 2; *Mann* v. *Copland*, 2 Madd. 223; *Dean* v. *Test*, 9 Ves. 146; *Colvile* v. *Middleton*, 3 Bea. 570; *Sparrow* v. *Josselyn*, 16 Bea. 135 (a decision of doubtful accuracy); *Vickers* v. *Pound*, 6 H. L. C. 885; *Sellon* v. *Watts*, 9 W. R. 847; *Fream* v. *Dowling*, 20 Bea. 624; *Hodges* v. *Grant*, L. R., 4 Eq. 140; *Sidebotham* v. *Watson*, 11 Ha. 170; *Boyd* v. *Boyd* [1928] N. Ir. 14. As to *Barker* v. *Rayner*, 2 Russ. 122, and *Le Grice* v. *Finch*, 3 Mer. 50, see *post*, p. 1060.

general terms, the question may arise whether those bequests are general, specific or demonstrative. This question is discussed elsewhere (*d*).

Re Grainger.

The distinction between specific and demonstrative legacies was discussed in *Re Grainger* (*e*); the testator bequeathed a number of pecuniary legacies, and then gave "all the residue and remainder" of a certain fund, after payment of his debts and funeral and testamentary expenses, to A; there was no general residuary gift. It was held by the Court of Appeal that the words "all the residue and remainder" in the gift to A meant that the pecuniary legacies were to be paid out of the fund before A took anything; it followed that the legacies were specific. The decision of the Court of Appeal on the first point was, however, reversed by the House of Lords (*f*), and the second point therefore did not arise.

Priority of specific legacies in administration.

Property given by way of specific bequest is assets for the payment of debts, but after 1925, property specifically devised or bequeathed is liable to contribute only after all the other assets of the testator (with the exception of property over which the testator has a general power of appointment which he exercises by his will) are exhausted (*g*).

General legacies not liable to ademption,

General legacies, on the other hand, are not liable to ademption (except in the cases mentioned before), but are liable for the payment of debts before property specifically devised or bequeathed (*h*).

nor are demonstrative legacies.

Demonstrative legacies are in their nature general and are not liable to ademption if the specific fund on which they are charged is adeemed or non-existent (*k*), and on the other hand, being payable out of a specific fund, they are not liable for debts until after the general legacies have been exhausted (*l*). If, however, the fund out of which a demonstrative legacy is primarily payable fails, so that it becomes a general legacy, it is liable to abatement with the other general legacies (*m*).

III.—Legacies of Money, Chattels, Stocks and Shares, Debts, Interests in Lands, etc.—The most common subjects of bequests

(*d*) *Post*, p. 1976.
(*e*) [1900] 2 Ch. 756.
(*f*) *Higgins* v. *Dawson*, [1902] A. C. 1.
(*g*) See Part II of First Schedule to the Administration of Estates Act, 1925.
(*h*) Strictly it is incorrect to say that debts are to be paid out of legacies. Debts are paid out of the testator's assets; but custom to some extent justifies this inaccurate language.
(*k*) *Savile* v. *Blacket*, 1 P. W. 777; *Cartwright* v. *Cartwright*, 2 Br. C. C. 114; *Colville* v. *Middleton*, 3 Bea. 570, and the cases cited above, n. (*c*).
(*l*) See Chap. LIV.
(*m*) *Mullins* v. *Smith*, 1 Dr. & S. 204.

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are (1) money, (2) chattels, (3) stocks and shares, (4) debts and choses in action, and (5) leaseholds and interests in land. Some observations may conveniently be made here on bequests of these natures, especially with reference to the question whether a bequest is specific or general. Two other subjects which may usefully be noticed are bequests of (6) property in a particular place and (7) property described with reference to its source.

The question what property passes by a specific bequest in any particular case is treated of elsewhere (*n*).

Bequests of money.

(1) *Legacies of Money.*—A bequest of money is ordinarily a general legacy, and the fact that the money is given that a particular chattel may be purchased by the legatee, or to buy an annuity, or a sum of stock, makes no difference. The legacy is a general and not a specific legacy (*o*).

When specific.

But a legacy of money may be specific, as a bequest of the money in a certain chest (*p*), or in such a hand (*q*), or secured by certain documents (*r*). And a legacy of money out of specific money—for instance, a legacy of money out of the dividends of specific stock (*s*), or out of a mortgage or other debt (*t*)—is specific. So a gift of money payable out of land may be specific; thus, if a testator directs land to be sold and £400 to be paid out of the proceeds to A, this is a specific bequest (*x*). But if there is first a bequest of a legacy, and then a particular fund or property is pointed out as that which is to be primarily liable for its payment, the legacy is demonstrative (*y*). These cases must of course be distinguished from those in which there

(*n*) Chap. XXXV.

(*o*) *Apreece* v. *Apreece*, 1 V. & B. 364; *Gibbons* v. *Hills*, 1 Dick. 324; *Edwards* v. *Hall*, 11 Ha. at p. 23; *Hinton* v. *Pinke*, 1 P. W. 539; *Hume* v. *Edwards*, 3 Atk. 693.

(*p*) *Lawson* v. *Stitch*, 1 Atk. 507.

(*q*) *Hinton* v. *Pinke*, 1 P. W. 539; *Crockat* v. *Crockat*, 2 P. W. 164.

(*r*) *Gillaume* v. *Adderley*, 15 Ves. 384.

(*s*) *Drinkwater* v. *Falconer*, 2 Ves. sen. 623.

(*t*) *Ford* v. *Fleming*, 2 P. W. 469; *Nelson* v. *Carter*, 5 Sim. 530; *Badrick* v. *Stevens*, 3 Br. C. C. 431; *Re Grainger*, [1900] 2 Ch. 756, stated *ante*, p. 1033; *per* Lord Davey, s. c. *Higgins* v. *Dawson*, [1902] A. C. p. 12. As to bequests of debts, see *post*, p. 1044. In *Ellis* v. *Walker*, Amb. 309, the law does not seem to be accurately stated.

(*x*) *Spurway* v. *Glynn*, 9 Ves. 483; *Rickets* v. *Ladley*, 3 Russ. 418; *Newbold* v. *Roadknight*, 1 R. & My. 677; *Dickin* v. *Edwards*, 4 Ha. 273; *Fream* v. *Dowling*, 20 Bea. 624; *Patching* v. *Barnett*, 51 L. J. Ch. 74. See also *Page* v. *Leapingwell*, 18 Ves. 463, *ante*, p. 1029. As to *Long* v. *Short*, 1 P. W. 403, and *Davenhill* v. *Fletcher*, Amb. 244, see *Creed* v. *Creed*, 11 Cl. & F. 491.

(*y*) *Gillaume* v. *Adderley*, 15 Ves. 384; *Mann* v. *Copland*, 2 Madd. 223; *Fowler* v. *Willoughby*, 2 S. & St. 354; *Colvile* v. *Middleton*, 3 Bea. 570. See *Poole* v. *Heron*, 42 L. J. Ch. 348; *Willox* v. *Rhodes*, 2 Russ. 452; *Paget* v. *Huish*, 1 H. & M. 663. For an instance of specific legacies given by a will being made demonstrative by a codicil, see *Williams* v. *Hughes*, 24 Bea. 474.

is a mere charge of legacies on real estate : there, before 1926, the personal estate was primarily liable (*z*).

Money described as invested in a certain way.

Where a testator bequeaths a sum of money which is described as "invested" in a particular stock or the like, such as a bequest of "£5,000 in the Funds," or "£5,000 invested in Consols," the question arises : does the testator mean the legatee to have £5,000 in any case, or has he a particular investment in his mind, so that if he realises it and invests the money differently the legacy is adeemed? In most cases the answer probably is that at the time the testator makes his will he wishes the legatee to have the particular investment, and does not contemplate the possibility of his afterwards realising it, or of the investment being changed by Act of Parliament or other paramount authority; if this possibility were in his mind, he would probably alter the form of the bequest so as to prevent its failing (*a*). "If I were allowed to guess what was the intention of the testator in this case and in other cases where specific bequests have been held to be adeemed, I should say that the doctrine of ademption very often defeats that intention" (*b*). It is probably this feeling which accounts for some conflicting decisions on the class of gifts above referred to. Thus in *Mytton* v. *Mytton* (*c*) the testatrix gave "the sum of £3,000 invested in Indian security" : at the time of her will she had £3,000 invested in Indian securities, which were paid off before her death : Malins, V.-C., held that the gift was demonstrative, and therefore did not fail, adding : "I am perfectly satisfied that this decision will be in accordance with her real intention." The learned Judge was no doubt influenced by the hardship which would have been caused by a contrary decision, for in the case of a similar gift, which came before him a few months later, and in which the question of ademption did not arise, he held that the gift was specific (*d*). In *Re Pratt* (*e*) a gift of "800 pounds invested in 2½ Consols" was held by North, J., to be specific.

Mytton v. *Mytton.*

Division of fund.

Where a testator is entitled to a fund which he estimates at a certain amount, and bequeaths particular sums out of it to different people, the total of which is equivalent to the stated amount of the fund, the question arises whether the legatees take merely the sums given them, or whether the testator

(*z*) *Davies* v. *Ashford*, 15 Sim. 42, and cases cited *post*, p. 2006.
(*a*) As in *Mullins* v. *Smith*, 1 Dr. & Sm. 204.
(*b*) *Per* Jessel, M.R., 7 Ch. D. p. 341.
(*c*) L. R. 19 Eq. 30.
(*d*) *Page* v. *Young*, L. R. 19 Eq. 501.
(*e*) [1894] 1 Ch. 491. See also *Kermode* v. *Macdonald*, L. R. 3 Ch. 584; *Re Sayer*, 53 L. J. Ch. 832; *Brennan* v. *Brennan*, Ir. R 2 Eq. 321. Other cases are referred to *post*, p. 1039.

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intended to divide the fund, whatever it might be, among the legatees in proportion to the sums bequeathed to them. The notion appears formerly to have prevailed that such an intention can be implied from the fact that the sums bequeathed exhaust the estimated amount of the fund, but this doctrine has been exploded. If in such a case the fund realises more than the estimated amount, the surplus is undisposed of (*g*).

Power of appointment.

Appointments under powers are subject to special rules (*h*).

Legacy of profit costs.

When an executor is empowered by a testator to act as solicitor to the estate and to charge for work so done, this is a legacy to him of his profit costs (*k*).

Foreign currency.

As to legacies in foreign currency, see *Cockerell* v. *Barber* (*l*) and *Saunders* v. *Drake* (*m*).

Gift of unascertained sum.

A legacy may consist of a sum not ascertained at the date of the will. Thus a direction to purchase an annuity of a certain amount for A B is a legacy to A B of the amount of the purchase-money required (*n*). Sometimes a sum of money is given by reference to the income it will produce when invested. In such case the sum must be ascertained on the basis of an investment in Consols (*o*).

So a testator may give a legacy equal to a sum of fluctuating amount: such as the amount of a servant's yearly wages (*p*); or a legacy of a certain amount subject to deduction: as where a testator bequeaths to A B a legacy of £5,000, and directs that if he makes advances to A B, or if A B is indebted to him at the time of his death, the amount of the advances or indebtedness shall be deducted from the legacy (*q*).

Statement by testator as to amount paid to legatee.

Sometimes a testator states or recites in his will that he has paid or advanced a certain sum, and directs that it is to be deducted from a legacy bequeathed by him; in such a case evidence is not admissible to show that the sum paid or advanced was in fact of greater or less amount than that stated in the will (*r*). But a statement or entry made by the testator

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(*g*) *Smith* v. *Fitzgerald*, 3 V. & B. 2, where *Cordell* v. *Noden*, 2 Vern. 148, is referred to as erroneous.

(*h*) See Chap. XXIII.

(*k*) *Re White*, [1898] 2 Ch. 217. See also *Re Pooley*, 40 Ch. D. 1.

(*l*) 16 Ves. 461.

(*m*) 2 Atk. 465. Other cases are, *Pierson* v. *Garnet*, 2 Br. C. C. 39, 47; *Malcolm* v. *Martin*, 3 Br. C. C. 50. The case of *Manner* v. *Pearson*, [1898] 1 Ch. 581, was one of contract.

(*n*) *Ford* v. *Batley*, 17 Bea. 303; *Re Mabbett*, [1891] 1 Ch. 707, and the cases there cited.

(*o*) *Prendergast* v. *Prendergast*, 3 H. L. C. 195; *Re Hollins*, [1918] 1 Ch. 503. *Re Marsh*, 62 Sol. J. 141, appears to be wrong.

(*p*) See *post*, p. 1088.

(*q*) *Re Taylor's Estate*, 22 Ch. D. 495.

(*r*) *Re Aird's Estate*, 12 Ch. D. 291; *Burrowes* v. *Lord Clonbrock*, 27 L. R. Ir. R. 538. In *Quihampton* v. *Going*, 24 W. R. 917, and *Re Wood*, 32 Ch. D. 517, the gifts were of shares of residue.

after the execution of the will, although admissible as *prima facie* evidence of the amount of the advances made by him, is not conclusive (*s*). In *Re Coyte* (*t*) the testator directed that all advances entered by him in a certain book should be brought into account by his legatees; he subsequently destroyed the leaves in this book which contained entries of the advances made by him, and it was held that this operated as a revocation of the direction contained in the will.

Re Coyte.

The cases on erroneous recitals as to the amount of advances are divided by Swinfen Eady, J., in his judgment in *Re Kelsey* (*u*), into two classes: "In class 1, the testator by apt words directs a legatee to bring a particular sum into hotchpot. He may recite erroneously that a particular sum has been advanced, and direct the legatee to bring that sum, or the sum 'hereinbefore recited to have been advanced' into hotchpot, or he may by other appropriate language show an intention that the legatee shall absolutely and in any event bring the sum mentioned into hotchpot; in other words, that the legatee shall only take upon the footing of bringing that particular sum into account, and only receiving the balance payable to him on that footing. In class 2 the testator recites the debt owing from the legatee—again he may recite it erroneously—and then directs the debt, 'or so much thereof as shall remain unpaid' at the testator's death or time of distribution, to be deducted and brought into account. In cases of this class the testator really intends that there shall be brought into account the debt or balance thereof which is actually owing at the time of death or distribution."

Re Kelsey.

(2) *Legacies of Chattels.*—Legacies of chattels may be general or specific. They are the former when there is nothing to show that a particular chattel is intended, the latter when the particular chattel is pointed out. There is an important distinction between chattels which are specified at the date of the will—as "the furniture now in my house"—and those which are specified at the death of the testator—as "the furniture I shall be possessed of at the date of my death." At one time it was considered that the latter type of bequest was not specific, but the contrary is now clearly settled (*v*). The importance of this

Bequests of chattels.

(*s*) *Whateley* v. *Spooner*, 3 K. & J. 542. See *Smith* v. *Conder*, 9 Ch. D. 170, referred to *ante*, p. 476.

(*t*) 56 L. T. 510.

(*u*) [1905] 2 Ch. 465, at p. 469. Cf. *Re Segelcke*, [1906] 2 Ch. 301.

(*v*) See *Stewart* v. *Denton*, 4 Dougl. 219, and the observations on that case by Jessel, M.R., in *Bothamley* v. *Sherson*, L. R. 20 Eq. 309.

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distinction will appear when the subject of ademption is discussed (*w*).

Chattels in a house.

The question what passes by a bequest of "goods" or "chattels" in a particular house is considered later (*x*).

What accessories pass by bequest of specific chattel.

As a general rule, a gift of a specific chattel passes everything which is properly accessory to it: thus a bequest of a mirror will pass a miniature belonging to it, although there may be a bequest of pictures (which includes ordinary miniatures) to another person (*y*); and a bequest of a box will of course pass the key belonging to it; but not conversely (*z*). So a bequest of "my tin dispatch-box, at present in the W Bank," will not pass valuable securities therein contained (*a*).

Right of selection.

If a testator gives to A the right to select certain chattels and A dies before selecting, the gift fails (*b*).

Legacies of stocks and shares.

(3) *Legacies of Stocks and Shares.*—Whether a legacy of stock is specific or general is a question which frequently arises; in the course of the many decisions on such a point, various rules have been evolved which are of great assistance in construing bequests of this nature. The rules are not rules of law, but only supply *prima facie* indications of the testator's intention, and they yield to other indications of that intention as expressed in the will.

Legacy of stock, shares, etc., *prima facie*, general.

A legacy of stock (*c*) or of money in stock (*d*), or of bonds (*e*), or of shares (*f*) is *prima facie* a general legacy, and it makes no difference that at the date of the will the testator had the precise amount of stock. A good illustration is the case of *Robinson* v. *Addison* (*g*), where the testator had fifteen and a-half Leeds and Liverpool Canal shares; he bequeathed five and a-half shares to A, five to B, and five to C. At his death

(*w*) *Post*, pp. 1062 *seq.*
(*x*) *Post*, p. 1062.
(*y*) *Re Craven*, 99 L. T. 390; 100 L. T. 284
(*z*) *Re Robson*, [1891] 2 Ch. 559.
(*a*) *Re Hunter*, 25 T. L. R. 19.
(*b*) *Re Madge*, 72 Sol. J. 284.
(*c*) *Partridge* v. *Partridge*, 9 Mod. 269; *Simmons* v. *Vallance*, 4 Br. C. C. 345; *Wilson* v. *Brownsmith*, 9 Ves. 180.
(*d*) *Peterborough* v. *Mortlock*, 1 Br. C. C. 565; *Bronsdon* v. *Winter*, 1 Amb. 57; *Webster* v. *Hale*, 8 Ves. 410; *Purse* v. *Snaplin*, 1 Atk. 414. But if the gift is of a certain sum of money "invested" in a certain stock, this, it is submitted, clearly points to an existing investment, and is specific. The decisions of Malins, V.-C., in *Mytton* v. *Mytton*, *ante*, p. 1035, and *Page* v. *Young*, L. R. 19 Eq. 501, seem to be inconsistent and both wrong. In *Brennan* v. *Brennan*, Ir. R., 2 Eq. 321, a bequest of "£500 of my money in the Bank of Ireland" was held to be a specific bequest of £500 Bank stock.
(*e*) *Macdonald* v. *Irvine*, 8 Ch. D. 101.
(*f*) *Re Gray*, 36 Ch. D. 205 (where the bequest failed: *post*, p. 1043); *Re Gillins*, [1909] 1 Ch. 345; *Barr's Trustees* v. *Ardrossan Club*, 3 Court of Sess. Ca. (Fraser, etc.) 903.
(*g*) 2 Bea. 515.

he possessed no shares. It was argued that the testator, in giving the precise number of shares which he possessed, must have had those shares in his contemplation, and no other, and consequently must have meant specific gifts of them. It was also argued that the shares of this canal were so rarely brought to market that they could not be considered as transferable or purchasable for money, and could not be considered as gifts of particular things which the executors could purchase out of the assets. But it was held that the legacies were general. There is an early case of *Jeffreys* v. *Jeffreys* (*h*), in which a bequest of £2,702 3s. 0d. capital stock in the Bank of England was held to be specific, the testator having that precise amount of stock at the time of making his will, but the decision stands alone (*i*) and was not followed in *Re Willcocks* (*k*).

Contrary intention.

But the fact that the testator had at the time of making his will shares or stocks of a particular description may, coupled with other indications, make a bequest of those shares or stocks specific. Thus in *Re Nottage* (*l*) the testator gave certain stocks and shares to trustees "upon trust to continue the same in their present state of investment," which made those bequests specific (*m*), and bequeathed other stocks and shares in the same companies to various legatees : it was held on the construction of the whole will, regard being had to the state of the testator's investments at the date of the will, that he meant to dispose of specific stocks and shares which he owned at the time, and that all the bequests were specific (*n*).

Power of appointment.

The fact that the testator has a power of appointment over certain stocks may make bequests of those stocks, though in general terms, take effect as appointments under the power, so as to be specific (*o*).

Gift of "my stock," etc., is specific.

Again, if the testator describes the subject-matter of the bequest as "my stock," the legacy is specific (*p*). Thus in the

(*h*) 3 Atk. 120.

(*i*) "It is presumed therefore that the case of *Jeffreys* v. *Jeffreys* cannot be considered of any authority."—Roper on Legacies (4th ed.), p. 262.

(*k*) [1921] 2 Ch. 327.

(*l*) [1895] 2 Ch. 657.

(*m*) *Post*, p. 1041.

(*n*) *Re Pratt*, [1894] 1 Ch. 491, where the earlier cases of *Gillaume* v. *Adderley*, 15 Ves. 384; *Page* v. *Young*, L. R., 19 Eq. 501; *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478; *Morley* v. *Bird*, 3 Ves. 628; *Gordon* v. *Duff*, 3 D. F. & J. 662; *McClellan* v. *Clark*, 50 L. T. 616 (reported s. n. *Re Sayer*, 53 L. J. Ch. 832); and *Mytton* v. *Mytton*, L. R., 19 Eq. 30, are referred to in the judgment.

(*o*) See Chap. XXIII.

(*p*) *Shuttleworth* v. *Greaves*, 4 Myl. & C. 35; *Kampf* v. *Jones*, 2 Keen, 756; *Hayes* v. *Hayes*, 1 Keen, 97; *Dummer* v. *Pitcher*, 5 Sim. 35, 2 M. & K. 262; *Miller* v. *Little*, 2 Bea. 259; and see *Measure* v. *Carleton* (a curious case), 30 Bea. 538; *Kermode* v. *Macdonald*, L. R., 1 Eq. 457, 3 Ch. 584; *Dobson* v. *Waterman*, 3 Ves. 308, n., where the stock was wrongly

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leading case of *Ashburner* v. *Macguire* (*q*) the bequest was of "my capital stock of £1,000 in the India Company's stock": Lord Thurlow said "the pronoun *my* has been relied on in many cases in deciding the legacy to be specific."

And a bequest of stock may be specific even if no amount is mentioned and the stock is not described as "my stock" or as "standing in my name." Thus in *Re Slater* (*r*) a testator bequeathed "the interest arising from money invested in the L. W. Company," and the bequest was held to be specific (*s*). So in *Re Hawkins* (*t*), where the gift was of "the" stocks and shares and securities particulars whereof were in the schedule set opposite to "the legatees" names.

After-acquired stock or shares.

There are cases, decided on section 24 of the Wills Act, according to which words literally referring to the date of the will have the same effect as if the will had been made immediately before the testator's death. As in *Hepburn* v. *Skirving* (*u*), where a gift of "the shares I am possessed of in the A Bank" was held to pass shares acquired after the date of the will. This is a specific bequest, being equivalent to a gift of "all the shares which I shall be possessed of at the time of my death" (*x*).

Direction to sell makes stock legacy specific.

A legacy of so much stock directed to be sold is specific, for the testator cannot intend his executors to buy the stock merely for the purpose of re-selling it. This seems to be the correct explanation of *Ashton* v. *Ashton* (*y*), a case which has caused some difficulty. On the other hand, a mere direction to transfer the stock will not make the legacy specific (*z*).

Gift of "stock now standing in my name" specific.

The testator's intention that the legacy shall be specific may also be shown by a reference to the stock as "now standing in my name," "which I now possess," etc., or by a reference to stock "of which I may at the time of my death be possessed," or other words referring to a particular investment (*a*).

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described. It will be remembered that a simple gift of "my Consols," although specific, is a fluctuating bequest: see *ante*, p. 1030.

(*q*) 2 Br. C. C. 108.

(*r*) [1906] 2 Ch. 480; [1907] 1 Ch. 665. See *D'Aglie* v. *Fryer*, 12 Sim. 1.

(*s*) It was admitted by both parties that the bequest was specific: the question argued was whether the legacy was adeemed by the conversion of the stock after the date of the will: see *post*, p. 1056.

(*t*) [1922] 2 Ch. 569.

(*u*) 4 Jur. (N.S.) 651, and other cases cited *ante*, p. 382.

(*x*) *Re Slater*, [1906] 2 Ch. 480; [1907] 1 Ch. 665; *Trinder* v. *Trinder*, L. R. 1 Eq. 695. See *Smallman* v. *Goolden*, 1 Cox 329 (before the Wills Act).

(*y*) 3 P. W. 384; see *Purse* v. *Snaplin*, 1 Atk. 414.

(*z*) *Sibley* v. *Perry*, 7 Ves. 522; *Webster* v. *Hale*, 8 Ves. 410; and see *Lambert* v. *Lambert*, 11 Ves. 607.

(*a*) *Barton* v. *Cooke*, 5 Ves. 461; *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478; *Norris* v. *Harrison*, 2 Mad. 268; *Fontaine* v. *Tyler*, 9 Pr. 94; *Queen's College* v. *Sutton*, 12 Sim. 521; *Stephenson* v. *Dowson*, 3 Bea. 342; *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478; *Gordon* v. *Duff*, 28 Bea. 519; 3 D. F. & J. 662; *Kermode* v. *Macdonald*, L. R., 3 Ch. 584; *Flood* v. *Flood*, [1902] 1 Ir. R.

Gift of stock out of specific stock.

It should be noticed that a gift of stock out of specific stock is specific (*b*).

Bequests of stock to different persons.

If a testator gives legacies of stock or shares, and then gives the remainder standing in his name, the intention that the previous bequests were specific seems clear, and the cases of *Sleech* v. *Thorington* (*c*) and *Millard* v. *Bailey* (*d*) are sometimes referred to as illustrations of this proposition. But on closer examination they do not appear expressly to decide the point. In the former the testatrix gave £2,413 13s. 0d. to several persons in several parcels and different proportions by the name of South Sea annuity stock or South Sea annuities, giving to her coachman the "remaining £13 13s. 0d. standing in my name." The gifts were held specific, but Sir Thomas Clarke, M.R., in giving judgment, considered it material that there was a direction to sell and convert part into money, and he referred to *Ashton* v. *Ashton*. In *Millard* v. *Bailey* a bequest of shares in the E. Gas Company to various persons was followed by a bequest of the remaining shares to A B. But it is material that the bequest was in the following form: "I leave and bequeath *the* shares in the E. Company as follows," and the specific nature of the bequests seems to have been assumed without argument. But even if these decisions do not conclude the point, a reference to the "remaining shares" as standing in the testatrix's name must imply that the former shares are also those standing in her name.

"Present state of investment."

Other instances are where a testator gives stock or shares upon trust to continue the same in their present state of investment (*e*), or otherwise refers to an existing investment in stock or shares (*f*).

Demonstrative bequest of money out of stock.

A bequest of a sum of £2,000 "to be paid out of the 4 per cent. consolidated annuities" was held in *Deane* v. *Test* (*g*) to be a pecuniary (or rather a demonstrative) legacy. In his judgment, Lord Eldon seems to cast some doubt on the accuracy

538; *Re Slater*, *supra*; *Harrison* v. *Jackson*, 7 Ch. D. 339 ("standing in the names of trustees"). *Blake* v. *Blake*, [1923] 1 Ir. R. 88 ("all the shares in any company I have that are absolutely my own"). But where the testator directed his brokers to buy stock, and died before it was purchased, it was held that the stock did not pass to the specific legatee: *Thomas* v. *Thomas*, 27 Bea. 537. The decision in *Parrott* v. *Worsfold*, 1 J. & W. 594, is, it is submitted, wrong. As to *Mytton* v. *Mytton*, L. R. 19 Eq. 30, see *ante*, p. 1035, and *post*, p. 1042.

(*b*) *Morley* v. *Bird*, 3 Ves. 628; *Oliver* v. *Oliver*, L. R. 11 Eq. 506; *Re Sayer*, 53 L. J. Ch. 832; *Davies* v. *Fowler*, L. R., 16 Eq. 308; *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478.

(*c*) 2 Ves. sen. 560.

(*d*) L. R., 1 Eq. 378.

(*e*) *Re Nottage* (*No.* 2), [1895] 2 Ch. 657.

(*f*) *Mullins* v. *Smith*, 1 Dr. & S. 204; *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478.

(*g*) 9 Ves. 146.

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of the decision of Arden, M.R., in *Kirby* v. *Potter* (*h*), in which it was held that a legacy of "£1,000 out of my Reduced Bank annuities" was pecuniary (or demonstrative). In *Mytton* v. *Mytton* (*i*) the bequest was of "the sum of £3,000 invested in Indian security," and it was held by Malins, V.-C., to be a demonstrative legacy. According to North, J. (*k*), the decision might have been different if the words "the sum of" had been wanting, but this distinction was not present to the mind of the V.-C., as appears from the judgment.

"Invested in" a company may mean shares.

A gift of £400 invested in the B Company means 400 £1 shares in that company (*l*). As to what passes by a gift of shares, see Lord Cranworth's judgment in *The Carron Company* v. *Hunter* (*m*).

Direction to make up amount of bequest.

In *Townsend* v. *Martin* (*n*) the testatrix bequeathed £5,000 Consols, with a direction that if she should not have sufficient stock to answer the legacy, her executors should out of her residuary estate purchase enough to make up the deficiency. The legacy was held to be specific.

Where stock insufficient.

It is hardly necessary to say that if a gift of a particular sum of stock is specific, and the testator at his death has only a smaller sum of that stock, only the latter passes by the bequest (*o*).

Gift of shares where none in the market or none in existence.

The rule that a stock legacy is *prima facie* general has probably arisen from the leaning of the Court against specific legacies, but no doubt in some cases the rule defeats the testator's intention, and a case might arise where great difficulty would occur. Suppose that a testator bequeaths ten shares in the A Company and has none at his death, and that the company is a small private company and none of the shareholders will part with their shares, is the gift to fail? There is no principle upon which it would; on the other hand, if it is to be supposed that there must be some price at which shares are obtainable, such a bequest might amount to a bequest of all the testator's personalty not specifically bequeathed, for it would be a general legacy of nearly infinite value. Such a case has never arisen, but it is possible that it should, and if it did,

(*h*) 4 Ves. 748. Compare *Selwood* v. *Mildmay*, 3 Ves. 306, commented on *post*, p. 1066.

(*i*) L. R. 19 Eq. 30, *ante*, p. 1035.

(*k*) *Re Pratt*, [1894] 1 Ch. p. 497.

(*l*) *Re Buller*, 74 L. T. 406.

(*m*) L. R., 1 H. L. Sc. & D. 362; and see *Maclaren* v. *Stainton*, 3 D. F. & J. 202.

(*n*) 7 Hare, 471. See also *Queen's College* v. *Sutton*, 12 Sim. 521; *Fontaine* v. *Tyler*, 9 Pr. 94.

(*o*) *Gordon* v. *Duff*, 3 D. F. & J. 662. As to *Ashton* v. *Ashton*, 3 P. W. 384, see *ante*, p. 1040.

in spite of *Robinson* v. *Addison* the Court might struggle against the rule. Another case is where the company or stock has ceased to exist. In such a case the gift fails because it is impossible to determine its value (*p*); but this ground is not altogether satisfactory, and it may be suggested that the true ground for the decision in *Re Gray* is that it is a legacy of something non-existent and which cannot be obtained. On this ground it may be that whereas a legacy of a black horse may be good (*q*), a legacy of a unicorn or a great auk would be bad.

Gifts of shares in a non-existent company.

The case where a testator makes a bequest of shares in a company and the company is in existence at the testator's death, but has ceased to exist within a year of his death, does not seem to have arisen. If the executor need not purchase the shares and transfer them to the legatee until the expiration of the year, it looks as though the legacy would fail on the principle of *Re Gray*; but on the other hand it might be argued that the legatee was entitled to the value of the shares, as at the testator's death, though the legacy was not payable until the expiration of the executor's year. It seems probable that the Court would hesitate to adopt a construction which would make a general legacy of shares fail because after the testator's death the company had been wound up and reconstructed, but the point is not without difficulty.

Effect of s. 24 of Wills Act.

Where a testator makes a general bequest of a certain number of shares in a company, and the nominal amount of the shares is altered after the date of the will, the effect of section 24 of the Wills Act is to give the legatee the same number of shares of the altered nominal amount (*r*). But when the shares have been sub-divided and the original shares, though changed in name and form, substantially exist in their sub-divided form, the new shares corresponding to the old shares pass under the specific bequest (*s*); and so also when a company is reconstructed and shares in the new company are substituted for those in the old one (*t*).

Subdivision of shares.

A gift of a sum of money to be purchased in the stock of the Bank of England is a gift of money of that amount, and not stock of that nominal amount (*u*).

(*p*) *Re Gray*, 36 Ch. D. 205.

(*q*) See footnote, *ante*, p. 1026.

(*r*) *Re Gillins*, [1909] 1 Ch. 345, cited *ante*, p. 384; *Re M'Afee*, [1909] 1 Ir. R. 124.

(*s*) *Re Clifford*, [1912] 1 Ch. 29; *Re Kuypers*, [1925] 1 Ch. 244; *Re Greenberry*, 54 Sol. J. 633; *Macfarlane's Trustees* v. *Macfarlane*, [1910] S. C. 325; but shares in compensation for alteration of right are not sufficiently identical with the old shares. *Re Faris*, [1911] 1 Ir. R. 165 (bonus shares).

(*t*) *Re Leeming*, [1912] 1 Ch. 828.

(*u*) *Allan* v. *Kelly*, 7 W. R. 139.

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Long annuities.

There are many old decisions on bequests of long annuities, but as this kind of investment is now practically obsolete, it is not thought necessary to examine them. Some of them are of doubtful accuracy (*x*).

Bequests of debts, etc.

(4) *Legacies of Debts.*—Legacies of debts, whether by simple contract or secured upon mortgages and bonds, frequently give rise to difficulties, for the distinction between giving the actual debt and a sum of money with reference to a debt is a fine one. Mr. Roper states the rule thus (*y*): "When the gift of the legacy is so connected with the debt or security as that the gift of the legacy and of the debt or security are the same, the intention to give nothing more than the identical debt or money due on the security is apparent, and consequently the legacy will be specific." *Ashburner* v. *Macguire* (*z*) is a good instance of a specific bequest of a debt; in that case Lord Thurlow said: "Whenever a debt or a part of a debt is the subject bequeathed, it is a *legatum nominis* or a *legatum debiti.*"

On the other hand, if the security is merely described as not of the essence of the gift, the legacy is general, as a bequest of £400 East India bonds (*a*), and in *Gillaume* v. *Adderley* (*b*) a bequest of £5,000 sterling or 50,000 current rupees, afterwards described as now vested in the East India Company's bonds, and sometimes mentioned as the said sum of £5,000 sterling, was held under all the circumstances of the case to be a demonstrative legacy. Legacies in their nature general given out of a debt are demonstrative, but a legacy of a part of a debt is specific.

Partnership debt.

A bequest of debts due from B does not include debts due from a firm in which B is a partner, if there is a debt due from B alone (*c*).

Interest.

A legacy of the amount of a bond for £1,000 seems to carry interest accrued during the lifetime of the testator (*d*).

(*x*) *Fonnereau* v. *Poyntz*, 1 Br. C. C. 472; *Colpoys* v. *Colpoys*, Jac. 451; *Boys* v. *Williams*, 2 R. & My. 689; *Att.-Gen.* v. *Grote*, 2 R. & M. 699; *Gordon* v. *Duff*, 3 D. F. & J. 662. Some of them are referred to in Chap. XXXI.

(*y*) Legacies, 4th ed., p. 227.

(*z*) 2 Br. C. C. 108. See also *Innes* v. *Johnson*, 4 Ves. 568 ("£300 upon bond"); *Chaworth* v. *Beech*, 4 Ves. 555; *Nelson* v. *Carter*, 5 Sim. 530; *Gardner* v. *Hatton*, 6 Sim. 93; *Davies* v. *Morgan*, 1 Bea. 405; *Sidebotham* v. *Watson*, 11 Ha. 170; *Re Wedmore*, [1907] 2 Ch. 277.

(*a*) *Sleech* v. *Thorington*, 2 Ves. sen. 560. See *Macdonald* v. *Irvine*, 8 Ch. D. 101, cited *ante*, p. 1026.

(*b*) 15 Ves. 384.

(*c*) *Ex p. Kirk, re Bennett*, 5 Ch. D. 800.

(*d*) *Harcourt* v. *Morgan*, 2 Keen, 274; *Gibbon* v. *Gibbon*, 13 C. B. 205; but see *Hawley* v. *Cutts*, 2 Free. 24, where a gift to a debtor of £300 "which he owes to me upon bond" did not carry the interest.

Rents of land.

Rent owing to a testator, in respect of either freeholds or leaseholds, may of course be specifically bequeathed (*e*).

What words include debts and other choses in action.

The questions whether debts and other choses in action pass by general words of description, such as "property," "articles and effects," or the like, and to what extent choses in action can be said to have a locality, are discussed elsewhere (*f*).

Legacies to debtors and creditors.

Legacies to debtors and creditors are considered in a subsequent part of this chapter (*g*).

Bequests of interests in land.

(5) *Legacies of Interests in Land, etc.*—A bequest of leaseholds is specific (*h*), even if the bequest is in form general or residuary: as if I bequeath "all my leasehold property," for the testator's intention clearly is to sever the property from the rest of the personal estate (*i*). Similarly a gift of a rent charge, or an annuity issuing out of land, is an interest in the land itself and necessarily specific. And a gift of tithes is specific (*k*). But a legacy or annuity charged on land is demonstrative. "General legacies do not become specific because they are payable out of the proceeds of real estate; but the gift of the proceeds of the sale of a real estate may be specific, as in *Page* v. *Leapingwell* (*l*). So the charge of the legacies upon the real estate does not make them specific, although the annuities payable and issuing out of them are so" (*m*).

Collateral benefits.

A bequest of property held under a lease does not necessarily carry the benefit of a collateral agreement or deed of covenant with the lessor (*n*). But it carries the right to compensation under a clause in the lease providing for its determination (*o*).

Renewed leases, etc.

The question whether a bequest of a leasehold property carries a new lease of the property, granted since the date of the will, is discussed elsewhere, as is also the question whether a term of years passes under a bequest of personal property if the testator afterwards acquires the reversion (*p*); and also the effect of section 24 of the Wills Act in making a bequest of

(*e*) As to the application of the Apportionment Act, 1870, in such a case, see *Re Lucas*, 55 L. J. Ch. 101, *post*, p. 1086. As to deducting outgoings, etc., see *Lindsay* v. *Earl of Wicklow*, Ir. R. 6 Eq. 72; *Re Duke of Cleveland's Estate*, [1894] 1 Ch. 164.

(*f*) *Post*, p. 1048.

(*g*) *Post*, pp. 1084, 1085.

(*h*) *Long* v. *Short*, 1 P. W. 403.

(*i*) Roper on Legacies, 194. See *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391.

(*k*) *Creed* v. *Creed*, 11 Cl. & F. p. 508; *Rudstone* v. *Anderson*, 2 Ves. sen. 418.

(*l*) 18 Ves. 463, *ante*, p. 1029.

(*m*) *Per* Lord Cottenham in *Creed* v. *Creed*.

(*n*) *Ledger* v. *Stanton*, 2 J. & H. 687.

(*o*) *Coyne* v. *Coyne*, Ir. R. 10 Eq. 496, stated *ante*, p. 721.

(*p*) *Post*, p. 1058.

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" my leaseholds " or " the leaseholds of which I am possessed " include leaseholds acquired after the date of the will, and renewed leaseholds (*q*).

Liabilities under lease.

Where there is a specific bequest of leaseholds, the question arises as to who is liable to pay the rent and perform the covenants in the lease. This question arises either between the legatee and the testator's estate, or if the leaseholds are given in succession, between the persons successively entitled. The latter question is discussed in Chapter XXXIV. The question how far a specific legatee of leaseholds is entitled to exoneration in respect of them out of the testator's estate is discussed in Chapter LIV. As a general rule the legatee is subject to all liabilities arising after the testator's death, and the executors are entitled to be indemnified by him against these liabilities (*r*).

Money payable out of land.

A bequest of an annuity or legacy payable out of the rents of land, or out of the corpus or proceeds of the sale of land, may be specific or demonstrative, according as the testator does or does not express an intention that the legatee shall have the money, whether the estate is available and sufficient for its payment or not (*s*).

Bequests of personal property in a particular place.

(6) *Bequests of Personalty in a Particular Place.*—It frequently happens that a testator makes a bequest of personal property which he describes with reference to its locality : for example, " the furniture in my house," or " my house, with all that shall be in it at my death," or " my property in England," or " not in England " (*t*). In construing bequests of this kind the following general rules should be borne in mind :

Effect of removal, etc.

(A) Although a bequest of " the furniture in my house," or the like, is specific, the testator generally contemplates the possibility of the subject-matter fluctuating from time to time (*u*). The effect of such a gift with reference to changes and removals is discussed in a subsequent part of this chapter (*x*).

(*q*) See Chap. XII, *ante*, p. 381.

(*r*) *Garratt* v. *Lancefield*, 2 Jur. (N.S.) 177; *Hickling* v. *Boyer*, 3 M. & G. 635; *Re Smith*, 84 L. T. 835.

(*s*) Roper, 195 *seq.*, citing *Long* v. *Short*, 1 P. W. 403; *Creed* v. *Creed*, 11 Cl. & F. 491; *Mann* v. *Copland*, 2 Madd. 223; *Dickin* v. *Edwards*, 4 Ha. 273; *Savile* v. *Blacket*, 1 P. W. 777; *Fowler* v. *Willoughby*, 2 S. & St. 354; *Page* v. *Leapingwell*, 18 Ves. 463.

(*t*) *Arnold* v. *Arnold*, *post*, p. 1050; *Drake* v. *Martin*, 23 Bea. 89; as to the latter case, see *ante*, p. 992.

(*u*) *Per* Jessel, M.R., L. R. 20 Eq. at p. 312.

(*x*) *Post*, p. 1064.

Things constructively in a house.

(B) It is not always essential that the chattels should be actually in the house at the time of the testator's death, assuming that to be the crucial time. Thus chattels which are temporarily removed from the house, or have even never been near it, may pass by such a bequest (*y*).

Ejusdem generis construction.

(C) "Goods and chattels," "effects" and "things," being words of generic description, it seems that a gift of "goods and chattels," "effects" or "things" in a house will pass all choses in possession therein, including money and bank-notes (*z*). So a bequest of goods and chattels in and about the testator's dwelling-house and outhouses at T will pass running horses (*a*). But where the testator commences by specifying a number of different kinds of household goods, as where he bequeaths his furniture, plate, pictures and other things (or effects) in a house, the *ejusdem generis* construction is frequently applied (*b*), and consequently such a gift only passes things falling within the description of furniture and household goods: it therefore does not include money (*c*), or securities, or jewellery (*d*), unless the intention appears to have been to give the legatee the whole contents of the house (*e*). The addition of the words "et cætera" to a gift of this description does not seem to enlarge its scope (*f*).

Where pecuniary legacy is also given.

It is said that a gift of goods and chattels, plate, jewels and household stuff in a house will not pass money found in the house, if a pecuniary legacy is also given to the legatee, but

(*y*) *Brooke* v. *Warwick*, 2 De G. & S. 425; *Rawlinson* v. *Rawlinson*, 3 Ch. D. 302; *Re Lea*, 104 L. T. 253; and other cases cited *post*, p. 1063. As to plate, see *Wilkins* v. *Jodrell*, 11 W. R. 588; *Re Stamford*, 22 T. L. R. 632, cited *post*, p. 1279. In *Lane* v. *Sewell* (43 L. J. Ch. 378) there was a gift of all corn and other articles in or about a mill; this was held not to pass corn *in transitu*.

(*z*) *Chapman* v. *Hart*, 1 Ves. sen. 271; unless the money is "an extraordinary sum, and just received," *ib.*; *Popham* v. *Lady Aylesbury*, Amb. 68. So a gift of "the contents" of a house will pass everything in it except title deeds, bonds, and securities for money: *Re Craven*, 99 L. T. 390; 100 L. T. 284; compare *Re McCalmont*, 19 T. L. R. 490.

(*a*) *Gower* v. *Gower*, Amb. 612.

(*b*) The cases in which the word "effects" passes the residuary personal estate, although preceded by words of specific description, as in *Hodgson* v. *Jex*, 2 Ch. D. 122, are considered *ante*, p. 988.

(*c*) *Trafford* v. *Berrige*, 1 Eq. Ca. Abr. 201, pl. 14, and other cases cited *ante*, p. 984; *Gibbs* v. *Lawrence*, 7 Jur. (N.S.) 137; *Campbell* v. *McGrain*, Ir. R. 9 Eq. 397; *Watson* v. *Arundel*, Ir. R. 10 Eq. 299; *Dutton* v. *Hockenhull*, 22 W. R. 701 (gift of "coins, curiosities and other articles" in a desk). In *Stone* v. *Parker*, 29 L. J. Ch. 874, and *Bradish* v. *Ellames*, 10 Jur. (N.S.) 1170, where the same construction prevailed, the gift was of things "in or about" a dwelling-house.

(*d*) *Re Miller*, 61 L. T. 365; *Re Hammersley*, 81 L. T. 150.

(*e*) See *Mahony* v. *Donovan*, 14 Ir. Ch. 262, 388. As to *Swinfen* v. *Swinfen* (*No.* 4), 29 Bea. 207, see *post*, p. 1279. The decision was discussed in *Campbell* v. *McGrain*, *supra*, and *Northey* v. *Parton*, 60 L. T. 30.

(*f*) *Steignes* v. *Steignes*, Mos. 296, stated *ante*, p. 989; *Hertford* v. *Lowther*, 7 Bea. 1.

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whether this doctrine is of much force except where the money found in the house is of considerable amount, may perhaps be doubted (*g*).

Heirlooms, or quasi-heirlooms.

A direction that the chattels or things are to go with the house, or be considered as heirlooms, necessarily restricts the bequest to such articles as are of household or domestic use or ornament, and are of a permanent character (*h*).

Fixtures.

Where chattels, such as pictures or tapestries, are fitted or fixed to a house, it is sometimes difficult to say whether they pass by a gift of "chattels in the house"; circumstances may show that they were considered by the testator as part of the house and were not intended to be given with the ordinary moveable furniture (*i*).

"Wines and property in England."

Where the gift is of things in a particular country, or the like, the *ejusdem generis* construction is less applicable. Thus in *Arnold* v. *Arnold* (*k*), the testator gave to his wife "My wines and property in England"; in addition to wines the testator was entitled to property in the English funds, money at his bankers, etc., and it was held that they all passed under the bequest.

Choses in action.

(D) Where a testator makes a bequest of all his property or effects in a particular country or other locality, it is necessary, in order to construe such a gift correctly, to bear in mind that certain kinds of personalty, strictly speaking, have no locality, so that words which would in general be sufficient to pass personalty of those descriptions, may be insufficient when the personalty is described by reference to locality (*l*). Thus the term "money," used generally, will pass many choses in action which would not pass by the description of money in a particular place. At one time the Courts seem to have held that choses in action (except Bank of England notes) had no locality, and consequently did not pass by any description referring to locality; but this is no longer an invariable rule, and choses of action are held to pass by reference to locality or position in space in certain cases. The cases in which choses in action are held to have locality are (i) Bank of England notes, (ii) debts, (iii) where the documents representing the choses in action are described by reference to a place where they are ordinarily kept for security. These will be considered in turn.

(*g*) *Anon.*, Finch, Pr. Ch. 8. The case of *Roberts* v. *Kuffin*, 2 Atk. 112, is of questionable authority: see *Re Robson*, [1891] 2 Ch. 559, and compare *Chapman* v. *Hart*, *ante*, p. 1047, n. (*z*).

(*h*) *Fitzgerald* v. *Field*, 1 Russ. at p. 427; *Hare* v. *Pryce*, 11 L. T. 101; *Re Moir's Estate*, [1882] W. N. 139. Compare *Manton* v. *Tabois*, 30 Ch. D. 92.

(*i*) *Re Whaley*, [1908] 1 Ch. 615.

(*k*) 2 My. & K. 365.

(*l*) *Hertford* v. *Lowther*, 7 Bea. 1, and cases cited in the notes *infra*.

(i) It is not known why Bank of England notes have locality; they acquired this position at a time when they were not legal tender (*m*); Lord Eldon did not know the origin of this anomaly (*n*), but possibly the Court thought that testators could not distinguish between them and actual coin (*o*). Country bank notes are not within the exception (*p*).

Bank of England notes.

(ii) Debts due from persons resident in a particular locality will pass under a gift of property in that locality (*q*). In *Nisbett* v. *Murray* (*r*) a testator, who at the time of his death resided in Jamaica, gave the residue of his estate in the island of Jamaica, except furniture and wearing apparel, to trustees. A debt had been due to the testator from persons resident in the island of Jamaica, but a person resident in England had become solely responsible for this debt; it was held that the debt had become property in England. With reference to these cases, Cotton, L.J., observed: "No doubt there are a great many cases which lay down that choses in action cannot be referred to as of any particular locality. Again, there are cases where a gift of property in a particular locality has been held to include debts due from persons in that locality. I think these latter cases go upon this—that there was in the will a sufficient indication of intention to include under the description of property in a particular place that which really cannot have any locality" (*s*). Yet it is not easy to point out what is a sufficient indication of intention; as the cases now stand, a simple gift of "all my property in Suffolk" would pass debts due to the testator by persons resident in Suffolk, but not shares in a company carrying on business in Suffolk (*t*).

Debts due from persons in a particular place.

Bonds of a corporation stand on the same footing as simple contract debts (*u*).

(iii) As a general rule, a gift in a will of goods and chattels, or money, or property, in a house, does not pass choses in action (*v*). But if a testator gives "my property in England,"

Choses in action in a particular place.

(*m*) *Popham* v. *Lady Aylesbury*, Amb. 68 (gift of "my house and all that shall be in it at my death": held cash and bank notes passed; promissory note and securities did not). See 11 Ves. at p. 662.

(*n*) *Stuart* v. *Marquis of Bute*, 11 Ves. at p. 662.

(*o*) *Hertford* v. *Lowther*, 7 Bea. at p. 9; *Fleming* v. *Brook*, 1 Sch. & Lef. 318; *Chapman* v. *Hart*, 1 Ves. sen. 271.

(*p*) *Brooke* v. *Turner*, 7 Sim. 671.

(*q*) *Tyrone* v. *Waterford*, 1 D. F. & J. 613; *Guthrie* v. *Walrond*, 22 Ch. D. 573 ("all my estate and effects in the island of Mauritius"); *Arnold* v. *Arnold*, 2 My. & K. 365; *Re Clark*, [1904] 1 Ch. 294.

(*r*) 5 Ves. 149.

(*s*) *Re Prater*, 37 Ch. D. at p. 486.

(*t*) *Re Clark*, [1904] 1 Ch. 294, stated *post*, p. 1050.

(*u*) *Re Clark*, *post*, p. 1050.

(*v*) *Moore* v. *Moore*, 1 Br. C. C. 127; *Green* v. *Symonds*, *ib.* 129, n.; *Fleming* v. *Brook*, 1 Sch. & L. 318; *Hertford* v. *Lowther*, 7 Bea. 1.

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this includes stocks in the English funds (*w*). Or if he gives "my property at R.'s bank" (*x*), such a gift passes not only the cash balance at the bank, but shares of which the certificates, whether payable to bearer or not, are deposited with the bank for safe custody. So a gift of a "desk with the contents thereof" (*y*), being a desk in which testator keeps securities, passes the securities in the desk. The *ratio decidendi* is that by such a gift the intention of the testator must be to give the choses in action usually kept in the place for safe custody. Chitty, J., states the distinction in the following way: "If the security box had been given with the contents thereof, it would have been absurd, to my mind, to take out all the valuable things which were found therein, and to say in substance that an empty box with any chattel put there by the testator, a lead pencil or the like, was all that was intended to pass. I think that 'with the contents thereof' does not mean the pens and ink and pen, and is not confined to mere chattels within the chattel. There is a distinction between a gift of chattels in a house and a gift of the contents of a desk; a desk being the kind of thing in which men do usually keep valuable things" (*z*).

But the title deeds to real property (or a key of a box) do not pass by such a gift, because they pass as part of the real property (or the box) to the person entitled thereto (*a*).

And the gift of a particular tin box, without more, does not include its contents (*b*).

Re Clark.

In *Re Clark* (*c*), where the testator bequeathed all his personal estate in the United Kingdom to one set of trustees, and all his personal estate in South Africa to another set of trustees, it was held that shares held by him in mining companies in South Africa passed by the former bequest: it was possible to transfer the shares in London, and the share certificates were at the testator's bankers in London; but bonds payable to bearer of a corporation carrying on business in South Africa were held to pass under the latter bequest, although the bonds were also at the testator's bankers in London.

In *Re Lazarus* (*d*) the testator bequeathed so much of his

(*w*) *Arnold* v. *Arnold*, 2 My. & K. 365, where *Fleming* v. *Brook*, 1 Sch. & L. 318, is commented on. See *Drake* v. *Martin*, 23 Bea. 89. The decision in *Fleming* v. *Brook* seems erroneous.

(*x*) *Re Prater*, 37 Ch. D. 481.

(*y*) *Re Robson*, [1891] 2 Ch. 559.

(*z*) [1891] 2 Ch. at p. 562. But the testator may indicate that he does not intend money in the desk to pass: *Dutton* v. *Hockenhull*, 22 W. R. 701.

(*a*) *Re Robson*, *supra*, at p. 565. Compare *Re Craven*, 99 L. T. 390, 100 L. T. 284 (title deeds and share certificates).

(*b*) *Re Hunter*, 25 T. L. R. 19.

(*c*) [1904] 1 Ch. 394. See *Favorke* v. *Steinkopff*, [1922] 1 Ch. 174 (German bonds lodged in an English bank).

(*d*) 121 L. T. 491.

property as should be "situate in or invested in England or Great Britain at the time of my decease." It was held that choses in action incurred by debtors resident outside Great Britain and secured on property abroad and shares in an American Company did not pass under that description.

Personalty described with reference to its source.

(7) *Legacies of Personalty described with Reference to its Source.*—Sometimes a testator describes personal property with reference to the source from which he derives it: as where he gives to A "all the property to which I am or may be entitled under the will of X" or "as next-of-kin of X" or the like (*e*). The general principle seems to be that so long as the property in question continues to exist in specie, or can clearly be traced into investments made by the testator and retained by him at his death, it will pass by the gift, but if it is sold and the proceeds are spent by the testator or mixed with his other property, the gift fails (*f*). The principle of these cases does not apply to a bequest of a specific sum of stock (*g*).

Negative description.

A bequest of all property "not included in" a particular settlement, will pass property which under that settlement belongs to the testator absolutely (*h*).

Failure of legacies.

IV.—Failure of Legacies—Lapse, etc.—Ademption of Specific Bequests.—Legacies may fail in many ways; some of these are common to all legacies, others only to particular kinds of legacies.

Lapse.

Lapse has already been treated of in Chapter XIII, and failure on account of uncertainty in Chapter XIV, but a few observations may not be out of place here. Failure by lapse does not occur on account of anything connected with the subject of the gift (*i*) but on account of something connected with the object of the gift. The most common case is where the legatee has died in the testator's lifetime. Failure from uncertainty may arise either from the subject or the object of the gift being uncertain. Further, legacies may fail because the law

Uncertainty.

Void from illegality.

(*e*) With regard to the question what will pass by such a gift, see *Askew* v. *Rooth*, L. R. 17 Eq. 426 (gift by a married woman of "all funds and property" purchased out of the savings of her separate estate); *Re Armstrong*, 49 L. J. Ch. 53 ("any property bequeathed to me"); *Green* v. *Giles*, 5 Ir. Ch. 25 ("patrimony"); *Scott* v. *Best*, 6 L. R. Ir. 7 ("all my interest in the property left to me by S." held not to include arrears of rent); *Re Trimmer*, 91 L. T. 26 (real estate derived under will and not partitioned).

(*f*) *Lee* v. *Lee*, 27 L. J. Ch. 824; *Moore* v. *Moore*, 29 Bea. 496; *Morgan* v. *Thomas*, 6 Ch. D. 176; *post*, p. 1060; *Manton* v. *Tabois*, 30 Ch. D. 92; *Re Borrer's Trusts*, 54 Sol. J. 32; *Re Veuille*, [1918] 1 Ir. R. 6 (where it was held that the gift was pecuniary).

(*g*) *Harrison* v. *Jackson*, 7 Ch. D. 339. See *post*, p. 1060, where the cases of *Le Grice* v. *Finch*, 3 Mer. 50, and *Clark* v. *Browne*, 2 Sm. & G. 524, are discussed.

(*h*) *Re Green*, 31 L. R. Ir. 338.

(*i*) As to misdescription of object, see Chap. XXXV.

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makes them void, as, for instance, by infringing the Rule against Perpetuities or (under the old law) by being given to a charity out of property which savours of realty.

Mistaken motive is immaterial.

It may here be mentioned that if a bequest is absolute, the motive for making it is, as a rule, immaterial; if, therefore, a testator makes a bequest under a mistaken belief that he was subject to a legal obligation to do so, the bequest nevertheless takes effect (*j*). On the other hand, a testator may so express himself that a bequest which is apparently made under a mistaken belief as to a certain state of facts, is in reality conditional on that state of facts existing (*k*).

Legacy given for a purpose.

Again, a legacy which is given for a particular purpose does not necessarily fail if that purpose is not carried into effect (*l*), unless the testator has taken the precaution of making his intention effectual by means of a trust, condition, gift over, or the like. This subject has been already discussed (*m*).

Insufficiency of assets.

Any kind of legacy may fail owing to the insufficiency of the testator's assets. The order in which legacies are applied in payment of debts, and the way in which they may abate rateably *inter se*, are considered under administration of assets (*n*).

Non-existence of subject-matter.

Specific or general (but not pecuniary) legacies may fail from non-existence of subject-matter. Thus a bequest of "my gold watch" fails if I never at any time had one (*o*); and a bequest of jewels in a box deposited in a certain place fails if no such box can be found (*p*). If I had a gold watch at the date of the will, and afterwards sold it, the legacy has been adeemed, unless I possess a gold watch at the time of my death, and the bequest takes effect by virtue of section 24 of the Wills Act (*q*). Similarly, a general bequest of shares in a non-existent company will fail, as has already been pointed out, on account of the

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(*j*) *Re Dyke*, 44 L. T. 568. Compare *Westcott* v. *Cullifordd*, 3 Ha. 265; *Att.-Gen.* v. *Ward*, 3 Ves. 327, stated *ante*, p. 176. Where the testator makes a mistake in the subject-matter of the bequest (*e.g.* in bequeathing to a creditor a larger amount than is actually due to him) this is regarded as *falsa demonstratio* : see *ante*, p. 1036, and *post*, p. 1241.

(*k*) *Doe* v. *Evans*, 10 Ad. & E. 228; *Thomas* v. *Howell*, L. R. 18 Eq. 198; *ante*, p. 176.

(*l*) Thus in *Parsons* v. *Coke*, 27 L. J. Ch. 828, a testator gave to his brother certain collieries, and for the better enabling him to carry on the collieries the testator bequeathed to him £10,000. Before his death the testator sold the collieries to his brother, but it was held that the legacy was not adeemed. See also *Att.-Gen.* v. *Haberdashers' Co.*, 1 My. & K. 420; *Lockhart* v. *Hardy*, 9 Bea. 379; *Mexborough* v. *Savile*, 88 L. T. 131; *Palmer* v. *Flower*, L. R. 13 Eq. 250; *Earl of Lonsdale* v. *Berchtoldt*, 3 K. & J. 185, and other cases cited *ante*, p. 857.

(*m*) *Ante*, p. 857 *seq.*

(*n*) Chap. LIV.

(*o*) See *Evans* v. *Tripp*, 6 Mad. 91.

(*p*) *Jerningham* v. *Herbert*, 4 Russ. 388.

(*q*) See Chap. XII; but see *Re Sikes*, [1927] 1 Ch. 364 ("my piano").

non-existence of the subject-matter (*r*). General pecuniary legacies may also in certain cases be adeemed; this subject is dealt with in another chapter (*s*), but it seems more convenient to consider the ademption of specific legacies in the present place.

Ademption of specific legacy.

A specific legacy is adeemed (*t*) if the subject of it has ceased to exist as part of the testator's property in his lifetime. Thus a specific bequest is adeemed, in the case of chattels if they are lost (*u*), destroyed, sold or given away; in the case of a debt if the debt is paid off; or in the case of stock if the stock is sold in the testator's lifetime (*x*); and if part of the debt is paid or part of the stock is sold, there is an ademption *pro tanto* (*y*). For this purpose a binding contract of sale has the same effect as an actual sale (*z*). At one time it seems to have been considered that the testator's intention must be looked at to see whether there was an intention to adeem. Thus if the testator specifically bequeathed a mortgage debt and afterwards called it in, it might be supposed that there was an ademption, but if he was paid off against his will that there was none (*a*). This distinction has, however, long since been swept away, and was treated as exploded by Lord Thurlow in *Ashburner* v. *Macguire* (*b*).

Intention not considered.

Republication of will.

An adeemed legacy is not revived by a republication of the will, so as to give the legatee the property representing the adeemed legacy (*c*).

No implied substitution of other property.

And if a legacy has been adeemed by being used by the testator for purposes for which he had provided by his will,

(*r*) See *Re Gray*, 36 Ch. D. 205.

(*s*) See *post*, p. 1122.

(*t*) As to translation, see *Swinburne*, 522. At one time a revoked legacy was considered to be adeemed.

(*u*) *Durrant* v. *Friend*, 5 De G. & S. 343, where insured chattels were lost at sea, and it was held that the specific legatee was not entitled to the insurance moneys.

(*x*) *Ashburner* v. *Macguire*, 2 Br. C. C. 108; *Badrick* v. *Stevens*, 3 B. C. C. 431; *Re Bridle*, 4 C. P. D. 336; *Harrison* v. *Jackson*, 7 Ch. D. 339; *Gardner* v. *Hatton*, 6 Sim. 93; *Re Robe*, 61 L. T. 497; *Makeown* v. *Ardagh*, Ir. R. 10 Eq. 445; *Manton* v. *Tabois*, 30 Ch. D. 92; *Maclean* v. *Maclean's Executrix*, [1908] Ct. of Sess. Ca. 838; *Sidney* v. *Sidney*, L. R. 1 Eq. 65 (release of interest on specific debt).

(*y*) *Humphreys* v. *Humphreys*, 2 Cox, 184 (stock); *Aston* v. *Wood*, 43 L. J. Ch. 715 (partnership debt); *Toole* v. *Hamilton*, [1901] 1 Ir. R. 383 (money in bank).

(*z*) *Watts* v. *Watts*, L. R. 17 Eq. 217 (notice to treat for leaseholds under Lands Clauses Act). But an offer by an agent to sell the subject-matter of a legacy made before, but accepted after, the testator's death does not cause ademption, because there was no binding contract: *Re Pearce*, 8 R. 805. As to conversion generally, see Chap. XXII.

(*a*) See *Crockat* v. *Crockat*, 2 P. W. 164; *Ford* v. *Fleming*, 2 P. W. 469; *Att.-Gen.* v. *Parkin*, Amb. 566.

(*b*) 2 Br. C. C. 108; *Stanley* v. *Potter*, 2 Cox, 180.

(*c*) *Ante*, p. 189; and compare *Cowper* v. *Mantell* (*No.* 1), 22 Bea. 223, *post*, p. 1055.

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the legatee has no equity to have the benefit of that provision (*d*). Nor does the fact that the proceeds of property comprised in a specific bequest have been set apart or re-invested by the testator so that they can be traced, entitle the legatee to them (*e*), unless the bequest is so expressed as to include the investments for the time being of a particular fund (*f*).

Where conversion is before the will.

It is of course necessary to distinguish between cases of ademption and misdescription. If a testator owns a certain investment and converts it into an investment of a similar kind, and subsequently makes a will by which he bequeaths the original investment, the legatee may be entitled to the equivalent in value of the original investment, on a principle somewhat similar to that of *falsa demonstratio* (*g*). It is obvious that in such a case no question of ademption arises. Thus in *Re Jameson* (*h*) the testatrix had at one time held shares in the S. and W. Bank; this bank afterwards amalgamated with the B. Bank, and the testatrix's shares were converted into shares of the B. Bank; the testatrix subsequently made her will, by which she bequeathed "all my shares in the W. and S. Bank": it was held that the shares in the B. Bank passed by this bequest.

Re Jameson.

But in *Re Atlay* (*i*) the testatrix gave to her son all the shares in the W. Company belonging to her at the time of her decease. The W. Company was not in existence at the date of the will or the death; before the will it had been amalgamated with the A. Company and the testatrix had received shares in the A. Company in exchange for those in the W. Company and held these shares at her death. Held that these shares did not pass to the specific legatee.

Slight changes.

A mere nominal change in the subject of a specific gift does not cause ademption, and it was held in *Oakes* v. *Oakes* (*k*), by Turner, V.-C., that a bequest of Great Western Railway shares

(*d*) *Humphreys* v. *Humphreys*, 2 Cox, 184.

(*e*) *Fryer* v. *Morris*, 9 Ves. 360; *Gardner* v. *Hatton*, 6 Sim. 93; *Re Bridle*, 4 C. P. D. 336 (with which compare *Makeown* v. *Ardagh*, Ir. R. 10 Eq. 445); *Harrison* v. *Jackson*, 7 Ch. D. 339; *Manton* v. *Tabois*, 30 Ch. D. 92; and cases cited *ante*, p. 1053.

(*f*) As to this, see *Lee* v. *Lee*, 27 L. J. Ch. 824, and other cases cited, *ante*, p. 1051.

(*g*) *Selwood* v. *Mildmay*, 3 Ves. 306, and cases cited in notes. As to *Selwood* v. *Mildmay*, see *post*, p. 1066. *Findlater* v. *Lowe*, [1904] 1 Ir. R. 519, was the case of a debt being converted into stock of a company: see *post*, p. 1085.

(*h*) [1908] 2 Ch. 111.

(*i*) 56 Sol. J. 444.

(*k*) 9 Ha. 666, and see *Morrice* v. *Aylmer*, L. R., 7 H. L. 717, overruling *Oakes* v. *Oakes* on one point. See *Re Slater*, [1907] 1 Ch. 665; *Re Pilkington's Trusts*, 13 L. T. 35 (where the words of the will were special); *Re Clifford*, [1912] 1 Ch. 29; *Re Leeming*, [1912] 1 Ch. 828; *Re Kuypers*, [1925] Ch. 244, referred to *ante*, p. 1043.

was not adeemed by the shares having been converted into consolidated stock by a resolution of the company under the authority of an Act of Parliament. This seems correct in principle, as the only difference between a £100 share (if fully paid) and £100 stock is that the latter can be sub-divided by the holder, while the former can not. So in *Partridge* v. *Partridge* (*l*) a conversion of South Sea stock into South Sea annuities was held not to adeem a bequest of the stock.

Substantial change.

But if there is a substantial change in the subject of the bequest, it is adeemed. Thus in *Re Lane* (*m*), where a testator gave all his debentures in the S. Railway Company, and after the date of the will, when the debentures became payable, arranged with the company to exchange them for a smaller amount of permanent debenture stock bearing a higher rate of interest, it was held that the legacy was adeemed; the case was the same as if the testator had sold the debentures and bought debenture stock with the proceeds (*n*).

Ademption of charge on land.

In *Cowper* v. *Mantell* (*o*) a testator bequeathed certain leaseholds to A and B subject to the payment out of the rents of an annuity of £60 to X; he afterwards assigned the property to trustees upon other trusts, reserving a power by deed or will to appoint an annuity of £60 to X; subsequently he confirmed his will, but did not in terms exercise the power: it was held that the annuity failed. On the other hand, in *Longfield* v. *Bantry* (*p*) a testator was entitled to a charge on certain estates and bequeathed it to A; afterwards the estates were re-settled with the concurrence of the testator, so as to give him a fresh charge for the same amount: it was held that there had been no substantial change, and that the bequest was not adeemed.

Declaration as to substituted investments.

In *Townsend* v. *Townsend* (*q*) a testatrix made specific bequests of various investments, and directed that if any of her investments should be changed, the substituted investment should be "considered legally the same" as that described in the will "on the production of sufficient memoranda to show the particulars of such change"; some of the investments were changed after the date of the will: it was held that

(*l*) 9 Mod. 269.

(*m*) 14 Ch. D. 856, and see *Pattison* v. *Pattison*, 1 M. & K. 12 (exchange of "Long Annuities" for short annuities); *Re Gibson*, L. R. 2 Eq. 669; *Macdonald* v. *Irvine*, L. R. 8 Ch. D. 101 (sale of Egyptian bonds and purchase of Egyptian bonds of a different kind); *Re Gray*, 36 Ch. D. 205; *Re Slater*, [1906] 2 Ch. 480; [1907] 1 Ch. 665 (conversion of stock in a water company).

(*n*) In *Re Herring*, [1908] 2 Ch. 493, Joyce, J., seemed to think that *Re Lane* ought to have been treated as coming under section 24 of the Wills Act. See *ante*, p. 386.

(*o*) 22 Bea. 223.

(*p*) 15 L. R. Ir. 101.

(*q*) 1 L. R. Ir. 180.

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memoranda in the testatrix's handwriting were admissible to identify the new investments, and that they passed accordingly. The decision seems contrary to the provisions of the Wills Act requiring every will to be in writing (*r*).

Conversion of property belonging to a lunatic.

A wrongful conversion will not in general operate as an ademption (*s*). On this principle, if a person becomes insane after making his will, a conversion by his committee, without the sanction of the Judge in Lunacy, will not cause ademption (*t*). But under the Lunacy Regulation Act, 1853, it seems to have been considered that if a conversion was made under an order of the Judge, this was equivalent to a conversion by the testator himself, and therefore caused ademption (*u*). On the other hand, a transfer under an Order in Lunacy of stock into the name of the Paymaster-General out of the name of a testator who had become of unsound mind, was held not to adeem a bequest of "all stock standing in my name and belonging to me at the time of my decease" (*x*). And in cases governed by the Lunacy Act, 1890, sales and other dispositions of the property of the testator under the powers of the Act do not affect the interests of his legatees except so far as the money thereby produced is actually expended under the Act (*y*), and the Court will as far as possible administer the estate of a lunatic testator so as to preserve the rights of legatees (*z*).

Compulsory conversion.

Re Slater.

So far as the question of ademption is concerned, it seems to be immaterial whether conversion is effected by the act of the testator or by a paramount authority, such as Act of Parliament. Thus in *Re Slater* (*a*) a testator bequeathed "money invested in the L. Company"; at the date of his will the testator held stock in the L. Company which under the provisions of an Act of Parliament was converted into the stock of another corporation: it was held by Joyce, J., that the latter stock did not pass by the bequest.

S. 24 of Wills Act.

The effect of section 24 of the Wills Act with reference to the question of ademption is discussed elsewhere (*b*).

(*r*) See the remarks of Chitty, J., in *Re Freer*, 22 Ch. D. at p. 627.

(*s*) *Basan* v. *Brandon*, 8 Sim. 171; *Taylor* v. *Taylor*, 10 Hare, 475; *Jenkins* v. *Jones*, L. R. 2 Eq. 323; *Harrison* v. *Asher*, 2 De G. & Sm. 436 (conversion by agent without knowledge of testator's death). *Browne* v. *Groombridge*, 4 Madd. 495, seems contrary to principle.

(*t*) *Re Larking*, 37 Ch. D. 310. See also the Scottish case of *Macfarlane's Trustees* v. *Macfarlane*, [1910] S. C. 325.

(*u*) *Re Freer*, 22 Ch. D. 622; *Jones* v. *Green*, L. R. 5 Eq. 555. See *ante*, p. 150.

(*x*) *Re Wood*, [1894] 2 Ch. 577.

(*y*) Section 123. *Re Hodgson's Trusts*, [1919] 2 Ch. 189; *Re Walker*, [1921] 2 Ch. 63.

(*z*) *Re Wood*, *supra*.

(*a*) [1906] 2 Ch. 480; [1907] 1 Ch. 665.

(*b*) See Chap. XII.

National Debt Conversion Act.

The effect of the National Debt (Conversion) Act, 1888, upon general and specific bequests of Consols is rather curious. By section 25, sub-section 2 it is enacted that "In any instrument executed before the passing of this Act references to any stock liable to be converted or enlarged in pursuance of this Act may, if the stock is so converted or enlarged, be construed as references to new stock, and in the case of any testamentary instrument executed before the passing of this Act, any disposition which but for the passing of this Act would have operated as a specific bequest of any such stock, shall, if the same is so converted or exchanged, be construed as a specific bequest of such new stock, and if the same is not so converted but is paid off or redeemed, shall be construed as a pecuniary legacy of a sum of money equal to the nominal amount of the stock so paid off or redeemed." In the first part of this sub-section the word instrument includes a will (*c*), so that a general bequest of £100 3 per cent. Consols in a will executed before the Act is now construed as a general bequest of £100 $2\frac{1}{2}$ per cent. Consols; and the same is the case with a specific bequest where the testator accepted the terms of conversion, but if the Consols are paid off and redeemed, the legatee, though he gets a legacy equal to the nominal amount of the stock, loses the benefit of the priority to which he would have been entitled as specific legatee, but gains the advantage that his legacy is not liable to ademption.

Exchange of securities under War Loan Acts.

The Finance Act, 1916, s. 60, and the Finance Act, 1921, s. 47, empowered the Treasury to carry out arrangements for the exchange of securities issued under any War Loan Act; and the War Loan Acts, 1915 and 1916, enabled the Treasury to make rules for carrying into effect the provisions of the Acts as to exchange of securities. By the War Loan (Exchange of Securities) Rules, 1917, it is provided that in the case of any testamentary instrument executed before the date of the rule (January 18, 1917), any disposition which but for the provisions of the War Loan Act and these Rules would have operated as a specific bequest of any securities shall if the securities are exchanged under the Acts be construed as a specific bequest of the same amount of new securities for which the same were exchanged. So that a specific bequest of $4\frac{1}{2}$ per cent. War Loan and Exchequer Bonds which were converted into 5 per cent. War Loan was not adeemed (*d*).

(*c*) *Re Howell-Shepherd*, [1894] 3 Ch. 649. See *Duke of Northumberland* v. *Percy*, [1893] 1 Ch. 298.

(*d*) *Re Macartney*, [1920] W. N. 132; 64 Sol. J. 409.

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Railway Amalgamation Schemes.

Similar provisions have been made under the War Loans (Exchange of Securities) Rules, 1919, 1920, 1921, 1922, 1924 and 1926, published in the Statutory Rules and Orders for those years (*e*); and in Railway Amalgamation Schemes made under the Railways Act, 1921 (*f*).

Change in nature of testator's interest.

The testator's interest in certain property may change between the date of the will and the death, and if he bequeaths his interest in the property, or the property, the question is whether he intends to describe the property or to limit the bequest to the interest he has at the date of the will. This question has been already referred to in connection with sections 23 (*g*) and 24 (*h*) of the Wills Act, the former of which abolished the old rule that where a testator bequeathed property in which he had an interest, and afterwards disposed of that interest and acquired a new interest (as where he surrendered a lease and took a new lease of the same property), the latter did not generally pass by the bequest (*i*). Under the present law the question is purely one of intention. Such a case occurs when a testator bequeaths his share and interest in a business and subsequently acquires the whole business (*k*), or when he bequeaths his leasehold house and afterwards takes a new lease by way of renewal (*l*), or purchases the fee simple. In the latter case, if the testator intends that his interest in the house, whatever it may be, shall belong to the legatee, the fee simple will pass by the gift. Thus in *Saxton* v. *Saxton* (*m*) the testator gave to his wife all his term and interest in the leasehold house No. 1 B. Gardens, in which he then resided, for her absolute use and benefit, subject to the payment of the ground rent and performance of the covenants affecting the same. He afterwards purchased the freehold of the house, which was conveyed to

Saxton v. *Saxton*.

(*e*) S. R. & O., 1919 (II), p. 906; S. R. & O., 1920 (No. 2), p. 1539; S. R. & O., 1921, p. 1434; 1921 (No. 2), p. 1437; S. R. & O., 1922, p. 1124; S. R. & O., 1924, p. 1846; 1924 (No. 2), p. 1848; S. R. & O., 1926, p. 1377; 1926 (No. 2), p. 1380.

(*f*) See *Re Anderson*, [1928] W. N. 46. Railway Amalgamation Schemes are not printed in the annual volumes of S. R. & O., but in separate S. R. & O. forms. Lists of the schemes are given in the annual volumes as follows :— 1921, p. 1520; 1922, p. 1951; 1923, p. 1104; 1924, p. 1938.

(*g*) Chap. VII, *ante*, p. 151.

(*h*) Chap. XII.

(*i*) See *Abney* v. *Miller*, 2 Atk. 593.

(*k*) *Re Russell*, 19 Ch. D. 432.

(*l*) This question is discussed in Chap. XII, *ante*, p. 381; *Re Bick*, [1920] 1 Ch. 488 (devise of rent-charge adeemed by purchase of fee simple). See *Leckey* v. *Watson*, Ir. R. 7 C. L. 157; *Wedgwood* v. *Denton*, L. R. 12 Eq. 290.

(*m*) 13 Ch. D. 359; *Leckey* v. *Watson*, Ir. R. 7 C. L. 157. See *Struthers* v. *Struthers*, 5 W. R. 809; *Miles* v. *Miles*, L. R. 1 Eq. 462; *Cox* v. *Bennett*, L. R. 6 Eq. 422, cited *ante*, p. 382, where *Emuss* v. *Smith*, 2 De G. & S. 722, is also referred to.

him in fee simple. Malins, V.-C., held that the house passed to the widow for an estate in fee simple.

Where property is ascertained at death.

Where the will refers to the property as existing at the testator's decease, the cases do not turn on the question of ademption, which cannot strictly arise, but on whether the description in the will is sufficient to pass the property as it exists at the death (*n*). This has already been discussed with reference to the effect of section 24 of the Wills Act on specific bequests (*o*) : such as the bequest of "my government stock," which clearly passes all the Government stock held by the testator at the time of his death (*p*).

Effect of sec. 24 of Wills Act.

Merger of term.

If a testator, being possessed of a term of years, bequeaths his personal estate, and afterwards purchases the reversion, the term will merge, and therefore will not pass by the bequest (*q*), unless he keeps the term alive by having the reversion conveyed to a trustee (*r*).

Gift of settled property.

When a testator has a general power of appointment by will over funds in a settlement, a bequest of the funds is not necessarily adeemed by a change of investment under the powers of the settlement (*s*). But the question depends on the words of the appointment, and it seems that no distinction is drawn between general and special powers (*t*).

Where testator bequeaths his share or interest in an estate or fund.

Sometimes a testator makes a specific bequest of his share or interest in a trust fund, or in the estate of a deceased person, which has not been received by him at the date of the will. In such a case it seems clear that no sale or change of investment by the personal representatives or trustees who have control of the property will effect an ademption of the bequest, unless the testator so describes the property with reference to its condition at the date of the will that the words of the gift are inapplicable

(*n*) *Re Knight*, 34 Ch. D. 518.

(*o*) The effect of section 23 of the Act is discussed in *Blake* v. *Blake*, 15 Ch. D. at p. 487.

(*p*) *Goodlad* v. *Burnett*, 1 K. & J. 341; *Everett* v. *Everett*, 7 Ch. D. 428, and other cases cited *ante*, pp. 385 *seq*. But a bequest in general terms may be so expressed as to show that the testator had in his mind specific property belonging to him at the date of his will : this is the construction which most people would have put on the two bequests in *Drake* v. *Martin*, 23 Bea. 89 : the construction which the M.R. put upon them does not seem to be in accordance with the authorities : see *ante*, p. 384.

(*q*) *Capel* v. *Girdler*, 9 Ves. 509. The actual decision seems to be erroneous, and to have proceeded on a misapprehension of *Whitchurch* v. *Whitchurch*, 2 P. W. 236; *Goodright* v. *Sales*, 2 Wils. 329, and similar cases. There is nothing in *Capel* v. *Girdler* to show that the term was an attendant term.

(*r*) *Scott* v. *Fenhoullet*, 1 Br. C. C. 69; *Belaney* v. *Belaney*, L. R. 2 Ch. 138.

(*s*) *Re Johnstone's Settlement*, 14 Ch. D. 162; *Willett* v. *Finlay*, 29 L. R. Ir. 156, 497.

(*t*) *Re Dowsett*, [1901] 1 Ch. 398; *Beddington* v. *Baumann*, [1903] A. C. 13, affirming decision of C. A. in *Re Moses*, [1902] 1 Ch. 100.

to the proceeds of sale or new investment (*u*). But if the property is actually made over to the testator during his lifetime, the question is more difficult. If it were converted into money and mixed by him with his own property, the bequest would fail (*x*), but this result does not necessarily follow if the property is preserved by him in specie (*y*), or can otherwise be traced and distinguished from his other property. Thus in *Lee* v. *Lee* (*z*) a testator bequeathed the share to which he was or might become entitled in the personal estate of X to A and B upon certain trusts for investment, etc.; after the date of the will, two separate sums of stock, representing his share in X's estate, were transferred to him; one of them he sold, but the other remained standing in his name until his death: it was held by Kindersley, V.-C., that the bequest of the latter sum was not adeemed. And the same principle applies if in such a case the stock is sold and the proceeds re-invested by the testator, provided the property can be followed and distinguished (*a*).

Where bequest is demonstrative.

In *Barker* v. *Rayner* (*b*) Lord Eldon said: "If there be a gift of a sum of money, and the testator points to a fund, not for the purpose of giving that fund, but for the purpose of showing that the money to arise from that fund is to go to the legatee as money, the cases would authorise me to say that, the intention being to give the money, the legatee is not to lose the benefit intended for him, even if the money should not remain in that fund: and its ceasing to remain in that fund would not amount to an ademption." Such a bequest is in fact demonstrative, and takes effect whether the investment is in existence at the testator's death or not. The decision in *Le Grice* v. *Finch* (*c*) seems to have been a mistaken application of this principle. There the bequest was of a sum of "£500 now out upon mortgage"; it was called in by the testatrix, part applied by her to her own purposes, and the remainder invested in stock; Sir W. Grant, M.R., said: "The thing given is not the mortgage, but the money," and he decreed payment: in other

(*u*) As in *Re Dowsett*, [1901] 1 Ch. 398: approved in *Beddington* v. *Baumann*, [1903] A. C. 13.

(*x*) *Jones* v. *Southall*, 32 Bea. 31; *Manton* v. *Tabois*, 30 Ch. D. 92.

(*y*) As in *Dingwell* v. *Askew*, 1 Cox, 427; *Clough* v. *Clough*, 3 My. & K. 296.

(*z*) 27 L. J. Ch. 824.

(*a*) *Moore* v. *Moore*, 29 Bea. 496; *Morgan* v. *Thomas*, 6 Ch. D. 176; *Re Kenyon's Estate*, 56 L. T. 626; *Re Vickers*, 81 L. T. 719 (deposit in a bank); *Toole* v. *Hamilton*, [1901] 1 Ir. 383 (similar case); *Longfield* v. *Bantry*, 15 L. R. Ir. 101. The case of *Clark* v. *Browne* (2 Sm. & G. 524) may possibly be supported on this principle, but the reasons given by V.-C. Stuart for his decision are unsatisfactory. The decision was criticised by Jessel, M.R., in *Harrison* v. *Jackson*, 7 Ch. D. 339, and by Bacon, V.-C., in *Manton* v. *Tabois*, 30 Ch. D. 92.

(*b*) 2 Russ. 122.

(*c*) 3 Mer. 50, commented on in *Sidebotham* v. *Watson*, 11 Ha. 170.

words, he held that the legacy was demonstrative. The decision is therefore not open to the criticism which Jessel, M.R., made on it in *Harrison* v. *Jackson* (*d*), for Sir W. Grant did not hold that the property which represented the £500 at the death of the testatrix passed to the legatees : he held that they were entitled to the £500. Nevertheless, the decision cannot now be looked upon as good law, for the bequest was specific (*e*); a bequest of a mortgage debt is adeemed if the debt is paid off (*f*), and the legatee cannot follow the money (*g*).

The effect of sec. 24 of the Wills Act, on bequests of personalty.

The subject of a specific bequest may either be some particular thing, or it may consist of a number of things answering a certain description, so that the subject of the bequest may possibly fluctuate from time to time. The distinction between the two kinds of bequests has already been adverted to, but it is not always easy to determine from the words of the will which kind is intended to be given, and the Wills Act has made some alteration in the law in this respect. A consideration of section 24 of that Act will make the difficulty manifest. The section enacts that " Every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear in the will." The effect of this section on a devise of real estate has been already dealt with. Before the Wills Act, as regards general devises, the will spoke from the date of execution, but as regards general bequests from the date of the death. The effect of the Act was not therefore in general to alter the law as regards general bequests, but it altered the law as regards an important class of specific bequests. The rule is thus stated by Jessel, M.R., in *Bothamley* v. *Sherson* (*h*) : " No doubt one class of specific bequests is affected by the Act, namely, the class of specific bequests described as generic, that is, a specific bequest which points to a class of objects given by the testator, and which from the nature would not naturally be referable to the date of the instrument. A good illustration of this class of bequests is a gift ' of my household furniture.' There are very few persons not *in articulo mortis* who would not expect that some articles of household furniture would wear out, or be

Bothamley v *Sherson.*

(*d*) 7 Ch. D. 339.

(*e*) It is submitted that *Selwood* v. *Mildmay*, 3 Ves. 306 (as to which see *post*, p. 1066), is open to the same objection : the decisions in that case and in *Le Grice* v. *Finch* appear, in fact, to have been due to a desire to avoid the operation of the doctrine of ademption which, as Jessel, M.R., remarked in *Harrison* v. *Jackson*, often defeats the intention of testators.

(*f*) *Re Bridle*, 4 C. P. D. 336.

(*g*) *Sidebotham* v. *Watson*, 11 Ha. 170.

(*h*) L. R. 20 Eq. 304, at p. 312.

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broken, or otherwise be parted with, and be replaced by other articles of a similar kind. It would not be natural to assume that a man giving that kind of legacy intended to restrict it to the property of that description which he had at the date of the will. It has been held in *Goodlad* v. *Burnett* (*i*) and in some other cases to which reference has been made, that in cases of that description the new law brings down the specific bequest to the date of the death; in other words, the new law makes a specific bequest of 'my furniture' to mean not 'the furniture which belongs to me at the time of making this my will,' but 'the furniture which shall belong to me at the time of my death.' Legacies expressed in both ways were specific before the Wills Act, and they equally remain specific now."

Description of chattels by reference to position.

The difference, however, which exists between moveable and immoveable property has given rise to a class of cases where the testator has defined the property by reference to its position in space. If the property is immoveable, this is clearly the most adequate definition, but with regard to moveable property many questions have arisen as to whether a removal was temporary or not, so that the reference to position in space does not always determine the matter. The cases on the subject are not altogether easy to understand, and it may assist the reader to make a general statement of the problems that arise. A testator may bequeath (1) the furniture in his house at A at the date of his will, or (2) the furniture in his house at A at the date of his death.

Gift of "furniture now in my house at A."

Consider now the first case; if he has furniture in his house at A, it is clearly marked out; the bequest may be adeemed by the furniture being destroyed or sold, but it is clear that subsequent removal cannot affect the gift (*k*). The subject of the gift is defined by its position in space at a given time; how, then, can its position in space at another time affect the matter? But what if he has no furniture in his house at A at the date of the will? *Prima facie* there is no legacy, but if the furniture had been removed for a temporary purpose and the testator was ignorant of or might reasonably have forgotten the fact, it would seem to be a case of *falsa demonstratio*. Thus a bequest of "all the furniture now in my study in my house at A" would clearly carry the study furniture, although on the actual day the will was made it had been removed into another room because the study was being cleaned (*l*).

(*i*) 1 K. & J. 341.

(*k*) *Cunningham* v. *Ross*, 2 Lee Eccl. R. 272, appears to be a case of this kind: *post*, p. 1063, n. (*m*).

(*l*) *See Norreys* v. *Franks*, Ir. R. 9 Eq. 18 (gift of contents of a box held to carry contents placed for safe custody in a safe).

Gift of "furniture in my house at A at the date of my death."

Consider the second case. Obviously no case of ademption can arise, because the date of the death is the period when the gift is ascertained. If the testator has no longer his house at A, and consequently no furniture in it, there is nothing to fit the subject matter of the gift : the legacy fails, it is not adeemed (*m*). But again, the same question of *falsa demonstratio* arising from temporary removal may arise. Thus, if the day before the testator's death the house was burnt down, but the furniture saved and removed, the furniture would clearly pass (*n*), or if the testator intended to put the furniture in the house but was prevented by the tenant from doing so, the furniture will pass (*o*), but a picture purchased and not sent home will not pass (*p*). Jewels removed to a banker's for safe custody have been held to pass (*q*). But the removal must be for a temporary purpose (*r*).

The topic thus stated does not appear to present any serious difficulty, and the rules seem to follow from well-ascertained principles of law applied to the particular properties of moveable chattels; but it must be admitted that the cases on the subject cause difficulties.

Difficulties of construction.

One difficulty lies in ascertaining to what chattels the description with reference to locality applies. Thus in *Domvile* v. *Taylor* (*s*) the testator gave to his wife "all my household furniture, plate . . . and other effects of the like nature, and all wines . . . and other consumable stores which shall at my decease be in or about my dwelling-house" : it was held that the qualification as to locality only applied to the wines, etc. A somewhat similar case was *Norris* v. *Norris* (*t*), where the words "To my beloved wife I give all my interest in my house at Lavender Hill, the furniture, books, pictures, wines, etc.," were held to pass all the furniture, books, etc., which the testator had at the time of his death in another house to which he had removed from Lavender Hill : the description of the furniture, etc., was held to be used generally, and not with reference to any particular place or time.

(*m*) *Shaftsbury* v. *Shaftsbury*, 2 Vern. 747; *Green* v. *Symonds*, 1 B. C. C. 129, n.; *Heseltine* v. *Heseltine*, 3 Madd. 276; *Spencer* v. *Spencer*, 21 Bea. 548, are cases of this nature. See also *Cunningham* v. *Ross*, *supra*, n. (*k*).

(*n*) *Chapman* v. *Hart*, 1 Ves. sen. 271; *Land* v. *Devaynes*, *post*, p. 1064. *Norreys* v. *Franks*, Ir. R. 9 Eq. 18.

(*o*) *Rawlinson* v. *Rawlinson*, 3 Ch. D. 302. The decision seems correct on principle, although it is contrary to *Duke of Beaufort* v. *Dundonald*, 2 Vern. 739, and other old cases.

(*p*) *Brooke* v. *Warwick*, 2 De G. & S. 425.

(*q*) *Re Johnston*, 26 Ch. D. 538; *Norreys* v. *Franks*, Ir. R. 9 Eq. 118; *Re Lea*, 104 L. T. 253. See *Wilkins* v. *Jodrell*, 11 W. R. 588.

(*r*) *Re Zouche*, [1919] 2 Ch. 178.

(*s*) 32 Bea. 604. A different construction was arrived at in *Heseltine* v. *Heseltine*, 3 Madd. 276.

(*t*) 2 Coll. 719.

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Whether locality is essential.

Another difficulty is that the testator frequently leaves it in doubt whether the place is an essential part of the description: in other words, whether he means the bequest to operate only on those chattels which at the date of his death are in the place referred to. If so, it is obvious that a permanent removal causes the gift to fail, wholly or in part. Thus, if a testator bequeaths the lease of his residence and the furniture in it to A, this may show an intention that the furniture is to go with the house, and if before his death the lease expires, and he moves the furniture to another residence, the gift of the furniture fails (*u*).

Where locality is not continuing part of description.

On the other hand, the testator may use the reference to locality as a means of identifying certain chattels, and in that case it is not a continuing part of the description. Thus in *Blagrove* v. *Coore* (*x*) the testator directed his executors to sell the house, furniture, fixtures, etc., situate in G., and out of the proceeds to pay his debts, and bequeathed to his sisters all his furniture in England: after the date of the will the testator sold the house and part of the furniture in G., and removed the remainder to another house; it was held that it was included in the bequest to the executors, and did not pass to the sisters.

Can removal ever cause ademption?

The proposition that a permanent removal of goods may cause an ademption is not only to be found in the arguments of counsel and in the works of learned writers, but is also supported by some judicial authority, and it is therefore not without great diffidence that it is suggested that removal can never be a cause of ademption strictly so called. The cases which are against this view will now be considered. In *Land* v. *Devaynes* (*y*) there was a bequest of all the testator's plate, linen and furniture in his house at Savile Street, together with the lease of the said house. At his death the plate was at B. It was argued by the Solicitor-

Land v. *Devaynes.*

(*u*) *Colleton* v. *Garth*, 6 Sim. 19. According to some of the old cases, the intention of the testator has nothing to do with the matter, the general rule being that where there is a gift of all goods in the house, that description relates to the death of the testator, and if they are removed they do not pass unless the removal is merely temporary; *per* Lord Hardwicke in *Chapman* v. *Hart*, 1 Ves. sen. 271. The case of *Green* v. *Symonds*, 1 Br. C. C. 129, n., was decided on this principle. In that case the testator gave to C. all his books at his chambers in the Temple; before his death he removed the books into the country: it was held that this annulled the legacy, "because a will of personalty shall only be construed from the death of the testator." Under section 24 of the Wills Act, a will is only construed from the death of the testator where no contrary intention appears (see Chap. XII): if in *Green* v. *Symonds* the testator had no chambers in the Temple at the time of his death, it is clear that the bequest showed a contrary intention within the meaning of section 24. The case is similar to *Cunningham* v. *Ross*, 2 Lee Eccl. R. 272, 478, where the bequest was of "all goods lying in the lodgings I possess at X.," and it was held that the bequest took effect notwithstanding the removal of the goods.

(*x*) 27 Bea. 138. Compare *Re Dennis*, 24 T. L. R. 499 (motor car in Cornwall held to pass as "carriage in or belonging to" house in Denbigh)

(*y*) 4 Br. C. C. 537.

General that any alteration of a specific legacy is an ademption. The Lord Chancellor, in his judgment, does not mention ademption, but said that "the testator had only one set of plate and linen. It is therefore like a general devise of all his plate and linen." That is, the Court decided that local position was not part of the description; and did not decide more than this. In *Moore* v. *Moore* (*z*) Lord Thurlow said that a removal of goods for a necessary purpose is not an ademption of a specific legacy. It would seem that he had in his mind the case where goods in a house at the testator's death were bequeathed, and if so *Bothamley* v. *Sherson* is an authority for saying that the term ademption is not applicable to such a case. In *Spencer* v. *Spencer* (*a*) the bequest was of household goods, etc., which at the time of the testator's death should be in the house he then occupied in Buck Road. The testator did not occupy a house in Buck Road at the time of his death. Sir John Romilly gave judgment as follows: "I am of opinion that this is a specific gift which has been adeemed by giving up the house and taking away property. If a testator gave all the property in a particular spot, by taking away the property the gift is adeemed. If taken away for temporary purposes, it would still be held to be given because intended to be returned. But here the taking away is permanent, and there is no description of the gift except as contained in the house. *Land* v. *Devaynes* does not apply. I must declare the gift fails." It will be noticed that Sir J. Romilly says finally the gift fails, though he begins by saying it is adeemed. As that, again, was a case of property defined at the date of the testator's death, failure and not ademption is the correct expression. The remaining and by far the most difficult of the cases is *Colleton* v. *Garth* (*b*). The testator bequeathed to his wife the lease of his house in Baker Street, and the household furniture, plate, pictures and certain other articles therein. The lease having expired in the testator's lifetime, part of the furniture was sold, and the remainder, together with the plate, pictures and other articles was removed to a house which the testator took in Edward Street. Sir L. Shadwell, V.-C., held that the testator made the bequest of the furniture, etc., with reference to giving the lease, and that he had in contemplation an enjoyment of the house with the furniture, etc., and consequently the bequest totally failed by the change of circumstances. He makes no reference to ademption, but Sir E. Sugden had mentioned it in argument, and the headnote says, "held that the legacy was adeemed." The

Moore v. *Moore.*

Spencer v. *Spencer.*

Colleton v. *Garth.*

(*z*) 1 B. C. C. 127.
(*b*) 6 Sim. 19.
(*a*) 21 Bea. 548.

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decision proceeds upon a principle that the furniture went with the house, and that the bequest of the house having failed, that of the furniture did also. The limits of the principle applied in this case are not easy to ascertain, and it may be doubted whether at the present time the Court would be likely to extend it. Ademption by removal is referred to in *Re Johnston* (*c*), where Chitty, J., in deciding that a box of jewellery deposited at the testator's banker's, passed under a bequest of "all the household furniture, paintings, pictures, books, china, and the whole contents of my said house," said: "No ademption by removal, it would seem, will take place when the goods are removed for their preservation," and he decided the case on the ground that the house was the usual locality. It may be that the theory of ademption by removal is by this time so completely established that it is idle to object to the use of the term, but it must be remembered that whereas the doctrine of ademption (in the case of specific legacies) in the usual sense only applies where at the date of the will the testator possessed the specific object, and at the date of his death did not, in the case of ademption by removal the object forms part of the testator's assets at the time of his death, but not necessarily (it would seem) at the date of his will. The inconvenience of the use of the word ademption to cover these different cases is not very great, but if the decision in *Re Johnston* is in fact an application of the rule *falsa demonstratio non nocet*, it seems more logical expressly to treat it as such (*d*).

Bequest of non-existent thing.

There is one very exceptional case in which a specific legacy does not fail on account of the non-existence of the subject matter. Where a testator gives a specific legacy and he is not entitled to the subject of the specific bequest, either at the date of his will or subsequently, it would naturally be supposed that the bequest would fail. But this is not always held to be so.

Selwood v. *Mildmay.*

In *Selwood* v. *Mildmay* (*e*) the testator gave to his wife £1,250, "part of my stock in the four per cent. annuities in the Bank of England." About four years before the date of his will he had sold out this stock and purchased (in several parcels) long annuities. Evidence was admitted to show how the error in the will arose; namely, from the will having been partly copied from a previous will made before he sold the four per cent. annuities, and Lord Alvanley, M.R., said: "It is clear the testator meant to give a legacy, but mistook the fund. He acted upon the idea that he had such stock. This distinction is, then: if he had had

(*c*) 26 Ch. D. 538; see *Re Zouche*, [1919] 2 Ch. 178.
(*d*) See *Norreys* v. *Franks*, Ir. R. 9 Eq. 18.
(*e*) 3 Ves. 306.

the stock at the time, it would have been considered specific, and that he meant that identical stock; and any act of his destroying that subject would be a proof of *animus revocandi*: but if it is a denomination, not the identical corpus in that case, if the thing itself cannot be found and there is a mistake as to the subject out of which it is to arise, that will be rectified. Mr. Cooke puts the case of a testator giving his black horse when he had only a white one: perhaps it would be said he mistook the colour: but suppose he had more white horses: I would rather put the case of a ring or a picture. The Court would not rectify that, if the subject could not be found, but here the Court will rectify it." From this it looks as if the Master of the Rolls has treated the question as one of *falsa demonstratio*, and in *Miller* v. *Travers* (*f*) the Court said, speaking of *Selwood* v. *Mildmay*: "This case is certainly a very strong one; but the decision appears to us to range itself under the head that '*falsa demonstratio non nocet*,' where enough appears upon the will itself to show the intention, after the false description is rejected." The suggested distinction between stock and chattels (like a ring) appears to rest on the notion that a man would value a ring or a horse for its individual qualities or associations, and would therefore not be likely to make a mistake in describing it, while stock is a mere mode of investing money. But in *Selwood* v. *Mildmay* it would appear that the legatee did not take the long annuities in place of the 4 per cent. annuities, as would have been done if the case had been one of *falsa demonstratio*; the legacy was satisfied out of the personal estate: consequently the legacy was treated as demonstrative (*g*). Such a legacy would not be held to be demonstrative at the present day (*h*).

V.—Interest and Income.—(1) *Specific Legacies.*—A specific bequest, if vested in possession, and if the subject-matter is income-bearing, entitles the legatee to the income from the testator's death (*i*), and also to all accretions which arise after

Immediate specific legacy carries income.

(*f*) 1 Moo. & Scott, 342.

(*g*) This appears to have been the view taken by Lord Langdale in *Lindgren* v. *Lindgren*, 9 Bea. 358, *ante*, p. 480, n. (*l*). But see *Gordon* v. *Duff*, 3 D. F. & J. 662.

(*h*) See *ante*, p. 1041.

(*i*) *Barrington* v. *Tristram*, 6 Ves. 345. A direction to transfer a sum of stock to the legatee within a year from the testator's death does not exclude the rule: *Bristow* v. *Bristow*, 5 Bea. 289; even if the executors have an option of transferring one or other of two different stocks: *Chester* v. *Urwick*, 23 Bea. 402; *Re Jacob*, [1919] 1 Ir. R. 134. It may be mentioned that the legatee is assessable to income tax on the basis that the income was his for the year when such income was payable notwithstanding the postponement of the executors' assent and receipt by the legatee of the income: *I. R. Commissioners* v. *Hawley*, [1928] 1 K. B. 578. As to appointments under powers, see *Re Marten*, [1901] 1 Ch. 370, cited *ante*, p. 829.

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the death (*k*). In the case of shares and stocks, the legatee is entitled (subject to apportionment, if necessary) to dividends declared after the testator's death, although derived from profits made during his lifetime, and to all bonuses and other benefits arising after the testator's death, whether in the nature of capital or income, including bonuses having their origin in events which took place during the testator's lifetime (*l*). Income and bonuses ascertained and made payable, but not actually paid, during the testator's lifetime, belong to his estate, as capital (*m*). A similar principle seems to apply to private partnerships (*n*), except that profits derived from them are not liable to apportionment (*o*).

Apportionment.

Dividends and other periodical payments in the nature of income are apportionable under the Apportionment Act, 1870. Consequently, if a testator bequeaths a specific sum of Consols to A, and dies between the dividend days, the dividend received after his death is apportioned between his estate and A (*p*). Whenever there are periodical payments accruing when the event calling for apportionment occurs, the Act is at once brought into operation and must be applied, and when, subsequently, the accruing payments become due and payable they must be distributed in accordance with the Act as applied on the occurrence of the event which brought it into operation (*q*). The payment need not be periodical in the sense that it is usually made at recurring intervals (*r*); but it must be in respect of some definite period (*s*). Dividends representing arrears of interest on cumulative preference shares are treated as being in respect of the year in which they are paid (*t*).

But a testator may exclude the operation of the Act: as if he bequeaths "all the dividends" or "the whole of the income" of certain shares to A for life (*u*), or declares that

(*k*) *Jacques* v. *Chambers*, 2 Coll. 435.

(*l*) *Clive* v. *Clive*, Kay, 600; *Maclaren* v. *Stainton*, 3 D. F. & J. 202; *Bates* v. *Mackinley*, 31 Bea. 280; *Carron Company* v. *Hunter*, L. R. 1 Sc. & D. 362; *Re Hopkins' Trust*, L. R. 18 Eq. 696.

(*m*) *Shore* v. *Weekly*, 3 De G. & S. 467; *Clive* v. *Clive*, *supra* (as explained in *Wright* v. *Tuckett*, 1 J. & H. 266, and *Browne* v. *Collins*, *infra*); *Lock* v. *Venables*, 27 Bea. 598; *De Gendre* v. *Kent*, L. R. 4 Eq. 283. See also *Re Raven*, 111 L. T. 938 (current dividends).

(*n*) *Browne* v. *Collins*, L. R. 12 Eq. 586, where *Johnston* v. *Moore*, 27 L. J. Ch. 453; *Ibbotson* v. *Elam*, L. R. 1 Eq. 188, and *Re Barton's Trust*, L. R. 5 Eq. 238, are referred to.

(*o*) *Jones* v. *Ogle*, *post*, n. (*y*).

(*p*) *Re Beaven*, 53 L. T. 245.

(*q*) *Per* Eve, J., in *Re Muirhead*, [1916] 2 Ch. 181, at pp. 185, 186.

(*r*) *Re Griffith*, 12 Ch. D. 655. As to this case see *Re Sale*, [1913] 2 Ch. 697, 701.

(*s*) *Re Jowitt*, [1922] 2 Ch. 442.

(*t*) *Re Wakley*, [1920] 2 Ch. 205; *Re Grundy*, 117 L. T. 470. See also *Re Marjoribanks*, [1923] 2 Ch. 307.

(*u*) *Jones* v. *Ogle*, L. R. 8 Ch. 192; *Re Meredith*, 67 L. J. Ch. 409.

the shares shall carry the dividend accruing thereon at his death (*v*).

Application of Act.

The Act does not apply to all kinds of income (*x*), and it has been suggested that it does not apply to a will made before the passing of the Act (*y*), but on principle there seems to be no foundation for the suggestion (*z*). It clearly applies to a will republished by a codicil executed after the passing of the Act (*a*). As regards the will of a testator who died before the passing of the Act, some difficulty is caused by section 7, providing the Act shall not apply if its application is expressly excluded, but it has been held that this does not prevent the Act from applying to such a case (*b*). The question whether the regulations of a company against apportionment of dividends on its shares can operate as an "express stipulation that no apportionment shall take place" within the meaning of the Act as between the beneficiaries under a will, was discussed but not decided in *Re Oppenheimer* (*c*). It would seem that such a stipulation, to be effective, must be contained in the will.

Arrears of interest.

A bequest of money secured by a particular bond or mortgage may be so worded to carry arrears of interest accrued during the testator's lifetime, but the authorities do not lay down any satisfactory principle (*d*).

Future specific legacy.

A specific bequest which is vested in interest, but the enjoyment of which is postponed, carries the interim income and accretions from the testator's death (*e*).

Before 1926 contingent specific bequest did not carry income, unless segregated.

Before 1926 a specific bequest which was contingent (such as a bequest to an unborn person, or to a person *in esse* on the happening of a contingency) did not, as a general rule, carry the intermediate income, which fell into residue (*f*). But if the

(*v*) *Re Lysaght*, [1898] 1 Ch. 115.

(*x*) *Jones* v. *Ogle*, L. R. 8 Ch. 192 (partnership); *Re Cox's Trusts*, 9 Ch. D. 159 (newspaper).

(*y*) By counsel, *arguendo*, in *Hasluck* v. *Pedley*, L. R. 19 Eq. 271, citing *Jones* v. *Ogle*, *supra*. But in *Jones* v. *Ogle* the question did not arise, because the will contained an express gift of "dividends": the C. A. said that the Act could not affect the construction of the will, which is obviously true.

(*z*) See the remarks of Jessel, M.R., in *Hasluck* v. *Pedley*, *supra*, adopted by Fry, J., in *Constable* v. *Constable*, 11 Ch. D. 681, acted on by North, J., in *Re Bridger*, [1893] 1 Ch. 44, where *Re March*, 27 Ch. D. 166, is also referred to.

(*a*) *Constable* v. *Constable*, *supra*.

(*b*) *Lawrence* v. *Lawrence*, 26 Ch. D. 795 (where *Re Cline's Estate*, L. R. 18 Eq. 213, is referred to).

(*c*) [1907] 1 Ch. 399.

(*d*) *Roberts* v. *Kuffin*, 2 Atk. 112; *Hawley* v. *Cutts*, 2 Freem. 24; *Harcourt* v. *Morgan*, 2 Kee. 274.

(*e*) *Per* Jessel, M.R., in *Long* v. *Ovenden*, 16 Ch. D. 691; *per* Fry, J., in *Guthrie* v. *Walrond*, 22 Ch. D. 573.

(*f*) *Per* Lord Thurlow in *Wyndham* v. *Wyndham*, 3 Br. C. C. 58; *Holmes* v. *Prescott*, 33 L. J. Ch. 264; *Donohoe* v. *Mooney*, 27 L. R. Ir. 26. In

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effect of the bequest was to separate the property from the general estate of the testator (as where leaseholds are bequeathed to trustees upon trust for A for life, with remainder to his children who attain twenty-one, and A dies leaving children who are all infants), then it carried the intermediate income from the death of the tenant for life, or if there is no preceding interest, from the testator's death (*g*). In *Harris* v. *Lloyd* (*h*) a testator directed a fund to be invested and held upon trust for the children of A, to be vested at twenty-one or marriage, with provision for their maintenance; at the death of the testator, A had no children: it was held that until the birth of a child the interest fell into residue. The decision seems contrary to the principle above stated.

After 1925 contingent specific bequest carries income.

But this rule has been altered by section 175 of the Law of Property Act, 1925, and in the case of wills coming into operation after 1925 a contingent specific bequest carries the intermediate income from the death of the testator except so far as such income is otherwise expressly disposed of.

Appointment.

The question of interest on an appointed fund is considered elsewhere (*k*).

Where bequest adeemed.

If a testator bequeaths property specifically to A, and afterwards enters into a contract of sale which is not completed until after his death, A is entitled to the income until the sale is completed (*l*).

Rule in *Howe* v. *Earl of Dartmouth*.

It is hardly necessary to say that the rule in *Howe* v. *Earl of Dartmouth* does not apply to specific bequests (*m*).

Revocation of probate: mesne income.

In *Re West* (*n*), specific shares were bequeathed to A by will duly proved; the bequest was assented to by the executors and the shares transferred to A; some years later a codicil was discovered revoking the bequest to A and giving the shares to B; the probate was revoked and a fresh probate, including the

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Wright v. *Warren*, 4 De G. & S. 367, the bequest appears to have been vested. Compare the authorities on contingent pecuniary legacies, *post*, p. 1077.

(*g*) *Re Woodin*, [1895] 2 Ch. 309 (commenting on *Furneaux* v. *Rucker*, [1879] W. N. 135). This case is referred to *post*, p. 1662, in connection with gifts to children as a class. Other cases are, *Boddy* v. *Dawes*, 1 Kee. 362, and *Re Clements*, [1894] 1 Ch. 665. The difference between these cases and the cases where a contingent pecuniary legacy is segregated, is that the latter only carries the income from a year after the testator's death: *post*, p. 1072. A direct bequest of leaseholds without the intervention of trustees was treated as a segregation in *Kiersey* v. *Flahavan*, [1905] 1 Ir. R. 45, but see *Re Eyre*, [1917] 1 Ch. 351.

(*h*) T. & R. 310. The fund formed part of a mortgage debt, and therefore the bequest was specific: *ante*, p. 1044.

(*k*) *Ante*, pp. 829 *seq.*

(*l*) *Watts* v. *Watts*, L. R. 17 Eq. 217. See *Townley* v. *Bedwell*, 14 Ves. 591.

(*m*) *Vincent* v. *Newcombe*, You. 599; *Cockran* v. *Cockran*, 14 Sim. 248; *Hubbard* v. *Young*, 10 Bea. 203.

(*n*) [1909] 2 Ch. 180.

codicil, was granted to the same executors : it was held that B was entitled to the mesne income of the shares.

(2) *General and Demonstrative Legacies.*—The general rule is that interest on legacies runs from the time when they are payable (*o*). Consequently, legacies payable at a time fixed by the testator generally carry interest from that time (*p*). The time may depend on an uncertain event (*q*), or on an event which may or may not happen during the testator's lifetime.

Where time of payment is fixed by the testator.

The executors deduct income tax on the interest (*r*).

It seems that if a pecuniary legacy is paid under a mistake the person who has received it is not liable for interest, unless he is entitled under the will to the income of another fund, in which case he is bound to bring into account interest on the sum erroneously paid to him (*s*).

The rate of interest payable on legacies, in the absence of an express direction by the testator, is 4 per cent. per annum (*t*), except where a contingent legacy by a person *in loco parentis* carries interest for maintenance, in which case if the income is sufficient and subject to any rules of Court to the contrary the rate is 5 per cent. (*u*).

Rate of interest.

A direction to pay interest on a legacy half-yearly obviously refers to the intervals at which the interest is to be paid, and has no reference to the rate. Nevertheless, in *Re Booker* (*v*),

Whether "per cent." implies "per annum."

(*o*) Legacies in foreign currency do not carry the foreign rate of interest : *Bourke* v. *Ricketts*, 10 Ves. 330; *Hamilton* v. *Dallas*, 38 L. T. 215. As to interest in the case of legacies to infants, wives, etc., see *post*, p. 1078; and as to interest on a sum or fund appointed under a power, see *ante*, p. 829. As to a sum forming part of a particular residue, see *Re White*, 101 L. T. 780.

(*p*) *Lloyd* v. *Williams*, 2 Atk. 108. In *Heath* v. *Perry*, 3 Atk. 101; *Crickett* v. *Dolby*, 3 Ves. 10, and *Tyrrell* v. *Tyrrell*, 4 Ves. 1, the legacies were payable on the legatees attaining twenty-one. So in *Chester* v. *Painter*, 2 P. W. 335, where the legatee died under twenty-one, it was held that his executors were not entitled to payment until the time when the legacy would have been payable if the legatee had lived. *Roden* v. *Smith*, Amb. 588, and *Maher* v. *Maher*, 1 L. R. Ir. 22, are to the same effect. *Re Gunn*, 128 L. T. 441 (legacy to be paid six months after signing of peace); *Re Rawson*, 124 L. T. 498.

(*q*) *Holmes* v. *Crispe*, 18 L. J. Ch. 439; *Lord* v. *Lord*, L. R., 2 Ch. 782; *Gibbon* v. *Chaytor* (*Re Gyles*), [1907] 1 Ir. R. 65. In *Re White*, 101 L. T. 780, the testator gave his residue to A for life, and after her death bequeathed out of it a legacy of £1,000 to B; A died within a year after the testator : it was held that the interest on B's legacy ran from A's death, and not from the expiration of a year from the death of the testator. *Re Lord Llangattock*, 34 T. L. R. 341, was a very special case.

(*r*) *Hamilton* v. *Linaker*, [1923] 1 Ir. R. 104.

(*s*) *Gittins* v. *Steele*, 1 Sw. 199. See *Re West*, [1909] 2 Ch. 180, *ante*, p. 1070.

(*t*) R. S. C. Order 55, r. 64. See *Re Davy*, [1908] 1 Ch. 61. As to legacies bequeathed by a person domiciled abroad, see *Hamilton* v. *Dallas*, 38 L. T. 215.

(*u*) Section 31, sub-section 3, of the Trustee Act, 1925.

(*v*) 54 L. T. 239. "Per cent." is frequently used as an abbreviation of "per cent. per annum," even in Acts of Parliament and other public documents : see for example the National Debt Conversion Act, 1888, *passim*.

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where the testator directed interest to be paid at the rate of 3 per cent. half-yearly, it was held that interest was payable at 6 per cent. per annum.

Where vested legacy payable *in futuro* is severed.

The general rule that a vested legacy, payable at a future time, only carries interest from that time, does not apply if the legacy is severed from the testator's estate : in such a case the legatee is entitled to the intermediate income from a year after the testator's death (*w*). The severance must be for some reason connected with the legacy itself, and not for mere reasons of administration (*x*). The rule also does not apply if the legacy is given to an infant, and the testator shows an intention that the legacy shall carry interest for maintenance (*y*).

Security for legacy payable *in futuro*.

A person to whom a vested legacy, payable *in futuro*, is given, may require the executor to set aside a sufficient sum to meet it : and conversely it seems that the executor may, without the consent of the legatee, appropriate proper investments for that purpose, so as to free the residue (*z*).

Where no time fixed.

A general legacy out of personal estate, if no time for its payment is fixed by the will, is payable at the expiration of one year from the testator's death (*a*), and carries interest from that date (*b*). A legacy under the will of a married woman made in exercise of a power of appointment is in the same position (*c*).

But a testator may indicate that a legacy is to carry interest from the death by charging an annuity upon it (*cc*).

Demonstrative legacy.

In like manner a demonstrative legacy carries interest only from the expiration of the executor's year (*d*).

Rule stated by Sir W. Grant.

The general rule has thus been stated : " Wherever legacies are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid until the money

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(*w*) *Dundas* v. *Wolfe Murray*, 1 H. & M. 425. In that case the fund carried interest from the testator's death, because in the special circumstances of the case it was severed immediately on that event. See *Boddy* v. *Dawes*, 1 Kee. 362, where the legacy was contingent.

(*x*) *Festing* v. *Allen*, 5 Hare, 573. See *Re Judkin's Trusts*, 25 Ch. D. 743, where the legacy was contingent, *post*, p. 1078.

(*y*) *Leslie* v. *Leslie*, Ll. & Go. 1, citing *Pett* v. *Fellows*, 1 Sw. 561 n.; followed in *Re Churchill*, [1909] 2 Ch. 431. These cases are distinguished in *Re West*, [1913] 2 Ch. 345, where other provision was made for maintenance.

(*z*) See *Re Hall*, [1903] 2 Ch. 226. As to contingent legacies, see *post*, p. 1077.

(*a*) *Benson* v. *Maude*, 6 Mad. 15. As to what amounts to a direction to pay legacies at a special time, see *Re Yates*, 96 L. T. 758; *Gibbon* v. *Chaytor*, [1907] 1 Ir. R. 65; *Re Whiteley*, 100 L. T. 920, 101 L. T. 508.

(*b*) *Maxwell* v. *Wettenhall*, 2 P. W. 26, and the cases there referred to; *Raven* v. *Waite*, 1 Sw. 553; *Freeman* v. *Simpson*, 6 Sim. 75.

(*c*) *Tatham* v. *Drummond*, 2 H. & M. 262. As to interest on appointed funds, see *ante*, p. 829.

(*cc*) *Re Stokes*, [1928] Ch. 716.

(*d*) *Mullins* v. *Smith*, 1 Dr. & Sm. at p. 210.

due upon such securities is actually got in; but by a rule that has been adopted for the sake of general convenience, this Court holds the personal estate to be reduced into possession within a year after the death of the testator. Upon that ground interest is payable upon legacies from that time, unless some other period is fixed by the will. Actual payment may in many instances be impracticable within that time: yet in legal contemplation the right to payment exists, and carries with it the right to interest until actual payment" (*e*).

Legacy to infant.

The most important exception to the general rule is where a testator gives a legacy to his infant child, without providing for its maintenance: in such a case interest, as a general rule, runs from the testator's death (*f*).

Where testator's property is reversionary,

The general rule is not affected by the circumstance that the testator's estate consists mainly of a reversionary interest which cannot be sold to advantage (*g*). But it is, of course, otherwise if the legacy is made payable out of the moneys to arise from a reversionary interest (*h*), or if payment of the legacy is expressly deferred until certain property falls into possession or is realised (*i*), or until the testator's estate is sufficient to pay it (*k*).

or legacy payable when specified property has been realised.

Legacy vested subject to be divested.

The fact that a legacy is liable to be divested in a certain event (as where it is given to an infant, with a gift over in the event of his dying under twenty-one) does not prevent interest running from the expiration of a year from the testator's death (*l*).

Rule applies to legacy given for life.

"If an annuity is given, the first payment is paid at the end of a year from the death: but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable, there is no fund to produce interest" (*m*).

Direction to pay as soon as possible.

A direction to pay a general legacy as soon as possible does not make it carry interest before a year has elapsed from the testator's death (*n*).

(*e*) *Per* Grant, M.R., in *Wood* v. *Penoyre*, 13 Ves. 325; *Re Yates*, 96 L. T. 758. See also *Kirkpatrick* v. *Bedford*, 4 A. C. at p. 100. The grounds for the actual decision in *Wood* v. *Penoyre* do not appear from the report. Possibly the report is erroneous. (*f*) *Post*, p. 1079.

(*g*) *Walford* v. *Walford*, [1912] A. C. 658; *Re Blachford*, 27 Ch. D. 676.

(*h*) *Earle* v. *Bellingham* (*No.* 2), 24 Bea. 448. So a legacy which is given by way of appointment under a power over a reversionary fund is not payable until the fund falls into possession: *Re Ludlam*, 63 L. T. 330. See *ante*, p. 829.

(*i*) *Lord* v. *Lord*, L. R. 2 Ch. 782, where *Wood* v. *Penoyre*, 13 Ves. 325, *supra*, is distinguished.

(*k*) *Holmes* v. *Crispe*, 18 L. J. Ch. 439.

(*l*) *Taylor* v. *Johnson*, 2 P. W. 504.

(*m*) *Per* Lord Eldon in *Gibson* v. *Bott*, 7 Ves. at p. 96; *Re Whittaker*, 21 Ch. D. 657.

(*n*) *Webster* v. *Hale*, 8 Ves. 410. See *also Benson* v. *Maude*, 6 Mad. 15.

Legacies charged on land.

In the case of legacies charged upon lands only, where no day of payment is fixed, interest begins to run from the death of the testator (*o*). But where there is an immediate devise of land upon trust to sell, and out of the proceeds to pay legacies, interest does not commence to run until a year from the testator's death (*p*), unless the testator otherwise directs, and if legacies are merely charged upon land in aid of the personalty, they do not carry interest until a year after the testator's death (*q*).

Rule not affected by nature of testator's property.

At one time it was thought that if a legacy were given out of personal estate consisting of mortgages carrying interest or of stocks yielding profits half-yearly, the legacy carried interest from the death of the testator (*r*), but this is no longer the rule (*s*).

Rate of interest fixed by will.

If a testator directs that a legacy shall bear interest at a certain rate (say 4 per cent. per annum) until payment, the executors cannot free the residue by setting aside Consols to meet the legacy and thus avoid payment of interest at 4 per cent. If, however, the legacy is to an infant, they can pay the money into Court under the Trustee Act, 1925 (*t*), or appoint trustees under section 42 of the Administration of Estates Act, 1925.

Legacy directed to be paid within the year.

A testator may expressly direct that a legacy be paid before the expiration of a year from his death, in which case it seems that interest is payable from the date fixed for payment. Thus if a testator gives a legacy to be paid three months after his death, it carries interest from the expiration of the three months (*u*). A legacy to children, with interest from the testator's death, does not, in the case of a child *en ventre*, carry interest before its birth (*x*).

(*o*) *Pearson* v. *Pearson*, 1 Sch. & Lef. 10; *Spurway* v. *Glynn*, 9 Ves. 483; *Shirt* v. *Westby*, 16 Ves. 393; *Maxwell* v. *Wettenhall*, 2 P. W. 26. In *Stonehouse* v. *Evelyn* (3 P. W. 252) a testatrix devised real estate upon trust to pay certain annuities, and after the death of the annuitants upon trust to sell and pay certain legacies out of the proceeds: it was held that the legacies carried interest from the death of the surviving annuitant: *Re Waters*, 42 Ch. D. 517.

(*p*) *Turner* v. *Buck*, L. R. 18 Eq. 301. But see the remarks of Kay, J., in *Re Waters*, *supra*.

(*q*) *Freeman* v. *Simpson*, 6 Sim. 75. In *Milltown* v. *Trench*, 4 Cl. & F. 276, the personalty was insufficient, and as the legacies were directed not to be raised out of the land until the death of the tenant for life, the interest was held to be payable out of the rents and profits in the meantime.

(*r*) *Maxwell* v. *Wettenhall*, 2 P. W. 26.

(*s*) *Gibson* v. *Bott*, 7 Ves. 89; *Pearson* v. *Pearson*, 1 Sch. & L. 10.

(*t*) *Re Salaman*, [1907] 2 Ch. 46.

(*u*) This is assumed in *Coventry* v. *Higgins*, 14 Sim. 30. A negative direction (as that no legacy shall be "legally payable" until six months after the testator's death) is not sufficient to alter the general rule: *Jauncey* v. *Att.-Gen.*, 3 Giff. 308, headnote.

(*x*) *Rawlins* v. *Rawlins*, 2 Cox, 425.

Legacy payable on event which happens in testator's lifetime.

It sometimes happens that a legacy is made payable on an event which happens after the date of the will but during the testator's lifetime; for example, if a legacy is given to A to be paid when he attains twenty-one, or a legacy is given to A immediately upon the death of B, and A attains twenty-one, or B dies (as the case may be) in the testator's lifetime. It is obvious that in such a case the intention of the testator was to postpone payment of the legacy until the event happened, and not to expedite it, and that the result of the event happening in his lifetime is merely that the legacy becomes an immediate legacy, like any other legacy. In *Pickwick* v. *Gibbes* (*y*), where the legacy was payable on the death of a tenant for life, who predeceased the testator, Lord Langdale, M.R., thought the case doubtful, but he held the legatee to be entitled to interest from the testator's death, because the testator intended him to have maintenance from the death of the tenant for life. This is an intelligible reason. In *Coventry* v. *Higgins* (*z*), however, where the legacy was payable at twenty-one, Shadwell, V.-C., said that the effect of the legatee attaining twenty-one in the testator's lifetime, was that the legacy became payable on the testator's death, and carried interest from that time. If this reasoning is correct, the result may be curious; for instance, if a testator gives a legacy of £10,000 to each of A and B, and, A being an infant at the date of the will, directs that A's legacy shall be paid when A attains twenty-one, the result is that if A attains twenty-one in the testator's lifetime he gets a year's interest (£400) more than B. The same remarks apply to the case of a legatee attaining twenty-one (or the tenant for life dying) shortly after the testator's death. Here, again, there is on principle no reason why a deferred legacy should begin to carry interest before an ordinary immediate legacy.

Re Palfreeman.

In *Re Palfreeman* (*a*) Sargant, J., said that the above criticism of *Pickwick* v. *Gibbes* and *Coventry* v. *Higgins* was well founded. In that case the testator gave his residuary estate upon trust, subject to an annuity, to pay certain legacies to each of his three sons and each of his four daughters on their respectively attaining the age of twenty-three years. The eldest son and the eldest daughter attained twenty-three in the testator's lifetime; it was held that their legacies became ordinary immediate legacies and did not carry interest until one year from the testator's death.

In *Re White* (*b*) Joyce, J., distinguished *Laundy* v.

(*y*) 1 Bea. 271.
(*z*) 14 Sim. 30.
(*a*) [1914] 1 Ch. 877.
(*b*) 101 L. T. 780.

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Williams (*c*), which he said was a case of general legacies, and held that in the case before him the bequest of £1,000 was a portion of the particular residue; from which it would seem that if a legacy of £1,000 is given to A for life and after his death to B, and A dies a short time after the testator, B is only entitled to interest from a year after the testator's death. This seems right on principle. It is, however, not quite clear how such a case differs from *Re White* (*cc*). The learned Judge seems to have relied on *Re Waters* (*d*), but the question in that case was quite different: see *ante*, p. 1074, n. (*o*).

Legacy to be paid within a certain period.

Sometimes a testator expressly directs a legacy to be paid within a certain period after his death exceeding a year; in such a case, if there is no reason why the legacy should not be paid at the expiration of a year from the testator's death, it carries interest from that time (*e*). But if it is impracticable to realise the assets within that time, it seems that the testator may be taken to have intended that the legacies should not carry interest until sufficient assets were got in. Thus in *Varley* v. *Winn* (*f*) there was a bequest to the testator's daughters of £6,000 each, to be invested by the executors within seven years from the testator's death: Wood, V.-C., said: "The testator does not give interest if his estate will not allow his executors to invest these sums within seven years. It seems to be their duty to invest them within seven years if they can. The testator saw very possibly that there might be a difficulty in that; I do not conceive that they are bound. Of course they would not be bound to pay them if they had not the money, and there may be reversionary interests on other portions of the testator's property not bearing interest. The point must depend on whether or not the executors are in a condition to make an immediate payment; if they are, I think it ought to be done. The interest must be at £4 per cent. from a year after the testator's death."

Power to postpone payment.

Where an executor has express power to postpone the payment of legacies for a certain period, this is *prima facie* considered to be intended for the convenience and benefit of the estate, and not for the benefit of the residuary legatee; consequently the legacies, though not payable at the end of a year from the testator's death, carry interest from that period if the estate is then sufficient to pay them (*g*); but if the executor is residuary legatee, it may be that the power to postpone is

(*c*) 2 P. Wms. 478.
(*cc*) 101 L. T 780.
(*d*) 42 Ch. D. 517.
(*e*) *Re Olive*, 53 L. J. Ch. 525.
(*f*) 2 K. & J. 700.
(*g*) *Per* Wood, V.-C., in *Varley* v. *Winn*, 2 K. & J. 700.

intended for his benefit, and then the interest only runs from the expiration of the period given by the will (*h*). So where a legacy is given for a specific purpose, and directed to be paid as soon as required, without interest in the meantime : if delay in carrying the purpose into effect is caused by litigation, the legacy bears interest from the end of a year from the testator's death (*i*).

Legacy payable "when required."

Where the executor of a testator, who had left large legacies charged on his real estate, had been advised to defer the sale of the real estate, and accordingly the payment of these legacies was deferred, it was held that the residuary estate must pay for the indulgence in deferring the sale by paying 5 per cent. instead of 4 per cent. on these legacies (*k*).

Legacy charged on real estate. Sale deferred.

(3) *Contingent Legacies.*—A contingent pecuniary legacy does not in general carry interest while it is in suspense (*l*). Thus a legacy to an unborn child does not carry interest until his birth (*m*), and a legacy to a person on attaining twenty-one does not carry interest during his minority (*n*). This rule, however, is subject to an important exception (in the case of a legacy to the testator's child), which is considered in a later part of this chapter (*o*). And, of course, an intention to give interest for maintenance during minority may be shown in the case of a legacy to an infant who is not a child of the testator (*p*).

Interest on contingent legacies.

The fact that the legacy is to be divided among a class of persons (such as the children of A) who shall be living at a future time, or shall attain a certain age or the like, does not take it out of the general rule (*q*).

Gift to a class.

But if a legacy is severed from the testator's general estate (as by being directed to be invested and held in trust for the children of A who attain twenty-one, and any of A's children

Severed legacy.

(*h*) *Thomas* v. *Att.-Gen.*, 2 Y. & C. Ex. 525.

(*i*) *Fisher* v. *Brierley* (*No.* 3), 30 Bea. 268.

(*k*) *Re Bailey*, 61 Sol. J. 398; *Re Brinton*, 67 Sol. J. 704; *Re Burley*, [1917] W. N. 115.

(*l*) *Wyndham* v. *Wyndham*, 3 Br. C. C. 58; *Re Raine*, [1929] 1 Ch. 716.

(*m*) *Rawlins* v. *Rawlins*, 2 Cox, 425. In *Harris* v. *Lloyd*, T. & R. 310, the bequest was specific : *ante*, p. 1070.

(*n*) *Re George*, 5 Ch. D. 837; *Re Dickson*, 29 Ch. D. 331; *Re Inman*, [1893] 3 Ch. 518; *Re Raine*, [1929] 1 Ch. 716. But interest may be expressly given for maintenance, in which case any unapplied balance of income will, in the event of the legatee dying under twenty-one, belong to his personal representative : *Harris* v. *Finch*, McClel. 141; the effect may be to make the legacy vested : *Re Peek's Trust*, L. R. 16 Eq. 221. But if a legacy, with interest, is given contingently on the legatee attaining twenty one, no interest is payable until the legatee attains that age : *Knight* v. *Knight*, 2 S. & St. 490.

(*o*) *Post*, p. 1079.

(*p*) *Re Churchill*, [1909] 2 Ch. 431, following *Pett* v. *Fellows*, 1 Sw. 561 n.

(*q*) *Shawe* v. *Cunliffe*, 4 Br. C. C. 144. The decision in *Gotch* v. *Foster*, L. R. 5 Eq. 311, is referred to *post*, p. 1392.

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are under age at the testator's death) then the legacy carries the intermediate income from one year after the testator's death (*r*). If the interests of the children are preceded by a life interest, the children are of course only entitled to the income from the death of the tenant for life (*s*). The severance must be for some reason connected with the legacy itself, and not for mere convenience of administration, or the like (*t*).

Contingent class.

The rules applicable to legacies to a contingent class of children are stated elsewhere (*u*).

Income of settled legacy.

Legacies are not subject to the rule in *Howe* v. *Earl of Dartmouth* (*x*). Consequently if trustees, in exercise of a power to that effect given to them, retain and appropriate speculative investments in satisfaction of a settled legacy, the tenant for life is entitled to the whole income (*y*).

Exceptions to general rules.

VI.—Special Classes of Legatees.—The properties of legacies do not merely depend on the nature of the subject of the gift, but also to some extent upon the legatee, and the general rules above stated are subject to certain exceptions depending on the character of the legatee. Bequests to charities are considered elsewhere (*z*), and need not be further mentioned here, but legacies to infants, to wives, to executors, to debtors, to creditors, and to servants all present certain special features.

Infant's legacy may be paid into Court,

(1) *Legacies to Infants.*—Where a simple legacy is given to a person who is an infant at the testator's death, the executors can pay the money into Court under section 63 of the Trustee Act, 1925 (replacing section 42 of the Trustee Act, 1893, which replaced section 32 of the Legacy Duty Act, 1796). The money is invested and the legatee is entitled to the income, and this takes the place of the interest, if any, directed to be paid by the will, although at a higher rate (*a*). The executors cannot free the residue by setting apart investments to meet the legacy (*b*); but under section 42 of the Administration of Estates Act, 1925,

or to trustees for the purpose.

(*r*) *Re Medlock*, 55 L. J. Ch. 738; *Johnston* v. *O'Neill*, 3 L. R. Ir. 476; *Re Snaith*, [1894] W. N. 115, 42 W. R. 568 (the report of this case, in 71 L. T. 318, says that interest was given from the testator's death, but this is obviously a mistake); *Re Couturier*, [1907] 1 Ch. 470. Compare the rule as to contingent specific bequests, *ante*, p. 1039.

(*s*) *Kidman* v. *Kidman*, 40 L. J. Ch. 359.

(*t*) *Festing* v. *Allen*, 5 Ha. 573; *Re Judkin's Trusts*, 25 Ch. D. 743; *Re Inman*, [1893] 3 Ch. 518. If the legacy is given for life, with remainder over, it is necessary to sever the legacy from the residue, for the sake of the tenant for life: *Kidman* v. *Kidman*, *supra*.

(*u*) *Post*, p. 1663 *seq.*

(*x*) As to which, see *post*, pp. 1207 *seq.*

(*y*) *Re Wilson*, [1907] 1 Ch. 394.

(*z*) Chap. IX.

(*a*) *Abraham* v. *Holderness*, 6 Jur. 290; *Re Salaman*, [1907] 2 Ch. 46.

(*b*) *Re Salaman*, *supra*; *Rimell* v. *Simpson*, 18 L. J. Ch. 55.

they can appoint trustees for the legacy to whom the legacy may be paid and invested in authorised investments.

Payment of legacy to infant or parent.

It seems that the Court has jurisdiction to allow a legacy given to an infant to be paid to its parent or guardian, on an undertaking that the money shall be applied for its benefit (*c*), but apparently this will only be done in the case of legacies of trifling amount. An executor must not do this (*d*), unless he is authorised by the will or by the Court. It sometimes happens that a testator directs a legacy to be paid to an infant, and that his or her receipt shall be a good discharge, and it is generally assumed that an executor would be justified in complying with such a direction (*e*), although the point does not seem to have been decided. It is clear that the Court can give effect to such a direction (*f*).

Interest by way of maintenance.

Where a father leaves a legacy to his infant child, the legacy carries interest from the testator's death, unless maintenance is provided by the will in some other way. This is a very old rule. In *Hearle* v. *Greenbank* (*g*) Lord Hardwicke, C., said: "The general rule is where legacies are given, payable at a certain time, they carry no interest, for interest is for delay of payment, and consequently till the day of payment comes no interest is demandable. But I do admit at the same time, where a legacy is given by a father to a child, though the legacy is not payable but at a certain time, yet the Court allows interest. But in all these cases the ground the Court goes on is giving interest by way of maintenance." And in *Wynch* v. *Wynch* (*h*), Lord Kenyon, M.R., said: "It is very clear that when a father gives a legacy to a child, whether it be a vested legacy or not (*i*), it will carry interest from the death of the testator as a maintenance for the child; but this will only be where no other fund is provided for such maintenance; for it is equally clear that where other funds are provided for the maintenance, then if the legacy be payable at a future day it shall not carry interest till the day of payment comes, as in the case of a legacy to a perfect stranger" (*k*).

Testator *in loco parentis*. Natural child.

And the rule is the same where the testator has placed himself *in loco parentis* to the infant legatee (*l*); but a natural

(*c*) *Walsh* v. *Walsh*, 1 Dr. 64. (*d*) *Dagley* v. *Tolferry*, 1 P. W. 285.
(*e*) Key and Elphinstone, Conv. 9th ed. vol. ii, 792.
(*f*) *Re Denekin*, 72 L. T. 220. (*g*) 3 Atk. 695 at p. 716.
(*h*) 1 Cox, 433.
(*i*) See *Mills* v. *Robarts*, 1 R. & M. 555.
(*k*) *Re George*, 5 Ch. D. 837. See also *Heath* v. *Perry*, 3 Atk. 101; *Incledon* v. *Northcote*, 3 Atk. 430 (at p. 438); *Harvey* v. *Harvey*, 2 P. W. 21; *Re Stewart*, 57 Sol. J. 646.
(*l*) *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372; *Raven* v. *Waite*, 1 Sw. 553; *Acherley* v. *Wheeler* (or *Vernon*), 1 P. W. 783, may have been decided on this ground: see *Heath* v. *Perry*, 3 Atk. 102; *Crickett* v. *Dolby*, 3 Ves. 10.

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child is not entitled to interest from the death unless the testator has put himself *in loco parentis* (*m*), or unless he expressly directs that interest on the legacy shall be applied in the maintenance of the child (*n*).

Child *en ventre.*

Where a testator bequeaths a legacy to a child of his which is *en ventre sa mère* at the testator's death, the child is only entitled to interest from its birth (*o*). This would seem to follow from the fact that interest is given for maintenance.

Legacy to adult subject to obligation to maintain infants.

Where a testator bequeaths a legacy to an adult, subject to the obligation of maintaining the testator's children, or children towards whom he stands *in loco parentis*, it does not carry interest until after a year from the testator's death (*p*), unless the primary intention is to maintain the children (*q*).

General rule that legacies given for maintenance carry interest from death.

If a legacy is bequeathed to an infant by a testator who is not its father (*r*) or *in loco parentis* to it, and the will expressly (*s*) or impliedly (*t*) shows an intention to provide for its maintenance, interest is allowed from the death of the testator, unless maintenance is available from some other source (*u*). In *Festing* v. *Allen* (*x*), Wigram, V.-C., refused to infer such a general intention from an express trust for maintenance which failed. And if a legacy, with interest, is given contingently on the legatee attaining twenty-one, interest does not run until a year from the testator's death, and the legatee is not entitled to it unless he attains twenty-one (*y*).

Maintenance during part of minority.

The fact that the testator expressly provides for the maintenance of the infant legatee during a part of his minority does not necessarily exclude the general rule; and in such a case maintenance (*z*) or interest by way of maintenance (*a*) may be allowed during the portion of the minority during which no express maintenance is given by the will.

(*m*) *Lowndes* v. *Lowndes*, 15 Ves. 301.
(*n*) *Newman* v. *Bateson*, 3 Sw. 689.
(*o*) *Rawlins* v. *Rawlins*, 2 Cox, 425.
(*p*) *Raven* v. *Waite*, 1 Sw. 553; *Re Crane*, [1908] 1 Ch. 379.
(*q*) *Re Ramsay*, [1917] 2 Ch. 64.
(*r*) See *Re Eyre*, [1917] 1 Ch. 351 (mother).
(*s*) As in *Re Richards*, L. R. 8 Eq. 119; *Chidgey* v. *Whitby*, 41 L. J. Ch. 699; *Beckford* v. *Tobin*, 1 Ves. sen. 308; *Newman* v. *Bateson*, 3 Sw. 689; *Dowling* v. *Tyrell*, 2 Russ. & My. 343; *Lowndes* v. *Lowndes*, 15 Ves. 301; *Pett* v. *Fellows*, 1 Sw. 561.
(*t*) *Lambert* v. *Parker*, Coop. t. Eldon, 143; *Leslie* v. *Leslie*, Ll. & G. t. Sugden, 1; *Pett* v. *Fellows*, 1 Sw. 561 n.; *Re Churchill*, [1909] 2 Ch. 431. The rule does not apply to a legacy to an adult: *Raven* v. *Waite*, 1 Sw. 553.
(*u*) *Re West*, [1913] 2 Ch. 345 (where the will made provision for maintenance out of other funds).
(*x*) 5 Hare, 573.
(*y*) *Knight* v. *Knight*, 2 S. & St. 490.
(*z*) *Chambers* v. *Goldwin*, 11 Ves. 1.
(*a*) *Martin* v. *Martin*, L. R. 1 Eq. 369. The decision in *Kime* v. *Welfitt*, 3 Sim. 533, if it can be supported at all, turned on the special language of the will.

Gift of residue.

The general principles above stated apply to a gift of residue (*b*).

Accumulations of surplus income of contingent legacies.

If a vested legacy is given to an infant, payable on attaining twenty-one, with interest in the meantime, it is clear that any accumulations of interest, after allowing for maintenance, if necessary, belong to the infant, whether he attains twenty-one or not (*c*). But if the legacy is bequeathed to the infant contingently on his attaining twenty-one, under such circumstances that it carries interest for maintenance during minority, the infant does not acquire a vested interest in the income except so far as it is required for his maintenance; the surplus is an accretion to the capital, and the infant does not become entitled to it unless he attains twenty-one, and thus acquires an absolute vested interest. If he only acquires a life interest in the legacy on attaining twenty-one he does not become entitled to the accumulations of the surplus income; they are added to the capital of the legacy, and he is entitled to the resulting income (*d*).

Rate allowed.

The full rate of interest allowed for maintenance is 4 per cent., but this is only allowed when it is required. The Court may allow a fixed annual sum, not exceeding 4 per cent. If the testator directs the legacy to be invested and set apart, what is required for maintenance is taken out of the income and the surplus accumulated (*e*).

Where express provision for maintenance is made.

In *Hearle* v. *Greenbank* (*f*) the testatrix made express provision out of her residuary estate for the maintenance of her infant daughter and bequeathed to her a legacy of £8,000, payable on her attaining twenty-one; it was held that she was not entitled to interest on the legacy. So if a testator bequeaths his residue to an infant child, and directs that out of the income a sum not exceeding £200 shall be applied for maintenance, this excludes the general rule (*g*).

Effect of statutory power of maintenance.

If a testator bequeaths a legacy to his infant child, payable at twenty-one, and also bequeaths a share of residue to the child contingently on its attaining twenty-one, and the will is made at such a date that it is subject to the statutory provisions as to maintenance contained in Lord Cranworth's Act (*h*) or the Con-

(*b*) *Mole* v. *Mole*, 1 Dick. 310; *May* v. *Potter*, 25 W. R. 507.

(*c*) See *Re Buckley's Trusts*, 22 Ch. D. 583.

(*d*) *Re Bowlby*, [1904] 2 Ch. 685 (disapproving *Re Scott*, [1902] 1 Ch. 918); *Re Mellor*, [1922] 1 Ch. 312. See section 31 of the Trustee Act, 1925. See Chap. XXXIV, where the subject is considered more in detail.

(*e*) *Re Bowlby*, [1904] 2 Ch. at pp. 693, 707 *seq.*

(*f*) *Ante*, p. 1079. *Wynch* v. *Wynch*, 1 Cox 433; *Donovan* v. *Needham*, 9 Bea. 164; *Maher* v. *Maher*, 1 L. R. Ir. 22, and *Re George*, 5 Ch. D. 837, were similar cases.

(*g*) *May* v. *Potter*, 25 W. R. 507; *Re Rouse's Estate*, 9 Hare, 649.

(*h*) 23 & 24 Vict. c. 145, s. 26.

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veyancing Act, 1881 (*i*), or the Trustee Act, 1925, the question arises whether the power of maintenance out of the income of the share of residue conferred by the statute on the trustees of the will, excludes the general rule as to interest on the legacy; in other words, has the statutory provision for maintenance the same effect as an express provision? It is clear that the Act was not intended to affect the construction of wills, because it applies to the wills of the testators who died before it came into operation (*k*), and it seems to follow that the question above stated should be answered in the negative. The question arose in *Re Moody* (*l*), and Kekewich, J., held that the infant legatees were entitled to interest on their legacies from the death of the testator, not on the ground above suggested, but on the ground that even if the will had contained an express power of maintenance out of the income of the infants' shares of residue, this would not have deprived them of the interest on their legacies (*m*). In *Re Abrahams* (*n*) Eve, J., considered himself bound to follow *Re Moody*. But he held that where a testator has made a legacy payable upon a contingency which has no reference to the attainment of full age then the general rule that a contingent legacy does not bear interest applies. Section 31 of the Trustee Act, 1925, may, however, have altered this.

Several sources available for maintenance.

It sometimes happens that two or more sources of income are available for maintenance under the same will. In such a case, if it is for the benefit of the infant that maintenance should be provided out of the income of one fund in preference to the other, that course will be adopted (*o*). Section 31 of the Trustee Act, 1925, has not, it is submitted, altered this.

Statutory power does not make contingent legacy bear interest.

The statutory power of maintenance conferred by Lord Cranworth's Act and the Conveyancing Act, 1881 (now replaced by section 31 of the Trustee Act, 1925), has not altered the rule that a contingent legacy does not, in ordinary cases, carry interest (*p*).

Vested legacy liable to be divested.

If a vested legacy is given to an infant with a gift over in the event of his dying under twenty-one, the infant is entitled to

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(*i*) See *Re Boulter*, [1918] 2 Ch. 40.

(*k*) See *Re Dickson*, 29 Ch. D. 331.

(*l*) [1895] 1 Ch. 101; *Re Stokes*, [1928] Ch. 716.

(*m*) But is not an express power of maintenance equivalent for this purpose to a trust for maintenance? See the cases cited above, p. 1081.

(*n*) [1911] 1 Ch. 108.

(*o*) *Martin* v. *Martin*, L. R. 1 Eq. 369; *Re Wells*, 43 Ch. D. 281. In *Lucas* v. *King*, 11 W. R. 818, two funds were settled by the same settlor, one by deed and the other by will. Compare *Bruin* v. *Knott*, 1 Ph. 572, and other cases cited in Chap. XXIV, p. 906.

(*p*) *Re Cotton*, 1 Ch. D. 232; *Re George*, 5 Ch. D. 837; *Re Judkin's Trusts*, 25 Ch. D. 743; *Re Dickson*, 28 Ch. D. 291, 29 Ch. D. 331.

interest unless and until the gift over takes effect (*q*). And the power of maintenance conferred by statute has not altered this rule (*r*).

When payment of deferred legacy accelerated.

If a legacy is given to A, to be paid at twenty-one, and the intermediate interest is not given, and A dies before that period, his representatives must wait for the money until the time when A, if living, would have attained twenty-one (*s*); but if the legacy is given over to B in the event of A dying under age, B will be entitled to call for it immediately upon the death of A (*t*). And if the legacy is given to A payable at twenty-one, with interest in the meantime, and A dies under age, his executor can claim the legacy immediately (*u*).

Gift to a class of children, born and unborn.

The rules as to the destination of income where a legacy is given to a class of children, born and unborn, are stated elsewhere (*x*).

Legacy to testator's wife.

(2) *Legacies to Testator's Wife.*—There is a dictum of Lord Alvanley's in *Crickett* v. *Dolby* (*y*) to the effect that a legacy to a wife is within the same exception as a legacy to a child in the matter of interest, but in *Stent* v. *Robinson* (*z*), Sir W. Grant, M.R., said that there was no authority to support that dictum, and it is now clearly settled that a legacy to a wife (*a*), even if in lieu of dower and freebench (*b*) or of jointure (*c*), is in the same position as any other legacy.

A legacy given to a wife in satisfaction of dower is entitled to priority, and does not abate with other general legacies (*d*).

(*q*) *Barber* v. *Barber*, 3 My. & C. 688; *Mills* v. *Robarts*, 1 R. & My. 555. In *Taylor* v. *Johnson*, 2 P. W. 504, the interest did not run until a year from the testator's death, he being apparently not *in loco parentis*.

(*r*) *Re Buckley's Trusts*, 22 Ch. D. 583. Compare the cases on life interests and contingent gifts, *ante*, p. 1081.

(*s*) *Chester* v. *Painter*, 2 P. W. 335; *Roden* v. *Smith*, Amb. 588; Roper on Legacies, 868.

(*t*) *Laundy* v. *Williams*, 2 P. W. 478. See *Maher* v. *Maher*, 1 L. R. Ir. 22, where maintenance was given out of the income of part of the estate, but no interest; and *Cusack* v. *Jellico*, 22 W. R. 344 (deed), where maintenance was given out of capital.

(*u*) Roper, 871, citing *Cloberry* v. *Lampen*, 2 Freem. 24; *Green* v. *Pigot*, 1 Br. C. C. 103; *Crickett* v. *Dolby*, 3 Ves. 13.

(*x*) *Post*, pp. 1663 *seq.*

(*y*) 3 Ves. at p. 16.

(*z*) 12 Ves. 461.

(*a*) See *Lowndes* v. *Lowndes*, 15 Ves. 301; *Re Percy*, 24 Ch. D. 616; *Re Whittaker*, 21 Ch. D. 657.

(*b*) *Re Bignold*, 45 Ch. D. 496.

(*c*) *Elton* v. *Montague*, 1 L. J. Ch. (o.s.) 212.

(*d*) *Davenhill* v. *Fletcher*, Amb. 244; *Blower* v. *Morret*, 2 Ves. sen. 420; *Burridge* v. *Bradyl*, 1 P. Wms. 127; *Heath* v. *Dendy*, 1 Russ. 543; *Acey* v. *Simpson*, 5 B. 35; *Norcott* v. *Gordon*, 14 Sim. 258; *Stahlschmidt* v. *Lett*, 1 Sm. & Giff. 421; *Re Saunders-Davies*, 34 Ch. D. 482; *Re Greenwood*, [1892] 2 Ch. 295. And see *Re Wedmore*, [1907] 2 Ch. 277; and section 12 of 3 & 4 Will. 4, c. 105.

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This does not apply where the real estate was conveyed to the testator with a declaration against dower (*e*).

A legacy to the testator's wife for her immediate requirements, even though directed to be paid three months after the testator's death, is not entitled to priority (*f*).

Legacies to executors.

(3) *Legacies to Executors.*—Where a testator gives his residuary estate to persons whom he appoints executors, the question whether they take beneficially or as trustees for the next-of-kin is often a difficult one (*g*). Where the gift is a simple bequest, the presumption seems to be that the executors take beneficially. Thus in *Caruth* v. *Parker* (*h*) a testator gave to "my executors" a sum charged on land and a policy of insurance, and it was held that they took beneficially.

The question whether a legacy by a testator to his executor is given to him in that capacity or independently of his acting as executor is discussed elsewhere (*i*).

A legacy to an executor as such does not, as a general rule, carry interest before he proves the will (*j*) or (to be quite accurate) before the time when he assumes the office and duties of an executor (*k*). From the fact that an infant cannot act as an executor, a legacy to an infant executor does not carry interest during his minority (*l*).

Legacies to executors for their trouble have no priority (*m*).

Legacies to creditors.

(4) *Legacies to Creditors.*—A legacy which operates as a satisfaction (as a legacy to a creditor in satisfaction of his debt) must in general take effect at the time of the testator's death (*n*), and therefore carries interest from the death. It will be remembered that contingent legacies and legacies to take place at a future day would not in general be considered to be in satisfaction of a debt (*o*).

Debts of another person.

A legacy in satisfaction of somebody else's debts does not

(*e*) *Roper* v. *Roper*, 3 Ch. D. 714.

(*f*) *Re Schweder's Estate*, [1891] 3 Ch. 44; *Blower* v. *Morret*, 2 Ves. sen. 420; *Cazanove* v. *Cazanove*, 61 L. T. 115. *Re Hardy*, 17 Ch. D. 798 (a decision of Malins, V.-C.), is not followed.

(*g*) See *ante*, pp. 696 *seq.*

(*h*) 11 L. R. Ir. 18.

(*i*) *Post*, p. 1956.

(*j*) *Angermann* v. *Ford*, 29 B. 349; *Hollingsworth* v. *Grasett*, 15 Sim 52.

(*k*) *Lewis* v. *Mathews*, L. R. 8 Eq. 277. It seems that if a bequest to an executor is intended to be received by him immediately on the testator's death, he is entitled to it although he eventually refuses to act: *Humberston* v. *Humberston*, 1 P. W. 332 (bequest of mourning, etc.). In *Brydges* v. *Wotton*, 1 V. B. 134, the legacy was to a trustee, not an executor.

(*l*) *Re Gardner*, 67 L. T. (N.S.) 552.

(*m*) *Duncan* v. *Watts*, 16 Bea. 204; *Heron* v. *Heron*, 2 Atk. 171; *Att.-Gen.* v. *Robins*, 2 P. Wm. 23.

(*n*) *Clark* v. *Sewell*, 3 Atk. 96.

(*o*) See *post*, p. 1136, where the doctrine of satisfaction is considered.

carry interest until a year after the testator's death (*p*), unless the bequest is so worded as to comprise arrears of interest on the debts (*q*).

Where debt is barred.

The doctrine that a legacy to a former creditor of the amount of a debt which has been barred by lapse of time or by the law of bankruptcy, is not subject to failure by lapse, has been already referred to (*r*). Such a legacy, it seems, is mere bounty in all other respects (*s*).

Legacy of a debt.

(5) *Legacies to Debtors.*—Sometimes a testator releases a person who is indebted to him by forgiving (or giving) him the debt. Such a bequest is liable to lapse (*t*).

If the debt has been extinguished before the date of the will, a "forgiveness" of it may amount to a legacy of the same amount: as in *Findlater* v. *Lowe* (*u*), where the testatrix before the date of the will had accepted debenture stock and shares in satisfaction of a debt.

Appointment of debtor executor.

If a testator appoints his debtor to be his executor, this extinguishes the debt at law, and, although it does not extinguish the debt in equity (*v*), evidence is admissible to prove that the testator intended to forgive or release it (*w*).

Verbal release.

A debt may also be released by a verbal direction given by the testator to his residuary legatee (*x*).

"I forgive all debts."

In *Re Neville* (*y*) the testator in a codicil said: "I forgive all debts owing to me." It was held that this did not operate as a legacy to certain companies and societies of the mortgage debt owing by them on the security of the mortgage and charges and of the amount secured by loan stock, which resembled permanent debenture stock.

(*p*) *Askew* v. *Thompson*, 4 K. & J. 620.
(*q*) *Aston* v. *Gregory*, 6 Ves. 151.
(*r*) *Ante*, p. 398.
(*s*) *Turner* v. *Martin*, 7 D. M. & G. 429, citing *Coppin* v. *Coppin*, 2 P. W. 291; *Williamson* v. *Naylor*, 3 Y. & C. 208.
(*t*) *Ante*, p. 404.
(*u*) [1904] 1 Ir. R. 519.
(*v*) *Re Bourne*, [1906] 1 Ch. 697.
(*w*) *Strong* v. *Bird*, L. R. 18 Eq. 315; *Re Pink*, [1912] 1 Ch. 498; [1912] 2 Ch. 528; *Jenkins* v. *Jenkins*, [1928] W. N. 119; *Re Comberbach*, 73 Sol. J. 403.
(*x*) *Re Applebee*, [1891] 3 Ch. 422, and other cases cited at p. 889. The debt may be extinguished in other ways: *Re Price*, 11 Ch. D. 163. In *Eden* v. *Smyth*, 5 Ves. 341, accounts and other documents in the testator's handwriting were admitted as evidence that the debt had been released; but the practice is not a convenient one: *Chester* v. *Urwick* (*No.* 2), 23 Bea. 404. It would seem quite unnecessary to say that where a creditor bequeaths a legacy to his debtor, this, without more, is not *prima facie* a release of the debt, were it not that in some of the older cases it seems to have been contended that a mere legacy might have this effect: see *Wilmot* v. *Woodhouse*, 4 Br. C. C. 227. See *Quin* v. *Sefi*, 1 T. L. R. 49. But ambiguous words in a bequest of a legacy to a debtor may operate as a release of the debt as in *Hyde* v. *Neate*, 15 Sim. 554. The subject is discussed in Roper on Leg. 1063, *seq.*
(*y*) [1925] Ch. 44.

In *Re Lucas* (*z*) the testator directed his executors to forgive his tenant all rent owing at the time of his decease : it was held that the Apportionment Act, 1870, did not entitle the tenant to be forgiven any part of the rent since the last quarter day.

Right of surety.

A surety's equitable right to be indemnified by the principal debtor does not create any debt before the surety has been called on to pay anything under his guarantee, so that a release of "all debts" to a principal debtor by the surety's will does not affect the right of the executors to come on the principal debtor's beneficial interest under the will for indemnity against claims under the guarantee made by the creditors after the testator's death (*a*).

Effect of hotchpot provision.

A direction that debts should be brought into account against any benefits given to the legatee by will does not operate as an implied release of the excess of the debt over the benefit (*b*), unless there are words which amount to a gift of the debt (*c*).

Legacies to servants.

(6) *Legacies to Servants.*—A gift by a testator to his servants without more takes effect in favour of the servants at the date of the will (though they subsequently quit the testator's service) to the exclusion of those who subsequently enter his service (*d*); but a gift to servants who shall have been in his employ for a certain time will include a servant who had left the testator's employment before the date of the will (*e*), and the testator may, of course, indicate that he means those in his service at the date of his death (*f*) or the date of his will and his death (*g*). In *Re Travers* (*h*) the testatrix after giving legacies by her will to her servants by name continued, "and to each of my servants a further sum equal to their respective wages for one year" : it was held that a hospital nurse though a servant of the testatrix at her death was not entitled to a legacy.

Hospital nurse.

If the testator adds a condition, "who shall be in my service at my decease," such a condition must be strictly complied with.

Previous dismissal, though wrongful, or even voluntary retirement intercepts the gift (*i*). But a temporary absence from actual service at the time of the testator's death will not deprive

(*z*) 55 L. J. Ch. 101.
(*a*) *Re Mitchell*, [1913] 1 Ch. 201.
(*b*) *Re Clark*, [1924] W. N. 75; *Re Barker*, [1918] 1 Ch. 128.
(*c*) *Re Trollope*, [1915] 1 Ch. 853.
(*d*) *Parker* v. *Marchant*, 1 Y. & C. C. C. 290.
(*e*) *Re Sharland*, [1896] 1 Ch. 517.
(*f*) *Re Marcus*, 56 L. J. Ch. 830.
(*g*) *Jones* v. *Henley*, 2 Ch. Rep. 162.
(*h*) 115 L. T. 604.
(*i*) *Darlow* v. *Edwards*, 1 H. & C. 547; *Re Serre's Estate*, 31 L. J. Ch. 519; *Re Hartley's Trusts*, 47 L. J. Ch. 610; *Re Benyon*, 51 L. T. 116.

the servant of the benefit of the legacy (*k*). It has been held that under a gift to the testator's two servants living with him at his death, a third servant engaged after the date of the will was entitled (*l*). A legacy to servants applies to such only as spend their whole time in the testator's service, and not to one who is occasionally employed only, such as a steward of courts (*m*). But a farm bailiff is a servant within the meaning of such a gift (*n*). It has been held not to extend to a coachman supplied by a jobmaster, for he is not the testator's servant (*o*); or a boy occasionally employed to clean boots and knives (*p*).

Indoor and outdoor servants.

The expression "indoor and outdoor" servants has been held to include an estate cashier, a farm bailiff, a dairymaid, an engineer, a blacksmith, gardener, carter, carpenter, gamekeeper, woodman, bricklayers, farmhands, labourers (*q*), a lodge-keeper (*r*); "man servant" has been held to include a chauffeur (*s*).

Chauffeur.

Servants.

Where the bequest is to "servants" the question whether persons whose social position is different from those merely ranking in the servant class are included depends on the circumstances of the case (*t*).

Clerk.

"Clerk" does not include a purser on a ship (*u*).

Domestic servants.

A domestic servant is a household servant and includes a male nurse who does not sleep in the house (*x*). And the expression "domestic servant" may include outdoor servants such as a gardener or a chauffeur (*y*).

Lunatic.

A servant engaged by the committee of a lunatic testator is not in the service of the testator (*z*).

Year's wages.

A legacy of a year's wages to servants implies that only those

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(*k*) *Herbert* v. *Reid*, 16 Ves. 481. As to absence on military service, see *Re Drake*, [1921] 2 Ch. 99; and *Re Cole*, [1919] 1 Ch. 218.

(*l*) *Steech* v. *Thorington*, 2 Ves. sen. 560.

(*m*) *Townshend* v. *Windham*, 2 Vern. 546.

(*n*) *Bulling* v. *Ellice*, 9 Jur. 936; *Armstrong* v. *Clavering*, 27 Bea. 226.

(*o*) *Chilcot* v. *Bromley*, 12 Ves. 114.

(*p*) *Thrupp* v. *Collett* (*No.* 2), 26 Bea. 147.

(*q*) *Re Drake*, [1921] 2 Ch. 99, distinguishing or not following *Re Forrest*, [1916] 2 Ch. 386, where "servants" was held not to include farm labourers.

(*r*) *Re Sheffield*, [1911] 2 Ch. 267. As to a land agent, see *Re Rosse*, 129 L. T. 592, and *Re Brownlow*, 69 Sol. J. 176.

(*s*) *Re Bell*, 58 Sol. J. 517.

(*t*) *Re Cassel*, 39 T. L. R. 75.

(*u*) *Re Sir A. L. Jones*, 106 L. T. 941.

(*x*) *Re Lawson*, [1914] 1 Ch. 682.

(*y*) *Re Jackson*, [1923] 2 Ch. 365. *Ogle* v. *Morgan*, 1 D. M. & G. 359, does not lay down any principle contrary to this although it was followed in *Vaughan* v. *Booth*, 16 Jur. 808; *Re Drax*, 57 L. T. 475; and *Re Ogilby*, [1903] 1 Ir. R. 525. See also *Howard* v. *Wilson*, 4 Hagg. 107. As to the meaning of domestic service under the Unemployment Insurance Act, 1920, see *Re The Unemployment Insurance Act*, 1920, [1922] 1 K. B. 172; [1922] 1 K. B. 466; [1923] 1 K. B. 215.

(*z*) *Re King*, [1917] 2 Ch. 420.

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who are hired at yearly wages are to take (*a*); thus a domestic servant hired at £20 a year, though paid monthly and dismissible at a month's notice, would be included, but a gardener hired at twenty shillings a week would not. But there is authority for limiting such a bequest to family servants usually hired by the year (*b*). In Ireland it has been held that under a bequest of one year's standing wages to servants, only those who are hired by the year can take (*c*). The earlier cases date from a time when yearly hirings of servants were common, and if they were strictly followed at the present day the testator's intention would be defeated. A construction based upon the fact that domestic servants were usually hired by the year should not be applied to a state of society where domestic servants are engaged by the month on the basis of an annual wage.

The principle does not apply where the expression is "the amount of one year's wages" (*d*). But the value of payments in kind are not included (*dd*).

Commission.

The expression "salaries and wages" does not include commission (*e*).

Satisfaction.

In giving legacies to servants it is important to state that the legacy shall be in addition to and not in satisfaction of any wages owing to the servant at the testator's death (*f*).

Double legacies.

VII.—Additional and Substituted Legacies.—It not infrequently occurs that more than one legacy is given to a legatee, either in the same or in different testamentary instruments. In such cases the question may arise whether the legacy last given is to be in addition to or in substitution for the previous legacies. The testator may indicate clearly his intention that the second legacy is additional or substitutional as the case may be. Thus (*g*) where the testator directed his trustees to convert his personal estate and to stand possessed of the proceeds upon certain trusts, among others on trust to pay £2,000 to each of his sons who should attain twenty-one, and upon further trust to set apart and pay over the sum of £2,000 to each of his sons on their respectively attaining twenty-one, the words "upon further trust" are sufficient to indicate that the second legacies were additional. A clear gift of an additional legacy will not be

(*a*) *Blackwell* v. *Pennant*, 9 Hare, 551; *Re Ravensworth*, [1905] 2 Ch. 1. In this case some of the Judges intimated that in the absence of authority they might possibly have decided the case the other way.
(*b*) *Booth* v. *Dean*, 1 My. & K. 560, and the cases there referred to.
(*c*) *Breslin* v. *Waldron*, 4 Ir. Ch. 334.
(*d*) *Re Sheffield*, [1911] 2 Ch. 267.
(*dd*) *Re Peacock*, 73 Sol. J. 220.
(*e*) *Re Smith*, [1915] W. N. 12.
(*f*) *Ellard* v. *Phelan*, [1914] 1 Ir. R. 76.
(*g*) *Burkinshaw* v. *Hodge*, 22 W. R. 484.

cut down by an ambiguous context, or for the reason that it appears to have been bequeathed under a misapprehension (*h*).

Hooley v. *Hatton.* Four cases of double legacies.

In the leading case of *Hooley* v. *Hatton* (*i*), Mr. Justice Ashton distinguished four cases of double legacies. First, where the same specific thing is given twice; secondly, where the like quantity is given twice; thirdly, where a less sum is given in a later instrument: as £100 by will and £50 by the codicil; fourthly, where a larger sum is given after a less. "The law seems to be, and the authorities only go to prove the legacy not to be double where it is given for the same cause in the same act and *totidem verbis*, or only with small difference; but where in different writings there is a bequest of equal, greater, or less sums, it is an augmentation."

Double gift of a specific object.

Evidently a gift of the same specific thing twice over to a legatee can only be one gift of that thing, and the second gift is mere repetition. Thus if a testator gives "my gold watch to A." and then in the same or another instrument gives "my gold watch to A.," and he has in fact only one gold watch, it is evident that the gift is merely repeated (*k*). Leaving this case aside, we have to consider the cases where the legacies are or are not given by the same instrument.

Whether testamentary writings form one instrument or not is decided by Court of Probate.

Whether different testamentary writings form one or several instruments is decided by the Court of Probate, and a Court of Construction is bound by the decision of the Court of Probate. Thus, where probate of a will and testamentary papers as containing together the testator's will was granted to his widow, Shadwell, V.-C., said that as all the papers had been proved as one instrument, they must all be construed together (*l*). And conversely, if probate is granted of a will and codicil, this shows that the writings are distinct instruments (*m*).

Legacies given by the same instrument.

We will first consider the case where legacies are given by the same instrument. In this case the rule (subject to any indications of a contrary intention) is that if the legacies are of the same amount, one only is good, but if of different amounts they are cumulative. The rule has no application to the case of a residue given to a person to whom previously a specific or pecuniary gift has been made. This seems obvious, but the point

(*h*) *Re Segelcke*, [1906] 2 Ch. 301; *Gordon* v. *Hoffman*, 7 Sim. 29; *Mann* v. *Fuller*, Kay, 624.

(*i*) 1 Br. C. C. 390, n.; White & Tudor (9th ed.), vol. i, p. 731.

(*k*) See *Duke of St. Albans* v. *Beauclerk*, 2 Atk. 636.

(*l*) *Brine* v. *Ferrier*, 7 Sim. 549; *Heming* v. *Clutterbuck*, 1 Bligh (N.S.), at p. 490; *Fraser* v. *Byng*, 1 R. & M. 90 (which has a valuable note).

(*m*) *Baillie* v. *Butterfield*, 1 Cox, 392; *Campbell* v. *Lord Radnor*, 1 Bro. C. C. 271; and see *Walsh* v. *Gladstone*, 1 Ph. 294; *Martin* v. *Drinkwater*, 2 Bea. 215.

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has been suggested in argument; Lord Cairns's dictum in *Kirkpatrick* v. *Bedford* (*n*) (where the point was raised) is conclusive: "No case could be cited, no case has ever occurred, where anyone ever thought of arguing that the cases about double gifts had any application to a case which, *ex specie*, is entirely distinguishable and different from them, the case of a gift of residue following a specific gift" (*o*).

Legacies of the same amount.

With regard to legacies of the same amount given by the same instrument, slight differences in the way in which the gifts are conferred—as for instance, that they may be payable at different times—are not sufficient to rebut the presumption afforded by the rule (*p*). The rule appears to be the same where the first gift is to a named person, and the second to a person coming within a given class. Thus in *Early* v. *Benbow* (*r*) the testator by a codicil gave legacies of £500 each to A, B, C and D, who were (as appeared from other parts of the will and codicil) grandchildren of his brother Henry. He added: "I direct my executors to pay out of my personal estate the sum of £500 apiece to each child that may be born to either of the children of either of my brothers lawfully begotten to be paid to them on his or her attaining the age of twenty-one." A, B, C and D were held not to be entitled to double legacies (*s*).

Annuities are within the rule.

Annuities are in the same position as legacies. The contrary was considered barely arguable in *Holford* v. *Wood* (*t*).

Legacies of different amounts.

The other part of the rule, that if the legacies given by the same instrument are of unequal amount (whether the latter is greater or less than the former), they are cumulative, is also clearly established by authority.

Where the second legacy is the greater the rule, as laid down in *Hooley* v. *Hatton* (quoted above), is that the legacies are cumulative, and this was followed in *Curry* v. *Pile* (*x*). The same rule applies to annuities (*y*). The rule yields to indications of the testator's intention. Thus in *Yockney* v. *Hansard* (*z*), Wigram, V.-C., said: "In this case I assume for the purpose of the argument that the rule of law, where there are

(*n*) 4 A. C. 96.

(*o*) *Gordon* v. *Anderson*, 4 Jur. (N.S.) 1097 (a legacy in a second codicil followed a gift of residue in the first codicil).

(*p*) *Manning* v. *Thesiger*, 3 M. & K. 29; *Brine* v. *Ferrier*, 7 Sim. 549; *Garth* v. *Meyrick*, 1 Br. C. C. 30; *Greenwood* v. *Greenwood*, 1 Br. C. C. 31, n.

(*r*) 2 Coll. 342. But see *Re Dyke*, 44 L. T. 568, where two legacies of £4,000 each were held to be cumulative, although the beneficiaries were the same.

(*s*) See also *Early* v. *Middleton*, 14 Bea. 453, a case on the same codicil.

(*t*) 4 Ves. 76. See also the cases last referred to, and the cases cited in Chap. XXXI, *post*, p. 1100.

(*x*) 2 Br. C. C. 225.

(*y*) *Hartley* v. *Ostler*, 22 Bea. 449.

(*z*) 3 Hare, 620.

One instrument held to be in substitution for another.

two distinct gifts of different amounts given by the same instrument, with nothing more to explain them, is in favour of both gifts taking effect. The only doubt I have had in this case is, whether there are in fact two distinct gifts, or whether the second does not, in point of grammatical construction, include the first; in other words, whether this part of the will is not a statement of the amount of the income to be derived from a specific fund, which the testator's daughters are to have at different times and under different circumstances " (*a*).

Legacies given by different instruments are *prima facie* cumulative. *Hurst* v. *Beach*.

Where the legacies are given by different instruments they are *prima facie* cumulative. The rule was thus stated by Sir J. Leach in *Hurst* v. *Beach* (*b*) : " I think the true result of the decisions is to be stated thus : where a testator leaves two testamentary instruments and in both has given a legacy *simpliciter* to the same person, the Court, considering that he who has twice given, must be *prima facie*, intended to mean two gifts, awards to the legatee both gifts, and it is indifferent whether the second legacy is of the same amount, or less or larger than the first; but if in such two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the Court considers these two coincidences as raising a presumption that the testator did not, by the second instrument, mean a second gift; but meant only a repetition of the former gift. The Court raises this presumption only when the double coincidence occurs of the same motive, and the same sum, in both instruments. It will not raise it if in either instrument there be no motive or a different motive expressed, although the sums may be the same; nor will it raise it if the same motive be expressed in both instruments and the sums be different." And in *Russell* v. *Dickson* (*c*) Lord Cranworth, C., laid it down as a general principle " that where a legacy is given to the same party in each of two different instruments,

(*a*) At p. 622.

(*b*) 5 Madd., at p. 358. See also *Hooley* v. *Hatton*, *supra*; *Wallop* v. *Hewett*, 2 Ch. Rep. 70; *Newport* v. *Kynaston*, Rep. t. Finch, 294; *Baillie* v. *Butterfield*, 1 Cox, 392; *Forbes* v. *Lawrence*, 1 Coll. 495; *Radburn* v. *Jervis*, 3 Bea. 450 (annuities); *Lee* v. *Pain*, 4 Ha. 201; *Roch* v. *Callen*, 6 Ha. 531; *Pit* v. *Pidgeon*, 1 Ch. Ca. 301; *Mackenzie* v. *Mackenzie*, 2 Russ. 262; *Guy* v. *Sharp*, 1 My. & K. 589; *Townshend* v. *Mostyn*, 26 Bea. 72; *Wilson* v. *O'Leary*, L. R. 12 Eq. 525; 7 Ch. 448; *Walsh* v. *Walsh*, Ir. R. 4 Eq. 396; *Suisse* v. *Lowther*, 2 Ha. 424; *Hertford* v. *Lowther*, 7 Bea. 107; *Lyon* v. *Colville*, 1 Coll. 449; *Brennan* v. *Moran*, 6 Ir. Ch. R. 26; *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69; *Re Armstrong*, 31 L. R. Ir. 154; *Wray* v. *Field*, 2 Russ. 257; 6 Madd. 300; *Hodges* v. *Peacock*, 3 Ves. 735; *Strong* v. *Ingram*, 6 Sim. 197; *Watson* v. *Reed*, 5 Sim. 431; *Spire* v. *Smith*, 1 Bea. 419; *Ledger* v. *Hooker*, 18 Jur. 481.

(*c*) 4 H. L. C. 293.

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a will and codicil, or two codicils, *prima facie* you must treat them as two gifts. That is an obvious proposition. If the party has twice said he gives, he must be understood to mean to give twice; but of course there may be circumstances to show that the *prima facie* construction is not, in the particular case, the construction to be adopted." In that case the presumption was rebutted by the fact that the testator stated in his last codicil that he had not time to alter his will (*d*).

Exception where the same motive for the gift is expressed.

From *Hurst* v. *Beach* it appears that there is an exception to the general rule, namely, where the same gift is given and for the same expressed motive. *Benyon* v. *Benyon* (*f*) is frequently referred to as an illustration of this exception, but in that case (where provision was made for the testator's natural son and his maintenance during minority) the main grounds of the decision seem to have been, first, that as the second codicil made some alteration in the provision for maintenance, the testator thought it necessary to repeat the bequest of capital contained in the previous codicil (*g*), and, secondly, the improbability of the testator creating two separate trusts of two sums of the same amount for the benefit of the same person. Grant, M.R., said with reference to the second legacy, that there was no probability that at so early a period of his (the son's) life, he was intended to have so very considerable an addition to his portion. And he regarded it as not settled whether the mere circumstance of the legacies being of the same amount did not raise a presumption against their duplication. But the rule seems now to be clearly established in the terms stated in *Hurst* v. *Beach* (*h*). Thus in *Suisse* v. *Lowther* (*i*), Wigram, V.-C., said: "It is clearly decided, however, that the mere fact that the amount is the same is not such an identification of the second with the first as would prevent both from taking effect as cumulative; but if in addition to the amounts being the same the testator connects a motive with both, and the express motive is also the same, the double coincidence induces the Court to believe that repetition and not accumulation was intended."

Different amounts.

If the amounts of the legacies are different, though the motive be the same, they are *prima facie* cumulative (*k*).

Difficulty in saying what is the motive of a legacy.

The mere fact that the legatee is in each case described as "my servant" is not expressive of motive; the words are words

(*d*) See also *Osborne* v. *Duke of Leeds*, 5 Ves. 369.
(*f*) 17 Ves. 34.
(*g*) The decision in *Hinchcliffe* v. *Hinchcliffe*, 2 Dr. & S. 96 (weekly sums payable to testator's sons), seems to rest on this principle.
(*h*) See *Ridges* v. *Morrison*, 1 Br. C. C. 389; *Moggridge* v. *Thackwell*, 3 Br. C. C. 517; *Fraser* v. *Byng*, 1 R. & M. 90.
(*i*) 2 Ha. 424, at p. 432.
(*k*) *Hurst* v. *Beach*, 5 Madd. 351.

of description only (*l*). It is, indeed, not easy to see what is the true meaning of the rule as to motive. Thus in *Wilson* v. *O'Leary* (*m*), Sir W. M. James, referring to some legacies to servants, said: "It is contended on one side that they come within the general rule that gifts of the same sum to the same person for the same cause are to be construed as substitutionary and not accumulative, and on the other side that they are an exception from that rule. I do not know exactly what is meant by the expression 'the same cause,' as used in the rule. When a man leaves a legacy to a child it is because he is a child; if he leaves a legacy to a friend it is because he is a friend that he gives it. Perhaps the same might be said of every case of testamentary bounty, except the giving a certain sum to an executor for his trouble as executor" (*n*).

Indications of the testator's intention.

There are no limitations to the way in which the testator may show his intention that the legacies are to be substitutional, and slight indications are often taken hold of to show an intention against double legacies (*o*). Thus if each bequest is of £1,000 and a particular picture (*p*), or if the original bequest is imperfectly expressed and the second bequest appears to be explanatory (*q*), the second bequest will be taken to be substitutional.

When legacies by codicil are payable out of same fund as legacies by will.

There are also several cases in which the whole of a later codicil has been held to be merely in substitution for a former codicil (*r*), even if there are differences between the manner in which the original and the substitutional legacies are given (*s*). As a general rule a difference in the manner in which two legacies are given indicates an intention that they are to be cumulative (*t*). But the distinction between legacies being sub-

(*l*) *Roch* v. *Callen*, 6 Ha. 531. (*m*) 7 Ch. 448.

(*n*) See the curious case of *Re Armstrong*, 31 L. R. Ir. 154, where the testatrix made two codicils, in each of which she gave B £500 in substitution for a legacy of £1,000 bequeathed by the will: it was held that the two legacies of £500 were not cumulative.

(*o*) *Robley* v. *Robley*, 2 Bea. 95, was a case where the presumption in favour of legacies being cumulative was rebutted by words showing that the testator intended to make a similar provision for all his daughters. See *Mayor of London* v. *Russell*, Finch. 290 (see 6 Ir. Ch. 131). In *Allen* v. *Callow*, 3 Ves. 289, circumstances had changed since the date of the will. In *Watson* v. *Reed*, 5 Sim. 431, and *Sawrey* v. *Rumney*, 5 De G. & S. 698, the legacies were held to be cumulative notwithstanding indications of a contrary intention. In *Bell* v. *Park*, [1914] 1 Ir. R. 158, the legacies were held to be substitutionary.

(*p*) *Currie* v. *Pye*, 17 Ves. 462; *Roxburgh* v. *Fuller*, 11 L. T. 587.

(*q*) *Moggridge* v. *Thackwell*, 3 Br. C. C. 517; *Fraser* v. *Byng*, 1 R. & M. 90. Possibly this may be the reason why the testator in *Whyte* v. *Whyte*, L. R. 17 Eq. 50, executed two codicils.

(*r*) *Campbell* v. *Radnor*, 1 Br. C. C. 271; *Barclay* v. *Wainwright*, 3 Ves. 462; *Coote* v. *Boyd*, 2 Br. C. C. 521; *Tuckey* v. *Henderson*, 33 Bea. 174.

(*s*) *Att.-Gen.* v. *Harley*, 4 Madd. 263. In *Gillespie* v. *Alexander*, 2 Sim. & St. 145, and *Hemming* v. *Gurrey*, 2 Sim. & St. 311, the substitution was only partial.

(*t*) *Hodges* v. *Peacock*, 3 Ves. 735; *Lee* v. *Pain*, 4 Ha. 201.

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stitutional and codicils being substitutional is not always very clearly observed. Thus in *Roxburgh* v. *Fuller* (*u*), the Master of the Rolls said that the question was similar to that decided in *Tuckey* v. *Henderson* (*v*)—not whether one *legacy* was substitutional for another, but whether the later *codicils* were substitutional for the earlier ones. In this case all the codicils referred to the will, but the later codicils did not allude to the earlier ones; the repeated gifts of horses, furniture, etc., could not be cumulative, and it was clear that the testator thought he had made only one codicil to his will: it was held that the dispositions made by the third codicil were substitutional, and that the legacies given by it only were payable. On the whole, however, the tendency of judicial opinion is to act on the general rule that gifts by different instruments are *prima facie* cumulative, and to discourage attempts to fritter it away by a mere balance of probabilities (*w*).

Evidence of intention.

In *Hubbard* v. *Alexander* (*x*), Bacon, V.-C., admitted evidence to show that two codicils of different dates, attested by different witnesses, were not intended by the testator to be two distinct instruments, but one. The decision, however, seems contrary to principle (*y*).

Probate.

In strictness, an instrument for which another has been substituted should not be admitted to probate. Thus in the case of *Chichester* v. *Quatrefages* (*z*), Jeune, P., held that a second codicil was in substitution for the first, and refused to admit the first to probate. The result of holding the legacies substitutional when the two codicils are identical is no doubt the same as holding the codicils substitutional. Thus in *Whyte* v. *Whyte* (*a*), a testator gave two legacies of £5,000, to the same person by two codicils executed at the same time and in nearly the same words, neither codicil comprising any other legacy, and it was held that the legacies were substitutional. Of course, the result is the same as holding that the codicils were substitutional, but it is suggested that the form of the decision is the right one, and that in *Hubbard* v. *Alexander*, Bacon, V.-C., wrongly assumed the jurisdiction of the Court of Probate in holding that two instruments were one when they had been

(*u*) 13 W. R. 39. Compare *Duke of St. Albans* v. *Beauclerk*, 2 Atk. 636, and the comments on that case in *Lee* v. *Pain*, 4 Ha. 201, and *Wilson* v. *O'Leary*, L. R. 7 Ch. 448.
(*v*) 33 Bea. 174; *Bell* v. *Park*, [1914] 1 Ir. R. 158.
(*w*) *Wilson* v. *O'Leary*, L. R. 7 Ch. 448.
(*x*) 3 Ch. D. 738.
(*y*) See Chap. XV.
(*z*) [1895] P. 186.
(*a*) L. R. 17 Eq. 50; *Bell* v. *Park*, [1914] 1 Ir. R. 158.

proved as two. In *Jackson* v. *Jackson* (*b*), where two instruments had been proved in the Ecclesiastical Court, Mr Justice Buller found from the whole of the second instrument an intention to make a new and distinct will in substitution for the earlier instrument, but the learned judge held the legacies (and not the instrument) to be substitutional. The fact that an instrument is described as a last will affords a presumption that so far as it goes it is intended to be substitutional (*c*). If the testator intends completely to revoke one instrument by a second, the former should not be admitted to probate; if he only intends to revoke it partially, the Court admits both to probate, and then it is a question of construction how far the revocation extends. This perhaps explains the language in the cases. And sometimes it is not easy to distinguish between questions of revocation and of substitution, for every substituted gift is a revocation of the former gift (*d*).

Substitution and revocation.

The fact that some legacies given by a later instrument are expressly stated to be additional to those given by an earlier instrument is not, of itself, sufficient to show that others, given *simpliciter*, are intended to be substitutional (*e*). Nor does the fact that some legacies given by a later instrument are expressly stated to be substitutional show that other legacies given *simpliciter* are also intended to be substitutional (*f*).

Inference from express statement as to other legacies.

The question whether extrinsic evidence is admissible to prove that two legacies are or are not intended to be cumulative, is discussed elsewhere (*g*).

It is often a question whether a legacy bequeathed by a codicil is payable out of the same fund, or is subject to the same restrictions, as a legacy bequeathed to the same person by the will. If the second legacy is expressly given on the same conditions, etc., of course the affirmative does not admit of doubt (*h*); and the same construction prevails where the legacy by codicil is expressed to be in addition to (*i*), or in substitution

Whether legacies by codicil are on the same terms as those given by will.

(*b*) 2 Cox, 35. In *Re Mitchell*, [1924] W. N. 52, one codicil was held to be substituted for another.

(*c*) *Jackson* v. *Jackson*, *supra*; *Kidd* v. *North*, 2 Ph. 91; *Tuckey* v. *Henderson*, 33 Bea. 174; *In b. Bryan*, [1907] P. 125.

(*d*) As to whether a jointure can be in substitution for a power of jointuring, see *Grealey* v. *Sampson*, [1917] 1 Ir. R. 286.

(*e*) *Lee* v. *Pain*, 4 Ha. 201.

(*f*) *Re Armstrong*, 31 L. R. Ir. 154.

(*g*) Chap. XV.

(*h*) *Lloyd* v. *Branton*, 3 Mer. 108; see also *Cooper* v. *Day*, *ib.* 154; *Corporation of Gloucester* v. *Wood*, 3 Hare, 131; 1 H. L. C. 272.

(*i*) *Crowder* v. *Clowes*, 2 Ves. jun. 449; *Russell* v. *Dickson*, 2 D. & War. 133; *Day* v. *Croft*, 4 Bea. 561; *Burrell* v. *Earl of Egremont*, 7 Bea. 205; *Cator* v. *Cator*, 14 Bea. 463; *Warwick* v. *Hawkins*, 5 De G. & S. 481; *Duffield* v. *Currie*, 29 Bea. 284; *Re Benyon*, 51 L. T. 116; *Re Lawrenson*,

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for (*j*), the legacy given by the will. But it seems that where a legacy is given to A for life, with remainder over, another legacy given to A in addition to the legacy before mentioned, will be construed an absolute gift to him; and it is only where the original legacy is absolute or defeasible on certain terms in the party to whom the additional legacy is given, that the second gift is held to be on similar terms. In no case has it been held that the latter gift is to go to parties entitled under the subsequent limitations of the former gift (*k*). So if the original legacy is revoked, and "in lieu thereof" the testator bequeaths to A a share of his residuary estate, A takes the bequest absolutely (*l*). But the tenour of the will and codicil may show an intention that the substituted gift is to be subject to the same limitations as the original gift (*m*).

The intention to assimilate the respective legacies or classes of legacies has in some instances been traced, though less distinctly indicated than in the cases mentioned above. As in *Leacroft* v. *Maynard* (*n*), where a testator devised his real estate in trust to sell and apply the produce in paying (among other legacies) £50 to each trustee, to the Foundling Hospital £2,000, and to the hospitals of L. and S. £1,000 each. Afterwards, by a codicil he revoked the devise and legacy to one of the trustees, and substituted another trustee, to whom he gave a legacy of

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[1891] W. N. 28; but the context may prevent an additional legacy from being paid precisely in the same manner as the original: *Overend* v. *Gurney*, 7 Sim. 128; *King* v. *Tootel*, 25 Bea. 23.

(*j*) *Cooper* v. *Day*, 3 Mer. 154; *Russell* v. *Dickson*, 2 D. & War. 133; *Martin* v. *Drinkwater*, 2 Bea. 215; *Bristow* v. *Bristow*, 5 Bea. 289; *Earl of Shaftesbury* v. *Duke of Marlborough*, 7 Sim. 237; *Fenton* v. *Farington*, 2 Jur. (N.S.) 1120; *Giesler* v. *Jones*, 25 Bea. 418; *Duncan* v. *Duncan*, 27 Bea. 392; *Johnstone* v. *Earl of Harrowby*, 1 D. F. & J. 183; *Re Wright*; *Knowles* v. *Sadler*, [1879] W. N. 20; *Re Boddington*, 25 Ch. D. 685; *Re Colyer*, 55 L. T. 344; *Re Joseph*, [1908] 1 Ch. 599; 2 Ch. 507. See also *Re Boden*, [1907] 1 Ch. 132, and other cases cited in Chap. XXXVI. In *Re Courtauld's Estate*, [1882] W. N. 185, a testator by his will gave several legacies and gave the residue among the legatees *pro rata* in proportion to the legacies; by a codicil he revoked the legacies given by the will and gave in substitution therefor other legacies of larger amounts: it was held by Kay, J., that the alteration in the amount of the legacies involved an alteration in the proportions of the residue. But express terms, annexed to a legacy given by codicil "instead of" one given by will, excluded the substitutional construction in *Haley* v. *Bannister*, 23 Bea. 336.

(*k*) *Re More's Trust*, 10 Hare, 171; *Mann* v. *Fuller*, Kay, 624. See also *Hill* v. *Jones*, 37 L. J. Ch. 465; and see *Cookson* v. *Hancock*, 1 Keen, 817; 2 My. & C. 606; and *Re Joseph*, [1908] 2 Ch. 507, the converse case, *post*, p. 1098.

(*l*) *Hargreaves* v. *Pennington*, 34 L. J. Ch. 180. *Alexander* v. *Alexander*, 5 Bea. 518, was the converse case.

(*m*) *Cookson* v. *Hancock*, 2 My. & C. 606, followed in *Donnellan* v. *O'Neill*, Ir. R. 5 Eq. 523, where it seems to be suggested that this construction is more easily adopted where the gifts are residuary. See also *Prescott* v. *Edmunds*, 4 L. J. (o.s.) Ch. 111.

(*n*) 1 Ves. jun. 279; see also *Brudenell* v. *Boughton*, 2 Atk. 268; *Bonner* v. *Bonner*, 13 Ves. 379; *Williams* v. *Hughes*, 24 Bea. 474; *Strong* v. *Ingram*, 6 Sim. 197.

£50. He also revoked the legacies to the three hospitals, and gave £1,500 to the Foundling, £500 to the Infirmary of N., and a sum to be distributed among the poor of S. It was unsuccessfully contended for the charities, that the legacies given by the codicil were not, like those of the will, charged on the land, and were therefore valid. Lord Thurlow seems to have thought, that the necessity which this would have occasioned of holding that the legacy to the new trustee must also come out of the personalty, formed a conclusive argument against the construction. But it seems that even without this ground the decision must have been the same (*o*).

So, in *Fitzgerald* v. *Field* (*p*), where a testator gave his personal and freehold estates to trustees, upon trust, with the money arising from his personal estate, and in aid thereof, by sale or mortgage of part of the freeholds, to pay certain annuities and legacies. By a codicil he revoked this bequest and devise, and gave the real and personal estate to other trustees upon the trusts in his will and codicil mentioned. He then bequeathed an annuity to A for life, with the payment of which he charged the residue of his said lands, and with a power of distress. Lord Gifford, M.R., held that, whatever might be the construction if the codicil stood alone, it was evident, looking at the will and codicil together, the intention of the testator was, that all his personal estate should be applied in the first instance to the payment of annuities and legacies. But this does not apply where the residue is by the will given to the legatees in proportion to the legacies "herein," or "by the will" bequeathed to them, and by codicil additional legacies are given to some of the legatees; the proportion in which the residue is to be divided here remains unaltered (*q*).

Whether legacy given by codicil is exempt from duty like those of will.

Whether a legacy bequeathed by a codicil is to participate in an exemption from duty created by the will in favour of the legacies in general given by the will (*r*), or of some particular legacy for which the legacy in the codicil is substituted, has often been a point of dispute. Even in the latter case, it seems the intention to exempt the substituted legacy must be distinctly indicated, there being no necessary inference that the legacy bequeathed by the codicil is to stand *pari passu* in all respects with the legacy for which it is substituted. Thus, where a

(*o*) *Johnstone* v. *Earl of Harrowby*, 1 D. F. & J. 183; *Re Smith*, 2 J. & H. 594.

(*p*) 1 Russ. 416.

(*q*) *Hall* v. *Severne*, 9 Sim. 515; see *Sherer* v. *Bishop*, 4 B. C. C. 55; and as to the meaning of "this my will," *Re Trinder*, 56 Sol. J. 74, and *Re Smith*, [1916] 2 Ch. 368.

(*r*) As to the exemption of legacies, see *post*, pp. 1795 *seq.*

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testator by his will gave to A and B an annuity of £300 equally to be divided between them, during their joint lives, free from all taxes and stamp duties, and after the death of one of them, to the survivor during her life, and after the death of the survivor, over to C for life. By a codicil the testator revoked the annuity of £300, and gave A and B a clear annuity of £100 each, with benefit of survivorship. It was held, that the gift by the codicil was independent of the gift in the will, and, therefore, the annuities were not exempt from the duty (*s*).

Option to take substitutional legacy.

If an annuity is given to A, subject to an express or implied condition, with an option to take "in lieu and in substitution thereof" a legacy, and A never becomes entitled to the annuity, he cannot claim the legacy (*t*).

Where substituted legacy is settled.

The general principle that an additional or substituted bequest is subject to the same provisions as the original bequest, obviously does not apply where the bequests are not to the same person. Accordingly, if a legacy is given by will to A absolutely, subject to a clause of forfeiture, and by a codicil the testator revokes the legacy, and in lieu thereof gives a legacy upon trust for A for life, with remainder to his children, the settled legacy is not subject to the original clause of forfeiture (*u*). *A fortiori*, a legacy given by the codicil to B in lieu of a legacy given by the will to A, who has died since the date of the will, is not subject to the same conditions or entitled to the same privileges as those attaching to the legacy to A (*x*).

Different legatees.

The general rule of construction, that *prima facie* a substituted legacy is subject to the same conditions as the original legacy, is not confined to cases where the only change introduced is one of amount, but may sometimes apply to cases where the legatee under the substituted gift is a different person from the original legatee (*y*).

It is clear, however, that if a testator by his will gives a legacy free from duty, and by a codicil, after reciting his intention of increasing the legacy, revokes it, bequeathing in lieu thereof a larger sum to the same legatees upon the same trusts, etc., the latter is also exempt (*z*).

(*s*) *Burrows* v. *Cottrell*, 3 Sim. 375.

(*t*) *Re Boddington*, 25 Ch. D. 685.

(*u*) The general principle and its limitations were stated by the Court of Appeal in *Re Joseph*, [1908] 2 Ch. 507 (reversing Eve, J., [1908] 1 Ch. 599), although it seems that on other grounds there was no forfeiture. See *Re Trinder*, 56 Sol. J. 74.

(*x*) *Chatteris* v. *Young*, 2 Russ. 183; *Re Gibson*, 2 J. & H. 656.

(*y*) *Re Backhouse*, [1916] 1 Ch. 65.

(*z*) *Cooper* v. *Day*, 3 Mer. 154. See also *Fisher* v. *Brierley*, 30 Bea. 267.

CHAPTER XXXI.

ANNUITIES AND RENT-CHARGES.

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I.—Annuities.—"An annuity is a right to receive *de anno in annum* a certain sum; that may be given for life, or for a series of years (*a*); it may be given during any particular period, or in perpetuity; and there is also this singularity about annuities, that, although payable out of the personal assets, they are capable of being given for the purpose of devolution, as real estate; they may be given to a man and his heirs, and may go to the heir as real estate" (*b*). Definition.

No special form of words is required for the bequest of an annuity. Thus if a testator directs his executors to invest a sufficient part of his estate to produce £100 a year for the benefit of A, that is *prima facie* a gift to A of an annuity of £100, and not merely the annual income of the fund. The question is of importance with reference to the annuitant's rights as against the residue (*c*). Indirect bequest of annuity.

Trustees are bound to deduct income tax in paying annuities, unless they are given free of tax (*d*). Income tax.

(i) *How far Annuities are governed by same Rules as Legacies.*—For most purposes, annuities given by will are Annuities, how far legacies.

(*a*) As in *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173.

(*b*) *Per* Kindersley, V.-C., in *Bignold* v. *Giles*, 4 Drew. 343. In saying that an annuity to a man and his heirs goes to the heir "as real estate," the V.-C. means that it goes "in the same way as real estate"; such an annuity is personal estate, and passes by a residuary bequest, although it does not pass to the executors *virtute officii*; *Stafford* v. *Buckley*, 2 Ves. sen. 170, and other authorities cited in *Aubin* v. *Daly*, 4 B. & Al. 59. As to annuities given to a man and his heirs, see *post*, p. 1105. But a testator may use the word annuity to mean a life interest in residue, *Re Fitch's Will Trusts*, 139 L. T. 556.

(*c*) *May* v. *Bennett*, 1 Russ. 370; *Baker* v. *Baker*, 6 H. L. C. 616, and other cases cited *post*, p. 1112.

(*d*) *Re Sharp*, [1906] 1 Ch. 793. As to what words will exempt an annuity from income tax, see *post*, pp. 1787 *seq.*

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legacies (*e*); but many questions arise on gifts of annuities which, from the nature of the case, do not arise upon pecuniary legacies of lump sums, and there are some points of difference between the gift of an annuity and the gift of a pecuniary legacy.

Under a charge of legacies, annuities will generally be included, unless the testator manifest an intention to distinguish them (*f*), as by sometimes using both words (*g*).

Tenant for life and remainderman.

Where a testator gives his residuary estate upon trust for persons in succession, there is a practical difference between legacies and annuities, for the former, as between the tenant for life and the remainderman, are payable out of capital, and the latter out of income (*h*).

Whether cumulative or substitutional.

Where a testator gives two annuities to the same person, the question whether they are cumulative, or whether the second is in substitution for the first, depends on rules similar to those which apply to legacies (*i*). Thus, two annuities of equal amount in the same will to the same person are *prima facie* not cumulative (*k*). But two annuities of equal amount to the same person, one given by will, the other by codicil, are *prima facie* cumulative (*l*). And where several annuities of different amounts are given to the same person by the same will, they are *prima facie* cumulative (*m*).

The question is, of course, one of intention, and depends on the wording of the will in each case (*n*).

Additional annuity.

If a testator bequeaths an annuity, and directs that in certain events the annuitant shall receive an additional annual sum to increase the amount, as a general rule the increased annuity is subject to the same provisions as the original annuity (*o*).

(*e*) *Sibley* v. *Perry*, 7 Ves. 522; *Bromley* v. *Wright*, 7 Hare, 334; *Ward* v. *Grey*, 26 Bea. 485; *Mullins* v. *Smith*, 1 Dr. & Sm. 204; *Nicholson* v. *Patrickson*, 3 Gif. 209; *Gaskin* v. *Rogers*, L. R. 2 Eq. 284.

(*f*) *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441. See *Cunningham* v. *Foot*, 3 A. C. 974.

(*g*) See *Nannock* v. *Horton*, 7 Ves. 391; *Woodhead* v. *Turner*, 4 De G. & S. 429; *Gaskin* v. *Rogers*, L. R. 2 Eq. 284 ("pecuniary legacies"); *Heath* v. *Weston*, 3 D. M. & G. 601; *Weldon* v. *Bradshaw*, Ir. R. 7 Eq. 168.

(*h*) *Scholefield* v. *Redfern*, 2 Dr. & S. 173. As to the mode of apportionment as between tenant for life and remainderman, see *Re Perkins*, [1907] 2 Ch. 596; *Re Thompson*, [1908] W. N. 195, cited *post*, p. 1194.

(*i*) *Ante*, p. 1089.

(*k*) *Holford* v. *Wood*, 4 Ves. 76; *Baylee* v. *Quin*, 2 Dr. & W. 116.

(*l*) *Spire* v. *Smith*, 1 Bea. 419; *Radburn* v. *Jervis*, 3 Bea. 450.

(*m*) *Hartley* v. *Ostler*, 22 Bea. 449. See the somewhat similar case of *Adnam* v. *Cole*, 6 Bea. 353, where one annuity was held to be for a shorter period than the life of the annuitant, and the other to be in substitution for it.

(*n*) See the cases on cumulative and substitutional legacies in Chap. XXX.

(*o*) *Re Boden*, [1907] 1 Ch. 132 (annuity payable out of income, see *post*, p. 1114). Compare the cases on additional legacies in Chap. XXX. In *Re Lawrenson*, [1891] W. N. 28, annuities were bequeathed to A and B, and after their deaths to C and D, and subject to these and other annuities the income of the residue was bequeathed to C and D in equal moieties for their

General, specific, or demonstrative.

The distinction between general, specific, and demonstrative annuities is considered in connection with the similar distinction between legacies (*p*).

Ademption of specific annuity.

A specific annuity is, of course, liable to ademption (*q*).

Rateable abatement of annuities and legacies.

In the case of a deficiency of assets, annuities and legacies abate rateably; the testator may, of course, indicate that he intends some annuities or legacies to be paid in priority to others, but the onus lies on the party seeking priority to make out that such priority was intended by the testator, and the proof of this must be clear and conclusive (*r*). As to the abatement of annuities, see Chap. LIV.

A direction to pay "pensions and allowances" does not include annual subscriptions for charitable purposes (*s*).

Prima facie for life.

(ii.) *Life Annuities.*—A gift of £100 to A is unambiguous, but a gift of an annuity of £10 to A is *prima facie* capable of two constructions: (1) that the annuity only endures during the life of A; (2) that it is perpetual. The rules of construction are thus stated by Fry, J., in *Blight* v. *Hartnoll* (*t*): "As a general rule there can be no doubt that the gift of an annuity to A is a gift of the annuity during the life of A and nothing more (*u*). It is equally free from doubt that where the testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, there the annuity is presumed to be a perpetual annuity (*v*). It is equally without doubt that there are cases in which the Court has come to the conclusion that the gift is not really that of an annuity, but the gift to a person of the income arising from a particular fund without limit, and there the Court holds that the unlimited gift of the income is a gift of the corpus from which the income arises."

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respective lives; the testator then directed that "the several annuities hereinbefore bequeathed" should be for the respective separate use of the annuitants without power of anticipation: it was held by the Court of Appeal, with some doubt, that the restraint on anticipation applied to the income of the residue as well as to the annuities.

(*p*) Chap. XXX. The question whether an annuity is specific, demonstrative, or general does not often arise except in the case of annuities charged on (or payable out of) land: see *ante*, p. 1023.

(*q*) *Cowper* v. *Mantell*, 22 Bea. 223, stated *ante*, p. 1055.

(*r*) *Miller* v. *Huddlestone*, 3 Mac. & G. 513, in which *Brown* v. *Brown* (1 Keen, 275) and *Lewin* v. *Lewin* (2 Ves. sen. 415) are discussed; *Roper* v. *Roper*, 3 Ch. D. 714, and other cases cited *post*, pp. 2023 *seq.*

(*s*) *Re Scott* (*No.* 2), 31 T. L. R. 505.

(*t*) 19 Ch. D. 294.

(*u*) *Savery* v. *Dyer*, Amb. 139; *Nichols* v. *Hawkes*, 10 Hare, 342; *Re Forster's Estate*, 23 L. R. Ir. 269; *Re Grove's Trusts*, 1 Giff. 74; *Whitten* v. *Hanlon*, 16 L. R. Ir. 298; *Re Taber*, 46 L. T. 805.

(*v*) See *Barden* v. *Meagher*, Ir. R. 1 Eq. 246; *Hedges* v. *Harpur*, 3 De G. & J. 129; *Courtenay* v. *Gallagher*, 5 Ir. Ch. 154, 356; *Mansergh* v. *Campbell* 3 De G. & J. 232.

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But if the gift is expressly one of an annuity, the fact that it is secured by a fund, or payable out of the income of a fund or the rentals of land, does not make it perpetual (*w*), unless the testator shows an intention to dispose of the whole fund, as in the cases mentioned below (*x*).

The general rule applies even where the testator, in bequeathing annuities to persons in succession, uses the words "for life" in one part of the bequest, and omits them in another. Thus if an annuity is given to A for life, and after his death to B, B will take the annuity for life only (*y*), in the absence of any indications that he is to take a different interest (*z*). So the bequest of an annuity to several persons and the survivors of them, or to a person for his life, and then to his children, does not create a perpetual annuity (*a*). And an annuity of £150 a year "to be secured to" A is an annuity for A for life (*b*). A gift of £250 per annum to "A or his descendants" is a gift of an annuity for life only (*c*).

Where an annuity is given equally amongst children who attain twenty-one, those who have attained twenty-one are only entitled to a proportionate part of the annuity if some of the other children are minors (*d*).

Survivorship.

It has been held (following apparently the analogy of gifts of life interests in personalty (*e*)) that the gift of an annuity to A and B during their lives is a gift to them and the survivor of them (*f*); but if the annuity is given "unto and equally between and amongst" the annuitants, without words of survivorship, they take as tenants in common, and on the death of one of them his share ceases to be payable (*g*). And a gift of £30 each, yearly, so long as A and B should live, is a gift of separate annuities of £30 to each of A and B for their lives (*h*).

(*w*) *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372; *Re Morgan*, [1893] 3 Ch. 222, where *Bent* v. *Cullen*, L. R. 6 Ch. 235, is observed upon; *Re Forster's Estate*, 23 L. R. Ir. 269; *Re Grove's Trusts*, 1 Giff. 74; *Re Taber*, 46 L. T. 805; *Banks* v. *Braithwaite*, 32 L. J. Ch. 198.

(*x*) *Post*, p. 1106.

(*y*) *Yates* v. *Maddan*, 3 Mac. & G., at p. 540; *Lett* v. *Randall*, 3 Sm. & G., at p. 91; *Blight* v. *Hartnoll*, 19 Ch. D. 294.

(*z*) As in *Potter* v. *Baker*, 15 Bea. 489, and other cases cited *ante*, n. (*v*).

(*a*) *Blewitt* v. *Roberts*, 10 Sim. 491 (which apparently involves the reversal of *Tweedale* v. *Tweedale*, 10 Sim. 453); *Yates* v. *Maddan*, 3 Mac. & G. 532; *Blight* v. *Hartnoll*, 19 Ch. D. 294 (dissenting from *Evans* v. *Walker*, 3 Ch. D. 211); *Ward* v. *Ward*, [1903] 1 Ir. 211; *Re Smith's Estate*, [1905] 1 Ir. 453; *Sullivan* v. *Galbraith*, Ir. R. 4 Eq. 582.

(*b*) *Re Lord Stratheden and Campbell*, [1893] W. N. 90.

(*c*) *Re Morgan*, [1893] 3 Ch. 222. As to the effect of the word "or" in creating a substitutional gift, see *post*, p. 1287.

(*d*) *Re Latham*, [1901] W. N. 248.

(*e*) *Townley* v. *Bolton*, 1 My. & K. 148, and other cases cited in Chap. XIX, *ante*, p. 618.

(*f*) *Alder* v. *Lawless*, 32 Bea. 72.

(*g*) *Re Evans*, 99 L. T. 271.

(*h*) *Lill* v. *Lill*, 23 Bea. 446.

Where an annuity is given to a number of persons in equal shares during their lives and the life of the survivor of them, on the death of one of them his share of the annuity goes to his personal representatives (*i*).

As to presuming the death of the annuitant, see *Re Long* (*ii*).

Annuities for maintenance.

(iii.) *Annuities for Special Purposes or Periods.*—If an annuity is given to several persons for their maintenance and education, it clearly will not extend beyond their lives (*j*); but as maintenance and education are not necessarily confined to minority (*k*), an annuity given for such purposes is for life, and not limited to minority (*l*).

In *Re Yates* (*m*), the testator gave an annuity to his widow for the maintenance and education of his infant daughter : it was held that the widow was only a trustee for the daughter, and, consequently, that the annuity did not cease by reason of the death of the widow during the minority of the daughter.

In *Wilson* v. *Maddison* (*n*), a bequest of £30 a year to A, together with her children B, C, and D, and for their joint maintenance, was held to be a bequest of that annual sum to A, B, C, and D for their joint lives and the life of the survivor.

Conditional annuity for maintenance.

In *Re Greenwood* (*o*), a testator gave his residue upon trust for his children for life, with remainder over, and directed that while any unmarried child resided with M., a sum of £50 a year should be deducted from that child's share of income and paid to M. An unmarried son ceased to reside with M., and assigned all his interest under the will for valuable consideration; he afterwards returned to reside with M. : it was held that, notwithstanding the assignment, M. was entitled to be paid the £50 a year.

Animals.

If a testator bequeaths an annuity to a person for his life so long as certain animals belonging to the testator are living, this is clearly good. If the annuity is expressly given for the maintenance of the animals, it, of course, comes to an end on

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(*i*) See *Jones* v. *Randall*, 1 J. & W. 100; *Bryan* v. *Twigg*, L. R. 3 Ch. 183, and other cases cited *ante*, pp. 619 *seq.*

(*ii*) 60 Sol. J. 59.

(*j*) *Knapp* v. *Noyes*, Amb. 662, was misunderstood. See 13 Ch. D., at p. 571. In some cases, however, it has been held that an annuity given for the maintenance of a person can continue after his death : see *Lewes* v. *Lewes*, 16 Sim. 266, commented on *ante*, pp. 905.

(*k*) *Re Booth*, [1894] 2 Ch. 282; and see Chap. XXIV, p. 903.

(*l*) *Soames* v. *Martin*, 10 Sim. 287; *Wilkins* v. *Jodrell*, 13 Ch. D. 564; *Williams* v. *Papworth*, [1900] A. C. 563; and see *Kilvington* v. *Gray*, 10 Sim. 293. As to *Foley* v. *Parry*, 2 My. & K. 138; *Gardner* v. *Barber*, 18 Jur. 508, and *Ryan* v. *Keogh*, Ir. R. 4 Eq. 357, see *ante*, p. 903.

(*m*) [1901] 2 Ch. 438. Compare *Smith* v. *Havens*, Cro. Eliz. 252.

(*n*) 2 Y. & C. C. C. 372.

(*o*) 66 L. T. 101.

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their death (*p*), and it would seem, on principle, that unless it were expended for that purpose, there would be a resulting trust for the testator's estate (*q*). It would also seem that a perpetual annuity may be given to a person and his representatives so long as certain animals are living. But it is submitted that a perpetual annuity cannot be given upon trust for the maintenance of certain animals, because if the annuity were not so applied in any year, there would be a resulting trust, and there does not appear to be any case (except that of a charitable trust) in which the rights of persons in personal property can be made to depend on an event which may not happen within the period allowed by the Rule against Perpetuities (*r*).

Annuity for a term, or *pur auter vie*,

The general rule that an annuity bequeathed to a person is *prima facie* a life annuity does not apply to an annuity bequeathed for a term, or *pur auter vie*. "It has never been doubted that the gift of an annuity for a term, or *pur auter vie*, is a gift to the annuitant and his personal representatives during the term or the life of the *cestui que vie*" (*s*). And it only applies to annuities created *de novo* (*t*).

or created *de novo*.

The question whether an annuity given expressly for the maintenance of A, during the life of B, is payable to A's representatives in the event of his predeceasing B, is discussed elsewhere (*u*).

In *Adnam* v. *Cole* (*v*), the testator gave the income of his residuary estate to his widow for life, subject to the payment thereout of an annuity of £10 to A for his life. After the death of his widow, the testator gave his property to various persons, and, among other gifts, bequeathed the dividends of £1,000 stock to A for life: it was held that the annuity of £10 ceased on the death of the widow.

Determinable annuity.

An annuity may be determinable, as where it is given to a person for life until alienation, followed by a gift over (*x*); or to a person so long as he has not an income exceeding a certain

(*p*) *Re Howard*, Times, October 30, 1908. In *Hicks* v. *Ross*, L. R. 14 Eq. 141, annuities were bequeathed by the testator to his dogs without the intervention of trustees.

(*q*) A trust for the maintenance of animals could not, it seems, be enforced. See *ante*, p. 877.

(*r*) The decision in *Re Dean*, 41 Ch. D. 552, is *contra*, but that decision is, it is submitted, erroneous. See *ante*, p. 268, n. (*c*), and Chap. XXIV, p. 877.

(*s*) *Per* James, L.J., in *Re Ord*, 12 Ch. D. 22; *Savery* v. *Dyer*, Dick. 162, Amb. 139; *Hill* v. *Rattey*, 2 J. & H. 634; *Re Drayton*, 56 Sol. J. 253; *Re Cannon*, 114 L. T. 231.

(*t*) *Savery* v. *Dyer*, *supra*; *Nichols* v. *Hawkes*, 10 Ha. 342.

(*u*) *Ante*, p. 905.

(*v*) 6 Bea. 353.

(*x*) *Power* v. *Hayne*, L. R. 8 Eq. 262; *Hatton* v. *May*, 3 Ch. D. 148; *Re Draper's Trust*, 57 L. J. Ch. 942. As to the effect where the annuity is reversionary, and the annuitant dies before it becomes payable, see *Day* v. *Day*, 22 L. J. Ch. 878, and other cases cited *post*, p. 1110.

sum (*y*); or to a woman while unmarried (*z*) or during widowhood (*a*), or so long as she and her son live together (*b*). So an annuity given out of the yearly rents of leaseholds comes to an end when the lease expires (*c*).

Restraint on anticipation.

Where an annuity is given to a married woman with a restraint upon anticipation with a provision for forfeiture if she assigns "whether under any disability or not," an assignment during coverture does not cause a forfeiture as it is ineffectual (*d*).

An annuity to a trustee so long as he should continue to execute the office of trustee, determines on the cesser of the active trusts, and does not continue until the trustee has retired from the trust (*e*); in fact, such a gift seems equivalent to an annuity to trustees for their trouble (*f*); the trustees do not lose their annuity in such a case by employing a person to collect the rents (*g*), and the annuity does not necessarily cease by reason of a suit for administration (*h*).

Annuity may be perpetual.

(iv.) *Perpetual Annuities.*—The testator's intention that an annuity should be perpetual may be shown in many ways.

Express words.

The proper way of bequeathing a perpetual annuity is to give it to A for ever, or to A and his executors, administrators and assigns, or (if the testator wishes to make it descendible to heirs) to A and his heirs. Apparently the bequest of an annuity to A and his descendants would have created a perpetual annuity by way of fee simple conditional (*i*).

Annuity to A and his heirs.

An annuity given to A and his heirs is personal property (*k*), though it descends to the heir. And a personal annuity could not be entailed, for it is not within the statute *De Donis*, so that a devise of a personal annuity to A and the heirs of his body would before 1926 give A a fee simple conditional (*l*).

(*y*) As to the manner in which the income in such a case is to be ascertained, see *Re Hedges' Trust Estate*, L. R. 18 Eq. 419 (commented on elsewhere); *Bateman* v. *Faber*, 48 W. R. 165 (settlement).

(*z*) *Heath* v. *Lewis*, 22 L. J. Ch. 721.

(*a*) *Re Howard*, [1901] 1 Ch. 412.

(*b*) *Sutcliffe* v. *Richardson*, L. R. 13 Eq. 606 (not determined by the death of the son).

(*c*) *Darbon* v. *Rickards*, 14 Sim. 537; *Courtenay* v. *Gallagher*, 5 Ir. Ch. 356.

(*d*) *Re Adamson*, 109 L. T. 25.

(*e*) *Hull* v. *Christian*, L. R. 17 Eq. 546.

(*f*) As in *Clay* v. *Coles*, [1880] W. N. 145; *Henrion* v. *Bonham*, Dru. t. Sug. 476; *McDermot* v. *O'Conor*, Ir. R. 10 Eq. 352.

(*g*) *Wilkinson* v. *Wilkinson*, 2 S. & St. 237; unless the annuity is for "collecting of rents," etc.; *Re Muffett*, 56 L. T. 685.

(*h*) *Baker* v. *Martin*, 8 Sim. 25.

(*i*) *Re Morgan*, [1893] 3 Ch. 222; *Young* v. *Davies*, 2 Dr. & S. 167.

(*k*) Co. Litt. 20a; *Aubin* v. *Daly*, 4 B. & Ald. 59; *Radburn* v. *Jervis*, 3 Bea. 450; *Lady Holdernesse* v. *Lord Carmarthen*, 1 Br. C. C. 377; *ante* p 1099, n. (*b*).

(*l*) *Stafford* v. *Buckley*, 2 Ves. sen. 179; and see *Turner* v. *Turner*, 1 Br. C. C. 316.

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New law.

But after 1925 personal property can be entailed, and property (not entailed) does not descend to the heir, so, it is submitted, that after 1925 an annuity to A and his heirs would, if not disposed of by will, be distributable in accordance with the Administration of Estates Act, 1925.

"For ever."

An annuity to A for ever passes to A's personal representative, and not to his heir (*m*).

There are two general rules applicable to cases in which the question arises, whether an annuity given indefinitely is for life or perpetual. "The one is, that the gift of the produce of a fund, whether particular or residuary, without limit as to time, is a gift of the fund itself; the other is, that where a testator speaks of an annuity which he gives to a person for life, as if it were in existence after the death of such person, irrespective of any words added for the purpose of continuing its existence for the benefit of any other person, there the annuity given indefinitely to such other person is a perpetual annuity" (*n*).

Thus if a testator dedicates the whole of his property, or the whole of a fund, to the payment of annuities, in such a way as to show that he treats the annuities as a mode of calculating the shares which the annuitants are to take in the property or fund, then the annuities are perpetual (*o*).

Some of the cases in which testators have shown an intention to give a perpetual annuity, by referring to it as continuing after the death of the first annuitant, have been already cited (*p*).

But the above are not the only methods by which a testator may indicate his intention to give a perpetual annuity. Thus, in *Engelhardt* v. *Engelhardt* (*q*), a testator directed the income of the shares settled on his married daughters to be increased out of his general dividends to £400 annually to each of them: Hall, V.-C., held that the trustees of the respective settlements were entitled to receive as corpus out of the testator's estate sums sufficient in each instance to produce the supplementary income. A gift to A of "£200 a year, being part of the moneys I now have in Bank security entirely for her own use and disposal,"

(*m*) *Taylor* v. *Martindale*, 12 Sim. 158; *Joynt* v. *Richards*, 11 L. R. Ir. 278; *Parsons* v. *Parsons*, L. R. 8 Eq. 260.

(*n*) *Per* Lord Truro, C., in *Yates* v. *Maddan*, 3 Mac. & G. 532, based on Lord Cottenham's judgment in *Stokes* v. *Heron*, 12 Cl. & Fin. 161.

(*o*) *Stokes* v. *Heron*, *supra*, as explained in *Yates* v. *Maddan*, *supra*; *Robinson* v. *Hunt*, 4 Bea. 450; *Potter* v. *Baker*, 15 Bea. 489; *Hill* v. *Rattey*, 2 J. & H. 634; *Hicks* v. *Ross*, 14 Eq. 141. See *Courtenay* v. *Gallagher*, 5 Ir. Ch. 154, 356, where the annuities were payable out of the profit rentals of renewable leaseholds.

(*p*) *Hedges* v. *Harpur*, 3 De G. & J. 129; *Mansergh* v. *Campbell*, 3 De G. & J. 232, and other cases cited *ante*, p. 1101, n. (*v*); *Pawson* v. *Pawson*, 19 Bea. 146; *Warren* v. *Wright*, 12 Ir. Ch. 401.

(*q*) 26 W. R. 853.

was held to give to A so much Bank stock as would produce £200 per annum (*r*).

Direction to purchase fund.

It has been held that a direction to the executor to purchase an annuity in Government securities to the amount of £50 a year for A creates a perpetual annuity to be provided for by an investment in Government securities sufficient to produce £50 per annum (*s*).

Power of appointment.

In *Townsend* v. *Ascroft* (*t*) the testator gave his daughter an annuity for life with a general power of appointment by will. The daughter by her will appointed the annuity to her daughter absolutely. It was held that the appointee was entitled to a perpetual annuity.

At what date annuities begin to be payable.

(v.) *From what Date an Annuity commences.*—The general rule is that an annuity given by will is to commence from the testator's death (*u*); that is to say, if no time for payment is fixed, the first payment is to be made at the expiration of one year from the testator's death, but if the testator directs that the annuity shall be paid, say, monthly, the first payment is to be made at the end of a month after the testator's death (*v*).

The arrears of an annuity charged on the testator's estate are computed from the testator's death (*x*).

It makes no difference that the annuity is charged on a reversion (*y*).

If the annuity is to be paid quarterly, on the usual quarter days, only a proportional part is payable on the first quarter day after the testator's decease (*z*).

Where a testatrix gave certain annuities, but not to commence till all her debts and legacies should be paid, it was held that the annuities commenced from the time when the legacies ought to have been paid (*a*).

(*r*) *Rawlings* v. *Jennings*, 13 Ves. 39.

(*s*) *Ross* v. *Borer*, 2 J. & H. 469; *Kerr* v. *Middlesex Hospital*, 2 D. M. & G. 576 ("the annuities to be purchased in the British funds"); and see *Aspland* v. *Watte*, 20 Bea. 474.

(*t*) [1917] 2 Ch. 14.

(*u*) See the general rule stated by Lord Eldon in *Gibson* v. *Bott*, 7 Ves., at pp. 96-7; *Re Robbins*, [1907] 2 Ch. 8.

(*v*) *Houghton* v. *Franklin*, 1 S. & St. 390.

(*x*) *Stamper* v. *Pickering*, 9 Sim. 176.

(*y*) *Pettinger* v. *Ambler*, 34 Bea. 542; *Re Williams*, 64 L. J. Ch. 349; unless an intention appears that the annuity is not to commence until the reversion falls in: *Jackson* v. *Hamilton*, 3 Jo. & Lat. 702; 9 Ir. Eq. 430.

(*z*) *Williams* v. *Wilson*, 5 N. R. 267. See *Irvin* v. *Ironmonger*, 2 R. & M. 531 (first payment to be made within eighteen months).

(*a*) *Ingham* v. *Daly*, 9 L. R. Ir. 484. Compare *Re Robbins*, [1907] 2 Ch. 8 (where the annuity was to be purchased after realisation of the estate and payment of debts, etc.); *Astley* v. *Earl of Essex*, L. R. 6 Ch. 898 (annuity to commence after incumbrances paid off); *Rawson* v. *McCausland*, Ir. R. 7 Eq. 277 (annuity to commence after payment of debts out of rents); *Roebuck* v. *Habershon*, 10 Jur. 279 (annuity to commence after death of another annuit-

If an annuity is in clear language made to commence at a time subsequent to the testator's death, with a later clause directing it to be paid by half-yearly payments, the first of such payments to be made at the expiration of six months from the testator's death, the later clause will not make the annuity commence from the testator's death, but will be rejected as inconsistent (*b*).

Interest on a legacy of money to buy an annuity.

(vi.) *Interest.*—Where a sum of money was bequeathed to executors, to be laid out in purchasing an annuity for the testator's daughter, it was held that interest on the sum of money only commenced to run one year after the testator's death (*c*). The daughter appears to have been of full age.

No interest is payable on the arrears of an annuity.

There is a curious distinction between pecuniary legacies and annuities as to the payment of interest. "The general rule of the Court is that arrears of an annuity do not carry interest. In the older cases, an exception was sometimes made in favour of the annuitant where the annuity was a provision for a wife or a child. Lord Hardwicke acted on this principle in *Newman* v. *Auling* (*d*). But in *Tew* v. *Lord Winterton* (*e*), Lord Thurlow repudiated this as a ground of decision, and his view of the law has, as I conceive, ever since been treated as sound and satisfactory. The cases in which in later times the Court, in the absence of express contract, has allowed interest, have been confined to those where the annuitant has held some legal security which, but for the interference of the Court, he might have made available for the obtaining of interest; or where the accumulation of arrears has been occasioned by the misconduct of the party bound to pay" (*f*).

And in *Re Hiscoe* (*g*), Kekewich, J., after stating that he was unable to see, on principle, why interest should not be payable, held, on a consideration of the cases, that the practice of not paying interest on annuities was established (*h*).

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ant); *Bedborough* v. *Bedborough*, 34 Bea. 286 (annuity to married woman in the event of her separation from her husband).

(*b*) *Re Bywater*, 18 Ch. D. 17. See *ante*, pp. 550 *seq.*, and compare *Re Williams*, *supra*, where the effect of a similar direction was to make the annuity commence from the testator's death, no other time having been previously specified.

(*c*) *Re Friend*, 78 L. T. 222. The point was considered doubtful in Lord Eldon's day: *Gibson* v. *Bott*, 7 Ves., at p. 97.

(*d*) 3 Atk. 579.

(*e*) 1 Ves. jun. 451.

(*f*) *Per* Lord Cranworth, C., in *Torre* v. *Brown*, 5 H. L. C. 555.

(*g*) 71 L. J. Ch. 347.

(*h*) *Batten* v. *Earnley*, 2 P. Wm. 163; *Anderson* v. *Dwyer*, 1 Sc. & L. 301; *Martyn* v. *Blake*, 3 Dr. & W. 125; *Taylor* v. *Taylor*, 8 Hare, 120; *Wheatley* v. *Davies*, 24 W. R. 818 (in which Malins, V.-C., refused to follow *Playfair* v. *Cooper*, 17 Bea. 187), but this does not apply where the annuity is not a legacy but in the nature of a debt: *Re Salvin*, [1912] 1 Ch. 332; see 56 Sol. J. 548.

Annuitant entitled to lump sum in lieu of annuity.

(vii.) *Sum given to buy Annuity.*—Where there is a bequest of a sum of money to buy an annuity, the annuitant is entitled to have the money, because the annuity might at once be sold, and it would be idle to compel the annuitant to have an annuity which he could resell (*i*); this is the case even where the testator shows clearly that he means the annuity to be held by trustees as a personal provision for the annuitant (*k*), or even where he expressly declares that the annuitant shall not be allowed to accept the value of the annuity in lieu thereof, or that it shall cease on alienation, unless such a condition is made effective by a gift over (*l*).

When an annuitant elected to have paid over to her the purchase value for her annuity and the will provided that the trustees should purchase the annuity from Government or any public company, it was held that she was only entitled to receive such a sum as would be required to purchase for her an annuity in a public company (*m*).

If the annuitant dies before the money is laid out in the purchase of the annuity, his representatives will be entitled to payment of the money, even if the annuity is directed to be purchased after the death of a tenant for life, such a gift being *prima facie* vested (*n*), or even if the annuity was given to a married woman for her separate use, with restraint on anticipation (*o*). And there is no difference in this respect between a gift of a certain sum to be laid out in the purchase of an annuity, and a direction to purchase an annuity of a certain amount (*p*). In the former case, however, interest on the bequest does not run until after a year from the testator's death (*q*), while in the latter case the value of the annuity is calculated at the date of the testator's death (*r*).

(*i*) *Ford* v. *Batley*, 17 Bea. 303; *Re Browne's Will*, 27 Bea. 324; *Yates* v. *Yates*, 28 Bea. 637; *Re Castle*, [1916] W. N. 195. A direction to set aside a fund to secure an annuity does not give the annuitant the right to have the value of the annuity paid to him: *Wright* v. *Callender*, 2 D. M. & G. 652; but if the estate is insufficient, see *Re Cottrell*, [1910] 1 Ch. 402. A discretionary power to invest a sum in the purchase of an annuity authorises the trustees to pay the sum to the annuitant: *Messeena* v. *Carr*, L. R. 9 Eq. 260.

(*k*) *Woodmeston* v. *Walker*, 2 R. & M. 197; *Re Browne's Will*, 27 Bea. 324.

(*l*) *Re Mabbett*, [1891] 1 Ch. 707; *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285; *Stokes* v. *Cheek*, 28 Bea. 620; *Hatton* v. *May*, 3 Ch. D. 148; *Roper* v. *Roper*, 3 Ch. D. 714.

(*m*) *Re Smith*, 130 L. T. 185.

(*n*) *Bayley* v. *Bishop*, 9 Ves. 6; *Yates* v. *Compton*, 2 P. W. 308; *Barnes* v. *Rowley*, 3 Ves. 305; *Palmer* v. *Craufurd*, 3 Sw. 482; *Wakeham* v. *Merrick*, 37 L. J. Ch. 45.

(*o*) As in *Re Ross*, [1900] 1 Ch. 162.

(*p*) *Dawson* v. *Hearn*, 1 R. & M. 606; *Re Robbins*, [1906] 2 Ch. 648, [1907] 2 Ch. 8; *Re Brunning*, [1909] 1 Ch. 276.

(*q*) *Re Friend*, 78 L. T. 222.

(*r*) *Re Robbins*, *supra*. In *Ford* v. *Batley*, 17 Bea. 303, the executors had

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The same rule applies where a sum of money is set aside for the payment of an annuity, and the principal, as well as the income, is dedicated to that purpose (*s*).

Where the testator directed his executor to set aside £200, and thereout to pay his wife £3 monthly, so long as she remained unmarried, it was held that on the death of the wife, unmarried, her executrix was entitled to the balance (*t*).

Reversionary annuity determinable on alienation.

In *Day* v. *Day* (*u*), a testator gave his residue upon trust for his wife for life, and after her decease, as to one-seventh part, in trust to invest the same in a Government annuity for the life of his son, and to pay the same, not by way of anticipation, to the son, but if the son should become bankrupt or encumber the annuity, then it was to go over to other persons; the son died during the lifetime of the widow without having committed a forfeiture, and it was held by Kindersley, V.-C., that the event upon which it was given over not having happened, the fund belonged to the son's representatives. But in *Power* v. *Hayne* (*x*), an exactly similar case, Malins, V.-C., refused to follow *Day* v. *Day*, and decided that the direction to purchase the annuity had failed, and that the fund was undisposed of, on the ground that the testator's obvious intention was that the annuity should be personally enjoyed by the annuitant; the V.-C. seems to have assumed that if in *Day* v. *Day* the son had survived the widow, Kindersley, V.-C., would have held him to be absolutely entitled to the fund (*y*). The decision of Malins, V.-C., was followed by Kekewich, J., in *Re Draper* (*z*), and by Peterson, J., in *Re Strange* (*a*).

Contingent purchase of annuity.

Where a testatrix charged annuities on land and, subject thereto, devised the land to trustees on trust for sale, and empowered the trustees to purchase Government annuities in place of the annuities charged on the land, and the trustees sold the land and deposited a sum of money in a bank sufficient to purchase the Government annuities, and an annuitant died before completion or payment of the purchase money, it was held that her personal representative was not entitled to receive the value of her annuity, but that the personal representative of an annuitant who died after completion was so entitled (*b*).

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a discretion as to the kind of annuity to be purchased, but the Master of the Rolls refused to allow them to exercise it : *ideo quære.*

(*s*) *Wakeham* v. *Merrick*, 37 L. J. Ch. 45.

(*t*) *Re Howard*, [1901] 1 Ch. 412, following *Rishton* v. *Cobb*, 5 My. & Cr. 145.

(*u*) 22 L. J. Ch. 878.

(*x*) L. R. 8 Eq. 262. See *Hatton* v. *May*, 3 Ch. D. 148.

(*y*) It is only fair to point out that Malins, V.-C., appears to have had before him only the report of *Day* v. *Day*, in 1 Dr. 569, which is inaccurate.

(*z*) 57 L. J. Ch. 942.

(*a*) 60 Sol. J. 640.

(*b*) *Re Mabbett*, [1891] 1 Ch. 707.

(viii) *Whether charged on Corpus or Income.*—Questions often arise whether an annuity is charged upon the corpus or only upon the income of property. Such questions arise between an annuitant and a residuary legatee, and also between an annuitant and the remainderman of a particular fund out of which, or the income of which, the annuity is payable; in the latter case, the question is whether the bequest is a bequest of an annuity for which the capital and income of the fund are liable, or whether it is a bequest of the income, or part of the income, of the fund which is directed to be set apart (*c*).

Whether charged on corpus or income.

Where there is a direct gift of an annuity, the annuity is payable out of the general estate before the residuary legatee is entitled to anything, and it makes no difference that the testator directs his executors or trustees to pay the annuity out of the income of his residuary estate (*d*), or to set aside a fund to produce the annuity (*e*). Sometimes the gift of residue is made subject to the payment of the annuity (*f*), which puts the matter beyond all doubt (*g*). The annuitant is not entitled to have the value of the annuity paid to him (*h*), but if the question arises between the annuitants and the pecuniary legatees the rule is different (*i*).

Direct gift of annuity.

Even if there is no direct gift of the annuity, the testator may by the provisions of his will, show that he intends it to be provided out of residue, that is, to be charged on the corpus of his property (*j*).

Intention to charge on corpus.

Where an annuity is given indefinitely out of rents, and the property is given over subject to the annuity, this *prima facie* amounts to charging the corpus with the annuity (*k*). And a direction to raise an annual sum out of land devised to trustees makes it a charge on the corpus (*l*).

(*c*) *May* v. *Bennett*, 1 Russ. 370. (*d*) *Re Mason*, 8 Ch. D. 411.

(*e*) *Carmichael* v. *Gee* (*Gee* v. *Mahood*), 5 App. Cas. 588 (where the gift of the annuity followed the direction to set aside a fund to secure it); *Bright* v. *Larcher*, 3 De G. & J. 148 (proceeds of real estate); *Pack* v. *Darby*, [1895] W. N. 123; *Davies* v. *Wattier*, 1 S. & St. 463; *Upton* v. *Vanner*, 1 Dr. & Sm. 594; *Miner* v. *Baldwin*, 1 Sm. & G. 522; *Re Taylor*, 50 L. T. 717.

(*f*) As in *Miner* v. *Baldwin*, *supra*; *Birch* v. *Sherratt*, L. R. 2 Ch. 644; *Picard* v. *Mitchell*, 14 Bea. 103; *Haynes* v. *Haynes*, 3 D. M. & G. 590; *Perkins* v. *Cooke*, 2 J. & H. 393.

(*g*) As to the effect of the words "subject thereto" or the like in creating a continuing charge on the income, see *Re Mason*, 8 Ch. D. 411, *post*, p. 1113.

(*h*) *Wright* v. *Callender*, 2 D. M. & G. 652.

(*i*) *Re Cottrell*, [1910] 1 Ch. 402.

(*j*) *May* v. *Bennett*, 1 Russ. 370; *Wright* v. *Callender*, 2 D. M. & G. 652; *Mills* v. *Drewitt*, 20 Bea. 632; *Ingleman* v. *Worthington*, 1 Jur. (N.S.) 1062; *Anderson* v. *Anderson*, 33 Bea. 223; *Percy* v. *Percy*, 35 Bea. 295; *Croly* v. *Weld*, 3 D. M. & G. 993; *Perkins* v. *Cooke*, 2 J. & H. 393.

(*k*) *Phillips* v. *Gutteridge*, 3 D. J. & S. 332; *Bell* v. *Bell*, Ir. R. 6 Eq. 239. It is a question of intention on the whole will: see *per* Wood, V.-C., in *Salvin* v. *Weston*, 12 Jur. (N.S.) 700.

(*l*) *Torre* v. *Browne*, 5 H. L. C. 555.

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In *Pearson* v. *Helliwell* (*m*), the testator charged annuities in favour of his wife and his mother on the corpus of the estate, and directed that if the rents and profits should prove insufficient, then the annuity bequeathed to his wife should abate in favour of that bequeathed to his mother. This direction was held not to deprive the wife of her right to have the corpus applied to make good her annuity.

Gift of annual income of fund.

A testator may, of course, show that he intends an annuity which he has bequeathed to be payable out of income only, as where he directs a fund to be set aside to produce an income of £200 a year, and to pay the dividends to A for life, with remainder to B, here B is not entitled to come upon the corpus of the fund if the income falls below £200 a year (*n*). This is not, strictly speaking, the gift of an annuity, and the question is not one between an annuitant and a residuary legatee, but between tenant for life and remainderman. In this class of case the gift is "not a gift to an annuitant of a sum of money specifically mentioned, but it is a direction to set apart a capital sum, and what is given, and what the person to whom the income is to be paid takes, is the income of that capital sum which accrues due during his life, and nothing else" (*o*).

Annuity payable out of income of fund

So if a fund is given to trustees upon trust to pay an annuity out of the "annual produce, dividends, or income" of the fund, there being no prior direct gift of the annuity, it will be charged only on income and not on corpus (*p*), unless the fund as well as the income is given in trust to pay the annuity (*q*). A gift over of the surplus income of a fund after payment of the annuity, goes to show that the annuity is only charged on income and not on corpus (*r*). If the surplus income is directed to be accumulated for the benefit of other persons, the annuitant has no claim on the accumulated fund (*s*). A note to the case of *Howarth* v. *Rothwell* (*t*) gives a useful list of the earlier cases

(*m*) L. R. 18 Eq. 411.

(*n*) *Baker* v. *Baker*, 6 H. L. C. 616; *Tarbottom* v. *Earle*, 11 W. R. 680. In *Carmichael* v. *Gee*, 5 A. C. 588, the language of the will was ambiguous, but it was held (affirming C. A. in *Gee* v. *Mahood*, 11 Ch. D. 891) that the gift was one of an annuity and not of the income of the fund which the testator directed to be set aside.

(*o*) *Per* Jessel, M.R., in *Re Mason*, 8 Ch. D. 411; *Michell* v. *Wilton*, 20 Eq. 269; *Att.-Gen.* v. *Poulden*, 3 Hare, 555.

(*p*) *Hindle* v. *Taylor*, 20 Bea. 109; *Miller* v. *Huddlestone*, 3 Mac. & G. 513; *Heneage* v. *Andover*, 3 Y. & J. 360 (annuity secured by term of years); *Forbes* v. *Richardson*, 11 Ha. 354.

(*q*) *Hickman* v. *Upsall*, 2 Giff. 124.

(*r*) *Stelfox* v. *Sugden*, John. 234; *Taylor* v. *Taylor*, L. R. 17 Eq. 324; *Salvin* v. *Weston*, 12 Jur. (N.S.) 700; *Wormald* v. *Muzeen*, 29 W. R. 795, reversing 17 Ch. D. 167. See *Bell* v. *Bell*, Ir. R. 6 Eq. 239. In *Carter* v. *Salt*, Ir. R. 1 Eq. 97; *Re Matthew's Estate*, 7 L. R. Ir. 269, and *Re Pepper's Trusts*, 13 L. R. Ir. 108, the annuities were created by deed.

(*s*) *Darbon* v. *Rickards*, 14 Sim. 537. (*t*) 30 Bea. 516.

—or residue.

in which annuities were held payable out of corpus or income, as the case may be (*u*). Similarly, a testator may give his residuary estate to trustees upon trust out of the income to pay an annuity, without having made any direct bequest of the annuity: in such a case the annuity is payable only out of income, and, if it is insufficient, the annuity fails *pro tanto* (*v*).

Charge on income or surplus income.

In *Re Platt* (*x*) the testator bequeathed a share of his residuary estate to trustees upon trust out of the income thereof to pay to his widow an annuity, and, subject thereto, to permit the same share and the income thereof to devolve under certain trusts. Sargant, J., held that so long as the annuity was paid in full the trustees had no power to retain the surplus income of a past year to make good a possible deficiency in a future year. But when realty is charged, in aid of personalty, with annuities the person entitled to the income of the realty must prove that the annuities are properly secured before he can receive the income (*y*).

Charge on corpus.

In *Re Croxon* (*z*) the testator bequeathed annuities charged on the income and corpus of his residuary estate. The income was insufficient, and some capital was raised to pay part of the annuities; when later there was a surplus income it was held that the tenant for life of the residue could not be called on to replace the capital which had been raised out of income.

Gift over subject to annuity.

But even where an annuity is made payable out of income, the testator may indicate an intention that it is to be charged on the corpus of the fund or residue. "If an annuity is given out of rents and profits, or dividends and interest, and the capital or corpus is given intact, from and after the annuitant's death, to another (*a*), the case is equivalent to the case of a life interest with remainder over. But if the capital is given over, not 'from and after the annuitant's death,' but 'from and after the satisfaction of the annuity and subject to the annuity,' then I think the case is equivalent to the case of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it on the capital of the estate or of the trust fund" (*b*). Thus in *Re Mason* (*c*), a testator

Re Mason.

(*u*) *Addecott* v. *Addecott*, 29 Bea. 460, is very shortly reported, and seems inconsistent with the general current of authority.

(*v*) *Re Boden*, [1907] 1 Ch. 132; and see *Sheppard* v. *Sheppard*, 32 Bea. 194.

(*x*) [1916] 2 Ch. 563.

(*y*) *Re Earle*, 131 L. T. 383.

(*z*) [1915] 2 Ch. 290.

(*a*) *Foster* v. *Smith*, 1 Ph. 629; *Michell* v. *Wilton*, 23 W. R. 789; *Earle* v. *Bellingham*, 24 Bea. 445.

(*b*) *Per* Rolt, L.J., in *Birch* v. *Sherratt*, L. R. 2 Ch. 644; *Playfair* v. *Cooper*, 17 Bea. 187; *Ex p. Wilkinson*, 3 De G. & S. 633; *Magill* v. *Murphy*, 1 L. R. Ir. 496; *Re Moore's Estate*, 19 L. R. Ir. 365.

(*c*) 8 Ch. D. 411.

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bequeathed life annuities to various persons, and bequeathed his residuary personalty to trustees upon trust out of the income thereof to pay and keep down the annuities, and subject thereto upon trusts for his children : it was held by Jessel, M.R., that the annuities were charged on corpus.

Effect of gift over "subject to" annuity.

The difficulty in these cases is to know whether the testator, in directing that the ultimate gift of the property is to be subject to the annuity, means anything more than to refer to the previous trust for payment of the annuity. If the gift over is clearly made subject to the complete performance of the trust for payment of the annuity, then the annuity is charged on corpus (*d*). If, on the other hand, the intention of the testator is merely to refer to the previous trust (as where the gift over is "subject to the trusts aforesaid"), this does not make the annuity a charge on the corpus (*e*).

Continuing charge on income.

There is, however, an intermediate class of cases. Where an annuity is made payable out of income without being charged on the corpus, the intention of the testator generally is that if the income is insufficient the annuity shall to that extent not be payable. But the testator may intend that the annuity shall be a continuing charge on the income, so that after the annuitant's death the income shall, in the first place, be applied in paying off the arrears of the annuity. Thus, in *Booth* v. *Coulton* (*f*), the residue was to be held upon trust out of the annual profits to pay three annuities, and "subject as aforesaid" upon trust to apply the annual profits for the benefit of A for life; after the death of A the testator gave the residue to B absolutely : it was held that the annuities were a continuing charge on the income. But this construction is an inconvenient one (*g*), and will not be adopted if the will is so framed that on the death of the annuitant the trustees are no longer in receipt of the income : as where the property is expressly given over on the death of the annuitant (*h*), or is taken out of the hands of the trustees by being given absolutely to a beneficiary (*i*).

Booth v. *Coulton.*

Re Boden.

In *Re Boden* (*k*), the testator directed that his trustees should

(*d*) *Phillips* v. *Gutteridge*, 3 D. J. & S. 332; *Birch* v. *Sherratt*, L. R. 2 Ch. 644; *Re Grant*, 31 W. R. 703; *Re Watkins' Settlement*, [1911] 1 Ch. 1 ("subject thereto") overruling *Re Bigg*, [1907] 1 Ch. 714. See also *Re Strict*, 67 Sol. J. 79 (bonus shares on investment part of appropriated fund); *Re Buchanan*, [1915] 1 Ir. R. 95.

(*e*) *Re Boden*, [1907] 1 Ch. 132, *post.*

(*f*) L. R. 5 Ch. 684. See also *Re Mason*, 8 Ch. D. 411; *Ex p. Wilkinson*, 3 De G. & S. 633; and *Forbes* v. *Richardson*, 11 Hare, 354.

(*g*) *Per* Jessel, M.R., in *Re Mason*, 8 Ch. D. 411.

(*h*) *Foster* v. *Smith*, 1 Ph. 629.

(*i*) *Re Boden*, [1907] 1 Ch. 132.

(*k*) [1907] 1 Ch. 132; *Re Boulcott's Settlement*, 104 L. T. 205. See also *Re Rose*, 113 L. T. 142.

pay an annuity of £8,000 to his wife out of the income of his residuary estate, and that in certain events they should pay her "such further sum" as should make up the annual sum of £10,000, and he disposed of the residue "subject to the trusts aforesaid"; it was held (first) that the direction to pay out of income applied to the annuity of £10,000, and not only to the annuity of £8,000, and (secondly) that the words "subject to the trusts aforesaid" meant "subject to the trusts for payment of the annuity of £8,000 or £10,000 (as the case might be) out of the income of the residuary estate," and did not create either a charge on the corpus or a continuing charge on the income (*l*). But in *Re Howarth* (*m*) where the gift was "subject to the aforesaid annuities," Joyce, J., adopted the principle of *Booth* v. *Coulton*, while the Court of Appeal came to the conclusion that the annuities were a charge on the corpus.

In *Re Young* (*n*) there was a trust to accumulate the residue of the income after payment of the annuities, but it was held that, notwithstanding this, the annuities were a charge upon the corpus, and that *Taylor* v. *Taylor* (*o*) must be taken to have been overruled by *Re Howarth* (*p*).

Remedies of annuitants.

If an annuity is charged on the corpus of personal estate, the arrears are, of course, payable out of capital (*q*); and if the fund is in Court, and the income is insufficient to meet the annuity, a prospective order will be made for the sale from time to time of part of the fund to make up the annuity (*r*). If the annuity is charged upon the corpus of settled real estate, the Court has power to order the arrears of the annuity to be raised by sale or mortgage of the estate (*s*).

If the testator charges all his property with an annuity, the executors do not release the property by setting aside an invested fund to meet the annuity (*t*), but the Court has jurisdiction to

(*l*) See the curious case of *Re Hedges' Trust Estate*, L. R. 18 Eq. 419, where the question whether an annuitant was entitled to have recourse to corpus was held to depend on the intention expressed (or supposed to be expressed) by another testator. Such decisions should not be reported.

(*m*) [1909] 1 Ch. 485; 2 Ch. 19.

(*n*) [1912] 2 Ch. 479.

(*o*) L. R. 17 Eq. 324.

(*p*) [1909] 2 Ch. 19.

(*q*) *Stamper* v. *Pickering*, 9 Sim. 176.

(*r*) *Hodge* v. *Lewin*, 1 Bea. 431; *Swallow* v. *Swallow*, 1 Bea. 432.

(*s*) *Re Tucker*, [1893] 2 Ch. 323, referred to in *Hambro* v. *Hambro*, [1894] 2 Ch. at p. 572. In *Philipps* v. *Philipps*, 8 Bea. 193, it was held that annuitants whose annuities were charged on settled estates were not entitled to arrears out of corpus; it is difficult to reconcile this case with *Re Tucker*, where, however, it was not cited. See *Picard* v. *Mitchell*, 14 Bea. 103; *Byam* v. *Sutton*, 19 Bea. 556.

(*t*) *Gordon* v. *Bowden*, 6 Mad. 342, but see now section 41 of the Administration of Estates Act, 1925, where the appropriation is made with the consent of the annuitant.

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set aside a sufficient sum to answer the annuity and pay the remainder of the residue to the residuary legatees (*x*). If, however, the income of the estate is insufficient, the Court will not direct the purchase of Government annuities, so as to set free the remainder of the residue for the benefit of the tenant for life (*y*).

If an annuity is given by a testator, and there is a direction that it is to be charged on land or paid out of a particular estate, such a superadded direction does not of itself exonerate the personal estate of the testator (*z*). But the testator may charge a particular part of his property in exoneration of the rest (*a*).

Where an annuity is charged on land which is amply sufficient to answer the annuity, and the annuity falls in arrear, it seems that the Court will not appoint a receiver if the annuitant could have recovered the arrears by distress (*b*). But the annuitant is entitled to a decree for administration if the annuity is charged on the general residue as well as on land (*c*). Where leasehold property is given subject to an annuity, the annuitant is not entitled to have the property sold and the annuity secured while the annuity is regularly paid (*d*).

An annuity may be charged on personalty as well as realty, in which case the annuitant is entitled to cumulative remedies for its recovery (*e*).

General rules.

II.—Rent-Charges (*f*).—The general rules above stated with regard to annuities apply to rent-charges. Thus, where a rent-charge is devised by will by way of creation *de novo*, without words of limitation, the devisee is *prima facie* entitled only to a rent-charge during his life, and not to a perpetual rent-charge. But this is a question of intention, depending on the language of

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(*x*) *Harbin* v. *Masterman*, [1896] 1 Ch. 351. Compare the cases on contingent legacies at p. 1077. The annuitant is entitled to the best security in Government stocks which can be obtained: *Hill* v. *Rattey*, 2 J. & H. 634; *Hicks* v. *Ross*, [1891] 3 Ch. 499.

(*y*) *Re Grant*, 31 W. R. 703 (the headnote erroneously states that the annuities were charged on real estate).

(*z*) *Re Trenchard*, [1905] 1 Ch. 82.

(*a*) *Greer* v. *Waring*, [1896] 1 Ir. R. 427. See Chap. LIII; and see *Paget* v. *Huish*, 1 H. & M. 663.

(*b*) *Sollory* v. *Leaver*, L. R. 9 Eq. 22; *Kelsey* v. *Kelsey*, L. R. 17 Eq. 495. But there seems no doubt that in a proper case the Court will appoint a receiver: *Garfitt* v. *Allen*, 37 Ch. D. 48. See also *post*, p. 1119, n. (*e*).

(*c*) *Wollaston* v. *Wollaston*, 7 Ch. D. 58.

(*d*) *Re Potter*, 50 L. T. 8; *Re Parry*, 42 Ch. D. 570.

(*e*) *Wollaston* v. *Wollaston*, 7 Ch. D. 58, and cases there cited. As to rent-charges created by deed, see *Butt's Case*, 7 Rep. 23a, and *Richardson* v. *Nixon*, 2 Jo. & Lat. 250.

(*f*) Mr. Burton and Mr. Challis think that the correct plural of rent-charge is rents-charge, but the more usual spelling is so convenient that no apology is made for adopting it.

the will (*g*). So if a rent-charge is given to three persons in equal shares, during their lives and the life of the survivor, the share of each of them (except the last survivor) passes on his death to his personal representatives (*h*).

Rent-charge in fee, in tail, etc.

An existing rent-charge in fee, being an incorporeal hereditament, may be disposed of by will, like any other hereditament (*i*), and as it savours of the realty it may be entailed (*k*). But there is this difference between a rent-charge created *de novo* by devise to A and the heirs of his body, and an existing rent-charge in fee devised to A and the heirs of his body, that in the former case, if A bars the entail, he only acquires a base fee, determinable upon his decease and the failure of his issue in tail, while in the latter case he acquires the fee simple. So if a rent-charge is devised *de novo* to A and the heirs of his body, with remainder to B and his heirs, A can by barring the entail acquire the fee simple (*l*).

A rent-charge may be limited *pur auter vie* (*m*).

A rent-charge might, before 1926, be limited by way of a use upon a use (*n*).

Power to appoint rent-charge.

A testator may give a person power to appoint a rent-charge (*o*). If the power authorises the appointment of a rent-charge to a married woman, by way of jointure, it is *prima facie* intended not to take effect until the death of her husband (*p*).

What words will create a rent-charge.

An annuity or yearly sum bequeathed by will may be made a rent-charge by words expressive of that intention. As where a testator devises land to A, " subject to and charged and chargeable with the payment of " a yearly sum to B (*q*). And where a testator bequeaths an annuity, it is converted into a rent-

(*g*) *Mansergh* v. *Campbell*, 3 De G. & J. 232; *Sullivan* v. *Galbraith*, Ir. R. 4 Eq. 582; *Blight* v. *Hartnoll*, 19 Ch. D. 294, and other cases, *ante*, p. 1102.

(*h*) *Cratfield* v. *Berchtoldt*, 18 W. R. 887, and other cases cited *post*, pp. 1171 *seq.*

(*i*) Wills Act, s. 3. A rent-charge for years is a chattel interest, and so is a rent-charge issuing out of a term of years; *Butt's Case*, 7 Rep. 23a; Copinger on Rents, 112; *Re Fraser*, [1904] 1 Ch. 726. As to a rent-charge issuing out of land held *pur auter vie*, see *Hassell* d. *Hodgson* v. *Gowthwaite*, Willes, 500; *Plunket* v. *Reilly*, 2 Ir. Ch. 585. The dictum of Sugden, L.C., in *Richardson* v. *Nixon*, 2 Jo. & L. 250, seems to be contrary to the doctrine laid down in Co. Litt. 148a.

(*k*) Co. Litt. 19b.

(*l*) Co. Litt. 298a, Butler's note, citing *Chaplin* v. *Chaplin*, 3 P. W. 229, and other cases.

(*m*) *Bearpark* v. *Hutchinson*, 7 Bing. 178. After 1925 it is equitable.

(*n*) *Gilbertson* v. *Richards*, 4 H. & N. 277; *Hanly* v. *Carroll*, [1907] 1 Ir. R. 166.

(*o*) See *Mountcashell* v. *Smyth*, [1895] 1 Ir. R. 346, where the amount of rent-charge was fixed by reference.

(*p*) *Re De Hoghton*, [1896] 2 Ch. 385, where *Jamieson* v. *Trevelyan*, 10 Ed. 269, is explained.

(*q*) *Buttery* v. *Robinson*, 3 Bing. 392; *Ramsay* v. *Thorngate*, 16 Sim. 575; *Ex p. M'Dowal*, 5 Jur. (N.S.) 553; *Creed* v. *Creed*, 11 Cl. & F. 491.

charge if the testator goes on to charge it on land with a power of distress in such a way as to show that the personal estate is not to be liable (*r*).

But if the annuity is payable out of the personal estate, the fact that it is also charged on real estate does not prevent it from being an ordinary personal annuity (*s*).

Charge on real and personal estate.

In *Taylor* v. *Martindale* (*t*), the testator gave his real and personal estate to his wife, subject to an annuity to his brother of " £50 a year for ever " : it appears to have been held that it was merely a personal annuity. This decision was followed by Malins, V.-C., in *Parsons* v. *Parsons* (*u*). But in two Irish cases it seems to have been assumed that the annuity in *Taylor* v. *Martindale* was charged on the real and personal estate of the testator (*x*). And in *Sollory* v. *Leaver* (*y*), where the testator gave an annuity to A, and devised and bequeathed all his real and personal property to B, subject and charged with the payment of the annuity, Malins, V.-C., held that the annuity was charged on the land, and that A could recover it by distress. Such an annuitant can also obtain the appointment of a receiver (*z*).

Whether trust to pay annuity out of rents creates rent-charge.

In *Adams* v. *Adams* (*a*), lands were devised to trustees and their heirs " upon trust for such persons and for such uses here mentioned," namely, upon trust to permit and suffer A to take the rents and profits during his life, " subject with this proviso, to pay my wife, or her assigns, one annuity or yearly rent of four guineas, issuing out of the same, during her life "; it seems to have been assumed by the Court that the annuity was to be paid by the trustees, and that they took the legal estate during the widow's lifetime, so that no rent-charge was created in her favour; but the point did not require decision.

But if the annuity is expressed to be payable out of the land,

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(*r*) *Patching* v. *Barnett*, 51 L. J. Ch. 74; *Ion* v. *Ashton*, 28 Bea. 379. See *Buckley* v. *Buckley*, 19 L. R. Ir. 544, and *Sinnett* v. *Herbert*, L. R. 12 Eq. 201 at p. 206.

(*s*) *Re Trenchard*, [1905] 1 Ch. 82, where *Lomax* v. *Lomax*, 12 Bea. 285; *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441; *Buckley* v. *Buckley*, 19 L. R. Ir. 544; *Re Waring*, [1896] 1 Ir. R. 427, are examined. The decision in *Re Trenchard* is examined in *Re Spencer Cooper*, [1908] 1 Ch. 130. As to cumulative remedies, see the cases referred to, *ante*, p. 1116, n. (*e*).

(*t*) 12 Sim. 158.

(*u*) L. R. 8 Eq. 260.

(*x*) *Joynt* v. *Richards*, 11 L. R. Ir. 278; *Martin* v. *Haynes*, 29 L. R. Ir. 416 (leaseholds).

(*y*) L. R. 9 Eq. 22. See the decision of the same Judge in *Kelsey* v. *Kelsey*, L. R. 17 Eq. 495 (leasehold). In *Re Parry*, 42 Ch. D. 570, it seems to have been assumed that the annuities were charged on the whole real and personal estate : these were life annuities.

(*z*) *Garfitt* v. *Allen*, 37 Ch. D. 48. As to arrears, see that case, and also *Re Anglesey*, L. R. 17 Eq. 283, and *post*, n. (*e*).

(*a*) 6 Q. B. 860.

and not merely out of the rents and profits, this creates a charge on the land (*b*).

Abatement.

If a testator gives a rent-charge, payable out of land devised by his will, and it is found that he was only entitled to an undivided share of the land, the rent-charge does not abate, but is payable in full out of the share belonging to the testator (*c*).

Priority of rent-charges.

Where several rent-charges are limited by the same will, they *prima facie* rank *pari passu*, in accordance with the general rule relating to annuities and rent-charges, and if the property is insufficient to pay them all in full, they abate rateably (*d*).

Remedies.

The Landlord and Tenant Act, 1730 (s. 5), gave a power of distress to recover rents seck, and now section 121 of the Law of Property Act, 1925 (which replaces section 44 of the Conveyancing Act, 1881, as amended), gives powers of distress and entry to persons entitled to any annual sum charged on land, and also power to demise the land charged upon trust to raise the annual sum and arrears, provided these remedies could have been conferred by the will or other instrument by which the rent-charge is created (*e*).

As to the effect of section 10 of the Real Property Limitation Act, 1874, on arrears of an annuity charged on real estate see *Re Jordison* (*f*), and the cases there referred to.

In *Grealey* v. *Sampson* (*g*) the testator gave his son a power to charge a jointure not exceeding £200 per annum. The son married; and subsequently by a codicil the testator charged a jointure of £200 per annum for the son's wife. It was held that the codicil republished the will, so that the son could charge £200 per annum given by the will, and that extrinsic evidence of the value of the estate charged was not admissible.

(*b*) *Jenkins* v. *Jenkins*, Willes, 650; *Doe* d. *White* v. *Simpson*, 5 East, 162; *Fenwick* v. *Potts*, 8 D. M. & G. 506; *Whittemore* v. *Whittemore*, 38 L. J. Ch. 17.

(*c*) *Roche* v. *Jordan*, [1896] 1 Ir. R. 494. See *Jackson* v. *Hamilton*, 3 J. & Lat. 702.

(*d*) See Chap. LIV, *post*, p. 2016.

(*e*) As to the power of the Court to appoint a receiver, see *Garfitt* v. *Allen*, 37 Ch. D. 48, and other cases cited *ante*, p. 1116. As to the power of the Court to raise arrears of a rent-charge, see *Cupit* v. *Jackson*, 13 Pr. 721; *White* v. *James*, 26 Bea. 191; *Hall* v. *Hurt*, 2 J. & H. 76; *Scottish Widows' Fund* v. *Craig*, 20 Ch. D. 208; *Graves* v. *Hicks*, 11 Sim. 536; *Philipps* v. *Philipps*, 8 Bea. 193; and *Horton* v. *Hall*, L. R. 17 Eq. 437 (explaining *Taylor* v. *Taylor*, L. R. 17 Eq. 324), most of which are considered in *Re Tucker*, [1893] 2 Ch. 323, and *Hambro* v. *Hambro*, [1894] 2 Ch. 564. Where the rent-charge is secured by a term, the owner's remedies are confined to that: *Blackburne* v. *Hope Edwardes*, [1901] 1 Ch. 419.

(*f*) [1922] 1 Ch. 440.

(*g*) [1917] 1 Ir. R. 286.

CHAPTER XXXII.

SATISFACTION—ADEMPTION—HOTCHPOT.

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Definition of Satisfaction

I.—Satisfaction and Ademption.—" Satisfaction is the donation of a thing, with the intention that it is to be taken, either wholly or in part, in extinguishment of some prior claim of the donee " (*a*).

From this definition it follows that satisfaction is a doctrine which does not arise only in cases of wills, but, as will appear later, it so frequently arises in connection with legacies, that it is convenient to treat of the doctrine under the law of wills.

Intention is at the root of the doctrine of satisfaction, but the presumption of Courts of Equity against double portions, although it is not a rule of construction, has gone far in the direction of inferring intention (in the case of personal estate) from the mere relation of father and child (*b*). The existence of this presumption not infrequently makes the application of the general rule to particular cases a very difficult one, but when once the true intention has been discovered, the doctrine of satisfaction in itself causes no difficulty.

Donatio mortis causa.

When a donor has made a *donatio mortis causa* the mere fact that he subsequently makes a will by which he gives the donee a legacy of equal amount does not raise the presumption that the legacy was intended as a satisfaction of the donation (*c*).

Satisfaction of debts by portions.

Thus, where a debt exists from a parent or other person *in loco parentis*, an advancement upon the marriage of the child is presumed to be a satisfaction, or satisfaction *pro tanto*, of the debt. This kind of satisfaction—of debts by portions—is outside

(*a*) White and Tudor, L. C., note to *Chancey's Case*, 1 P. W. 408, cited with approval in *Chichester* v. *Coventry*, L. R. 2 H. L., at p. 95. As to the effect of an express provision for satisfaction see *Hoare* v. *Barnes*, 3 Br. C. C. 316; *Nottley* v. *Palmer*, 2 Dr. 93, and other cases cited *ante*, p. 526; and see *post*, p. 1135.

(*b*) *Chichester* v. *Coventry*, L. R. 2 H. L., at p. 86.

(*c*) *Hudson* v. *Spencer*, [1910] 2 Ch. 285.

the scope of this treatise, but the two cases of satisfaction of debts by legacies, and satisfaction of portions by legacies, will be considered and discussed.

Ademption of legacies by portions.

If, on the other hand, a testator, after making a will giving a legacy to a child, advances a portion on the marriage of the child, a similar question arises, namely, whether the child is intended to have both the legacy and the portion, but it will be seen that this case is not within the definition of satisfaction given above, because the donee had no prior claim; and if the portion is intended to be in substitution for the legacy the latter is said to be adeemed.

The words satisfaction and ademption have sometimes been confused: both cases may perhaps be included in the neutral word substitution; but there are several most important distinctions to be drawn between them which will now be pointed out, after a few observations on the meaning of the word ademption.

Different meanings of the word ademption.

The word ademption (from the Latin *adimere*) implies that the legacy has been taken away. Thus there are two kinds of ademption: the one where the testator gives a specific chattel or fund, and the legacy fails because the chattel or fund has ceased to be part of the testator's assets; the other, where the testator gives a general legacy, and the legacy is held not to be payable because the intended bounty has already been satisfied by the testator: that is, there is an implied revocation of the gift of the legacy. The former of these kinds of ademption has been treated of in the chapter on legacies, and some observations are there made upon what may be considered to be a third kind of ademption, namely, ademption by removal (*d*). It is the other kind which we treat of here, and it will be convenient to state, in the first place, the distinctions between it and the former kind of ademption, and between it and satisfaction.

Distinction between the two kinds of ademption.

Ademption by the taking away of the subject of the gift from the testator's assets only occurs in the case of specific legacies; further, the testator's intention has nothing to do with the matter: ademption by the previous satisfaction of the gift only occurs in the case of general legacies; further, the testator's intention has everything to do with the matter.

Distinction between ademption and satisfaction.

Lord Romilly, in *Lord Chichester* v. *Coventry* (*e*), has thus explained the distinction between ademption and satisfaction: "In ademption the former benefit is given by a will which is a revocable instrument, and which the testator can alter as he

(*d*) A specific devise of land may be adeemed by the property being sold or conveyed after the date of the will. Mr. Jarman treats this as an instance of "revocation by alteration of estate": *ante*, p. 148.

(*e*) L. R. 2 H. L., at p. 90.

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pleases, and consequently, when he gives benefits by deed subsequently to the will, he may, either by express words or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case the law uses the word ademption because the bequest or devise contained in the will is thereby adeemed; that is, taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he give benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenant the right to elect whether they will take under the covenant, or whether they will take under the will. Therefore, this distinction is manifest. In cases of satisfaction, the persons intended to be benefited by the covenant, who, for shortness, may be called the objects of the covenant, and the persons intended to be benefited by the bequest or devise, in other words, the objects of the bequest, must be the same. In cases of ademption they may be, and frequently are, different."

Election.

Thus in cases of satisfaction the will is subsequent to the settlement or debt; the intention to satisfy is to be found in, or presumed to be found in, the will; a case of election must arise; and the objects of the covenant or creditors must be the legatees (*f*). In cases of ademption, on the other hand, the will is prior to the settlement; the intention to revoke the gift cannot be found in the will, but must be found in some act subsequent to the will; election cannot arise; and the objects of the covenant and of the bequest need not be the same. There is no great difficulty in keeping these distinctions in mind, if we recollect that ademption is in the nature of a revocation of a legacy, satisfaction the discharge of an obligation by means of a legacy; why then have ademption and satisfaction been so often confused? The reason is that in both classes of cases we are, speaking generally, applying the general rule of equity, which presumes against double portions to children.

Ademption of legacies by portions.

II.—Ademption of Legacies by Portions.—In the leading case of *Ex p. Pye* (*g*), Lord Eldon, C., stated the general rule of ademption of legacies by portions in the following terms: "When a father gives a legacy to a child, the legacy coming from a father to a child must be understood as a portion, though it is not so described in the will; and afterwards advancing a portion for that child, though there might be slight circumstances of

(*f*) *Cooper* v. *Macdonald*, L. R. 16 Eq. 258.
(*g*) 18 Ves. 140; White and Tudor, L. C. (9th ed.), vol. ii, p. 304.

difference between that advance and the portion and a difference in amount, yet the father will be intended to have the same purpose in each instance; and the advance is therefore an ademption of the legacy" (*h*).

The doctrine, then, which is fully established, although some modern judges dislike it (*i*), depends upon two assumptions: (1) that a legacy to a child is intended to be a portion; (2) that a subsequent portion is intended to be in substitution for the legacy. It is not very easy to ascertain the precise import of the first of these propositions, for the word portion is not a term of art. But it seems to be something which is given by the parent to establish the child in life or to make what is called provision for him (*k*). The second proposition is merely a special case of the general rule of equity which presumes that a testator does not intend a child to have a double portion. This presumption is not a rule of law, and may be rebutted (*l*). The circumstances may show that a gift given during the lifetime is not intended as an ademption of the bequest. Thus, if a father gives a large sum to a daughter and expressly declares that it is not a portion, and subsequently gives a similar sum to a son, these circumstances may be sufficient to show that the payment to the son was not intended as a portion (*m*). From the fact that the object of a portion is to make provision for a child, it is clear that small gifts, or even a series of small gifts, do not constitute a portion (*n*); thus, a gift for a wedding outfit or trip (*o*), or to enable the donee to pay off a debt (*p*), is not a portion, and the rule that a legacy to a child is a portion, of course does not mean that a small specific legacy is a portion, but that a gift of a substantial sum or a share of residue is intended to be a provision for the child. On the other hand, the

What is a portion?

(*h*) Early cases on this subject are, *Elkenhead's Case*, cited 2 Vern. 257 (see *Farnham* v. *Phillips*, 2 Atk. 215); *Ward* v. *Lant*, Pre. Ch. 182; *Scotton* v. *Scotton*, 1 Stra. 235; *Tapper* v. *Chalcroft*, cited 2 Atk. 492; *Watson* v. *Earl Lincoln*, Amb. 325; *Grave* v. *Salisbury*, 1 B. C. C. 425; *Jenkins* v. *Powell*, 2 Vern. 115; *Platt* v. *Platt*, 3 Sim. 503. The effect of most of these is stated in Roper, p. 367 *seq.* See *Montefiore* v. *Guedalla*, 1 D. F. & J. 93.

(*i*) *Montagu* v. *Sandwich*, 32 Ch. D., at p. 544.

(*k*) *Taylor* v. *Taylor*, 20 Eq. 155.

(*l*) *Re Lacon*, [1891] 2 Ch. 482, at p. 498.

(*m*) *Re Scott*, [1903] 1 Ch. 1. In this case the Court of Appeal adopted the view of Jessel, M.R., in *Taylor* v. *Taylor*, 20 Eq. 155, in preference to that of Wood, V.-C., in *Boyd* v. *Boyd*, L. R. 4 Eq. 305, and of Pearson, J., in *Re Blockley*, 29 Ch. D. 250.

(*n*) *Suisse* v. *Lowther*, 2 Ha. 424; *Schofield* v. *Heap*, 27 Bea. 93; *Nevin* v. *Drysdale*, 4 Eq. 517; *Re Pollock*, 28 Ch. D. 552; *Re Lacon*, [1891] 2 Ch. 482; *Taylor* v. *Taylor*, 20 Eq. 155; *Ravenscroft* v. *Jones*, 32 Bea. 669, 4 D. J. & S. 224.

(*o*) *Watson* v. *Watson*, 33 Bea. 574; *Re Peacock's Estate*, 14 Eq. 236; *Ferris* v. *Goodburn*, 27 L. J. Ch. 574.

(*p*) *Taylor* v. *Taylor*, L. R. 20 Eq. 155; *Re Scott*, [1903] 1 Ch. 1, disapproving *Re Blockley*, 29 Ch. D. 250, *supra*.

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purchase of a business for a son is clearly intended to be a provision for him, and may be a portion (*q*). It is hardly necessary to point out that the most ordinary case of a portion is a gift upon marriage, for the purpose of making provision for the child and his or her family (*r*). An annuity may be a portion (*s*).

In loco parentis.

The rule extends to all cases in which the testator is *in loco parentis* to the legatee, and is not confined to the case of father and lawful child (*t*). The meaning of a person being *in loco parentis* is carefully discussed by Lord Cottenham, C., in *Powys* v. *Mansfield*, from which it appears that a person *in loco parentis* to a child is a person who means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child. But unless the testator has put himself *in loco parentis*, or unless the purpose for which the legacy was given appears on the face of the will (*u*), the rule does not extend to natural children, or to grandchildren, brothers, nephews, or other relatives (*x*).

Evidence is admissible to prove that a person means to put himself *in loco parentis* (*y*).

Ademption *pro tanto.*

At one time it was thought that the ademption was complete, although the sum advanced was less than the legacy (*z*), but in *Pym* v. *Lockyer* (*a*), Lord Cottenham, C., decided that there was not sufficient authority to support this view, and that where the advance is less than the legacy there is an ademption *pro tanto*. The portion, in fact, is to be brought into hotchpot, and its value is taken at the time the portion was advanced (*b*).

(*q*) *Stevenson* v. *Masson*, 17 Eq. 78; but not a fee paid to an architect to learn the business: *Re Watney*, 56 Sol. J. 109.

(*r*) *Leighton* v. *Leighton*, 18 Eq. 458.

(*s*) *Watson* v. *Watson*, 33 Bea. 574; *Hatfeild* v. *Minet*, 8 Ch. D. 136.

(*t*) *Booker* v. *Allen*, 2 Russ. & M. 270; *Powys* v. *Mansfield*, 3 My. & C. 359; *Rogers* v. *Soutten*, 2 Keen, 598.

(*u*) *Re Smythies*, [1903] 1 Ch. 259.

(*x*) *Re Dawson*, [1919] 1 Ch. 103; *Grave* v. *Lord Salisbury*, 1 Br. C. C. 425, Roper, 382; *Shudal* v. *Jekyll*, 2 Atk. 516; *Powel* v. *Cleaver*, 2 Br. C. C. 499; *Wetherby* v. *Dixon*, Coop. C. C. 279; *Roome* v. *Roome*, 3 Atk. 181; *Perry* v. *Whitehead*, 6 Ves. 544; *Ellis* v. *Ellis*, 1 Sch. & L. 1; *Twining* v. *Powell*, 2 Coll. 262; *Lyddon* v. *Ellison*, 19 Bea. 565; *Curtin* v. *Evans*, 9 Ir. R. Eq. 553; *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343.

(*y*) *Powys* v. *Mansfield*, 3 My. & C. 359; *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343.

(*z*) Roper on Legacies, 4th ed. p. 366; *Hartop* v. *Whitmore*, 1 P. W. 681; *Clarke* v. *Burgoine*, 1 Dick. 353; *Ex p. Pye*, 18 Ves., at p. 151.

(*a*) 5 My. & Cr. 29; and see *Hopwood* v. *Hopwood*, 7 H. L. C. 728; *Kirk* v. *Eddowes*, 3 Ha. 509. In *Hoskins* v. *Hoskins*, Pre. Ch. 263, there was evidence of intention that the ademption should be partial; *Montague* v. *Montague*, 15 Bea. 565; *Re Pollock*, 28 Ch. D. 552; *Watson* v. *Watson*, 33 Bea. 576. *Kircudbright* v. *Kircudbright*, 8 Ves. 51; *Hatfeild* v. *Minet*, 8 Ch. D. 136; *Re Beddington*, [1900] 1 Ch. 771; *Re Furness*, [1901] 2 Ch. 346.

(*b*) As to hotchpot and valuation for purposes of hotchpot, see below, pp. 1140 *seq.*

Advance before will no ademption.

Where the advance is made before the date of the will, it is clear that, apart from any agreement between the father and the child (*c*), the advance cannot cause a legacy to be adeemed, for, in fact, there is no legacy to adeem at the date of the advance, and it has accordingly been laid down that "There is no presumption of law that the payment of a sum of money to a child even by a father before the date of the will is to go against a legacy to that child" (*d*). On the other hand, a legacy which has been adeemed will not be revived by a codicil republishing the will. The reason is that "the codicil can only act upon the will as it existed at the time; and, at the time, the legacy revoked, adeemed, or satisfied, formed no part of it" (*e*). And since the Wills Act, a bequest of personalty once adeemed cannot be revived by parol, and the "continuing operation" of a will under section 24 extends only to uninterrupted gifts.

Adeemed legacy not revived by republication.

Rule applies to share of residue,

—but not for the benefit of strangers.

At one time it was doubted whether the rule applied to gifts of shares of residue (*f*), but it was settled in *Montefiore* v. *Guedalla* (*g*) that it does so. But though, where a legacy which is not a share of residue is adeemed, the residuary legatees get the benefit though they are strangers, yet the doctrine is not applied for the benefit of strangers where the legacy is a share of residue. The reason for this is explained by Mellish, L.J., in *Meinertzagen* v. *Walters* (*h*): "Now in the ordinary case of a legacy, where a legacy has been left to a child, and then a gift has been made which amounts to an ademption of that legacy, there certainly appears to be no possible way of holding it to be an ademption, so as to carry out the general rule against double portions, except by holding that whoever has the residue benefits by it; because by the necessity of the case the persons who have the residue must benefit by the fact of the previous legacy not being paid from any cause whatever. But, when we come to apply the rule as to a share of residue, it appears to me that it is perfectly easy to carry out what I consider the real principle of the rule, namely, equality between the children without allowing the

(*c*) *Upton* v. *Prince*, 1 Cas. t. Tal. 71; *Taylor* v. *Cartwright*, L. R. 14 Eq. 167.

(*d*) *Taylor* v. *Cartwright*, L. R. 14 Eq., at p. 176. See also *Re Peacock's Estate*, L. R. 14 Eq. 236.

(*e*) *Powys* v. *Mansfield*, 3 M. & Cr., at p. 376. See also *Drinkwater* v. *Falconer*, 2 Ves. sen. 623; *Izard* v. *Hurst*, Free. Ch. 224; *Monck* v. *Lord Monck*, 1 Ba. & Be. 298; *Booker* v. *Allen*, 2 Russ. & M. 270; *Montague* v. *Montague*, 15 Bea. 565, and the cases quoted on p. 198.

(*f*) Roper, 4th ed., p. 377; *Farnham* v. *Phillips*, 2 Atk. 215; *Watson* v. *Earl Lincoln*, Amb. 325; *Smith* v. *Strong*, 4 B. C. C. 493; *Freemantle* v. *Banks*, 5 Ves. 79; *Devese* v. *Pontet*, 1 Cox 188; but on the other hand see *Bengough* v. *Walker*, 15 Ves. 507.

(*g*) 1 D. F. & J. 93.

(*h*) L. R. 7 Ch. 670; *Re Heather*, [1906] 2 Ch. 230; *Schofield* v. *Heap*, 27 Bea. 93; *Beckton* v. *Barton*, 27 Bea. 99; *Thynne* v. *Glengall*, 2 H. L. C 131; *Keays* v. *Gilmore*, 8 Ir. R. Eq. 290.

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stranger to take any benefit. It appears to me, therefore, that if the rule is to be applied to a share of residue it is to be applied simply to such an extent as may be necessary to carry out the principle that a testator who has divided his residue among his children, either equally or in any other proportion, does not intend to alter that equality or proportion by making a subsequent gift to a particular child."

According to this principle, if a testator bequeaths his residuary estate, the value of which is £20,000, to his three sons, A, B, and C, and a stranger, X, in equal shares, and after the execution of the will makes an advance of £2,000 to A, the estate is divisible thus: £3,666 13s. 4d. to A, £5,666 13s. 4d. to each of B and C, and £5,000 to X. The exact point did not arise in *Meinertzagen* v. *Walters*, but the principle seems to be settled (*i*).

And where a legacy is given to a child, as well as a share of residue, the other residuary legatee being a stranger, neither the legacy nor the share of residue is adeemed in favour of the stranger (*k*).

Where legacy is absolute and share of residue settled.

If a testator bequeaths a legacy to a son absolutely, and also bequeaths a share of residue for the benefit of that son and his family by way of settlement, and afterwards makes an advance for the benefit of his son and his family by way of settlement, the advance will, as a general rule, operate *pro tanto* as an ademption of the share of residue rather than as an ademption of the absolute pecuniary legacy to the son (*l*).

Children taking by substitutional gift.

It seems that if a testator bequeaths a share of residue to a son, with a substitutional gift to the son's children in the event of his dying in the testator's lifetime, and afterwards makes an advance by way of portion to the son, and the son predeceases him, leaving children, they must bring the advance into account (*m*).

The presumption may be rebutted—by evidence,

The will, since it is prior to the advance, cannot throw any light upon the question whether the subsequent advance is intended as a portion and in substitution for the legacy. The rule is founded on a presumption which can be rebutted by evidence, for this evidence is not directed towards the construc-

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(*i*) See *Stewart* v. *Stewart*, 15 Ch. D. 539. It would appear from this case that if a testator dies intestate as to part of his property, and his children take as his next-of-kin under the Statute of Distribution, the doctrine of ademption applies to the share of any child who has been advanced since the date of the will.

(*k*) *Re Heather*, [1906] 2 Ch. 230.

(*l*) *Montefiore* v. *Guedalla*, 1 D. F. & J. 93.

(*m*) *Re Scott*, [1903] 1 Ch. 1. The point did not really arise, because the advance in that case was not a portion. See *Re Binns*, [1929] 1 Ch. 677, and *Rose* v. *Rogers*, 39 L. J. Ch. 791, where the advance was made by way of loan, and the principle was not applicable.

tion of a written document—the will—but to show what are the circumstances of the subsequent act (*n*). Apart from extrinsic evidence, the presumption may be rebutted by differences between the advance and the portion; but, as will be seen later, the differences which may be sufficient to rebut the presumption in cases of satisfaction are not always sufficient to rebut it in cases of ademption. In fact, where both the gifts are established to be portions, that is, provisions for the child, considerable differences are not sufficient to rebut the presumption, and the principle is applied although it results in depriving persons entitled in remainder to the legacy. Thus, if the father gives a settled legacy to a child, and afterwards makes a settlement on that child, the principle applies, in spite of the fact that the limitations under the will and settlement are not the same (*o*). And in *Twining* v. *Powell* (*p*), a legacy to M., with a contingent limitation over to charity, which was adeemed by an advance to M. in the testatrix's lifetime, was held to be extinguished, as to the charity.

—by differences between the advance and the portion.

Different limitations are not sufficient to rebut the presumption

Again, the fact that the legacy and the portion, where it is provided for by a settlement, subsequent to the will, are payable at different times, is not of itself sufficient to rebut the presumption (*q*).

—nor are different times of payment.

How far the different motives for the property given by the will and that given subsequently is sufficient to rebut the presumption is a difficult question. The general rule is that the presumption against double portions will not prevail where the testamentary portion and the subsequent advancement are not *ejusdem generis* (*r*). Several of the cases refer to gifts of a share of a business, and it seems that for the purposes of considering the difference of the gifts the cases upon the subject of satisfaction are applicable to those of ademption. So far as any general principle can be laid down, it seems to be that "where a testator gives to a child a beneficial lease or share of works or any other thing, and says nothing about the value,

Where the nature of the property is different.

(*n*) *Kirk* v. *Eddowes*, 3 Ha. 509; *Re Lacon*, [1891] 2 Ch. 482; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516.

(*o*) *Stevenson* v. *Masson*, L. R. 17 Eq. 78; *Edgeworth* v. *Johnston*, Ir. R. 11 Eq. 326; *Durham* v. *Wharton*, 3 Cl. & Fin. 146; *Trimmer* v. *Bayne*, 7 Ves. 508; *Baugh* v. *Reed*, 3 Br. C. C. 192; *Monck* v. *Lord Monck*, 1 Ba. & Be. 298; *Platt* v. *Platt*, 3 Sim. 503; *Carver* v. *Bowles*, 2 R. & Myl. 301; *Lloyd* v. *Harvey*, 2 R. & Myl. 310; *Barry* v. *Harding*, 1 Jo. & L. 475; *Sheffield* v. *Coventry*, 2 R. & M. 317; *Delacour* v. *Freeman*, 2 Ir. Ch. R. 633.

(*p*) 2 Coll. 262.

(*q*) *Hartopp* v. *Hartopp*, 17 Ves. 184; *Stevenson* v. *Masson*, L. R. 17 Eq. 78.

(*r*) *Re Jaques*, [1903] 1 Ch. 267, following *Holmes* v. *Holmes*, 1 Br. C. C. 555, and disapproving the observations of North, J., in *Re Vickers*, 37 Ch. D. 525. See also *Saville* v. *Saville*, 2 Atk. 458.

he is not to be taken to be giving it in satisfaction of a pecuniary bequest; but where he does refer to the value the presumption of satisfaction may arise" (*s*). Other cases on this point are given in the footnote (*t*).

Annuity may be a portion.

An annuity may, or may not, be a portion. The question is whether it is a permanent provision for the child or not (*u*).

The presumption may be rebutted if the portion is contingent

On the other hand, the following differences appear to be sufficient to rebut the presumption. If the portion is contingent it will not adeem a legacy (*x*), unless the contingency which would defeat is very remote (*y*), though, as has been mentioned above, a legacy limited over upon a contingency may be adeemed by a portion so as to defeat the limitation over.

—or if the beneficiaries are different.

Again, if the beneficiaries are different, the presumption of ademption does not often arise; as a general rule, there must be direct evidence of an intention to adeem. The question has chiefly arisen in the case of legacies to married daughters. Thus, in *Kirk* v. *Eddowes* (*z*), the testator by his will settled £3,000 on a married daughter and her children; after the date of the will, the testator, at his daughter's request, gave her husband £500, declaring it to be a payment on account of the settled legacy: it was held that the settled legacy was adeemed to the extent of £500. Whether a gift of money to the husband of a daughter can operate as a substitution for a legacy to the daughter in the absence of any indication of intention is doubtful (*a*). A substitutional gift to issue of a child is not adeemed by a portion to the child (*b*).

The rule does not apply to a devise of land: a devise of land is not a legacy, and it could not ordinarily be termed a portion (*c*).

Mr. Roper (*d*) considers the case where the advancement or legacy is given in lieu of a right to be another exception to the general rule, and he quotes *Baugh* v. *Read* (*e*) in support of

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(*s*) *Per* Jessel, M.R., in *Re Lawes*, 20 Ch. D., at p. 88.

(*t*) *Holmes* v. *Holmes*, 1 B. C. C. 555; *Re Pollock*, 28 Ch. D. 552; *Re Lacon*, [1891] 2 Ch. 482; *Re Vickers*, 37 Ch. D. 525; and as to Consols and stock, see *Watson* v. *Watson*, 33 Bea. 574; *Leighton* v. *Leighton*, L. R. 18 Eq. 458; *Lenehan* v. *Wall*, [1922] 1 Ir. R. 59 (farm).

(*u*) *Kircudbright* v. *Kircudbright*, 8 Ves. 51; *Dawson* v. *Dawson*, L. R. 4 Eq. 504; *Edwards* v. *Freeman*, 2 P. W. 435; *Watson* v. *Watson*, 33 Bea. 574; *Hatfeild* v. *Minet*, 8 Ch. D. 136.

(*x*) *Spinks* v. *Robins*, 2 Atk. 491; *Crompton* v. *Sale*, 2 P. W. 553.

(*y*) *Powys* v. *Mansfield*, 2 My. & C. 359.

(*z*) 3 Hare, 509. See *Re Shields*, [1912] 1 Ch. 591.

(*a*) *Ravenscroft* v. *Jones*, 32 Bea. 669, 4 D. J. & S. 224; *Cooper* v. *Macdonald*, L. R. 16 Eq. 258; *Earl of Durham* v. *Wharton*, 3 Cl. & F. 146; *Nevin* v. *Drysdale*, L. R. 4 Eq. 517.

(*b*) *Rose* v. *Rogers*, 39 L. J. Ch. 791; *Hewitt* v. *Jardine*, L. R. 14 Eq. 58.

(*c*) *Davys* v. *Boucher*, 3 Y. & Coll. 397.

(*d*) p. 376.

(*e*) 1 Ves. jun. 257.

this. But it hardly seems to be an exception to the rule, since an advancement or legacy in lieu of a right is not mere bounty on the part of the testator, and is, therefore, not merely a portion. The legatee, in fact, is in the position of a purchaser.

Ademption of appointment.

An appointment under a special power by will may be satisfied by a subsequent appointment by deed (*f*).

Ademption of legacies given for a purpose.

III.—Ademption of Legacies given for a Purpose.—There is another case in which general legacies may be adeemed which may fitly be mentioned here. If a testator, not being a parent or *in loco parentis* to a legatee, gives him a legacy for a particular purpose, and afterwards advances money for the same purpose, the legacy is adeemed. The rule is thus stated by Lord Selborne, C., in *Re Pollock* (*g*) : "The presumptions arising out of the parental relation do not, of course, extend to any case in which the legatee is a stranger to that relation. But numerous authorities have determined that if a legacy appears on the face of the will (*h*) to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a similar presumption is raised *prima facie* in favour of ademption. And it is clear from the authorities that evidence of the circumstances under which the subsequent gift was made, including contemporaneous or substantially contemporaneous declarations of the donor (whether communicated to the donee or not) may be admissible in such a case. To constitute a particular purpose within the meaning of that doctrine, it is not, in my opinion, necessary that some special use or application of the money by, or on behalf of the legatee (*e.g.*, for binding him an apprentice, purchasing for him a house, advancing him upon marriage or the like) should be in the testator's view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation recognised by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognised or would have presumed to exist. And it appears to me that a case of this kind comes very near in principle to the first class of cases, in which ademption by a subsequent gift is inferred from the parental relation. The reasonable presumption is the same, namely, that as the purpose

(*f*) *Re Eardley's Will*, [1920] 1 Ch. 397; *Re Peel's Settlement*, [1911] 2 Ch. 265; *Re Ware*, 70 Sol. J. 691; see also *Re Moore's Rents*, [1917] 1 Ir. R. 244 as to an appointment in full discharge of a share.

(*g*) 28 Ch. D. 552.

(*h*) As to these words see *Re Fletcher*, 38 Ch. D., at p. 376, and *Re Jupp*, [1922] 2 Ch. at pp. 365, 366.

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of both gifts was to fulfil one and the same antecedent obligation, or duty, a double fulfilment was presumably not intended " (*i*).

The purpose has to be specific, as, for instance, a legacy given to purchase an advowson for the testator's son, which is adeemed by the testator afterwards purchasing an advowson for him (*k*).

The law presumes a legacy to a creditor to be in satisfaction of a debt (*l*).

Parol evidence.

Parol evidence is not admissible to show that a gift was intended to be in satisfaction of a legacy when the intention is not communicated to the legatee in the testator's lifetime (*m*). Where the will and the subsequent deed of gift expressed a different motive and object, it was held that parol evidence was not admissible to vary their construction (*n*).

Satisfaction of portions by legacies.

IV.—Satisfaction of Portions by Legacies.—The doctrine of the satisfaction of portions by legacies is another illustration of the general leaning of Courts of Equity against double portions; and in this respect it bears some resemblance to the doctrine of the ademption of legacies by portions, and for the same reason it differs markedly from the doctrine of the satisfaction of debts by legacies (*o*). There need be no personal liability to pay the portions (*p*).

The rule is thus stated by Mr. Roper (*q*): " Where a parent is under obligation by articles or settlement to provide portions for his children, and he afterwards by will or codicil makes a provision for these children, it is a well-established rule of equity that such subsequent testamentary provision should be considered a satisfaction or performance of the obligation." There are numerous cases illustrating the general rule, which are referred to in the footnote (*r*). Mr. Roper's statement appears

Criticism of Mr. Roper's statement of the rule.

(*i*) *Robinson* v. *Whitley*, 9 Ves. 577; *Roome* v. *Roome*, 3 Atk. 181. See also *Debeze* v. *Mann*, 2 B. C. C. 519; *Monck* v. *Monck*, 1 Ba. & Be. 298; *Powys* v. *Mansfield*, 3 M. & Cr. 359; *Griffith* v. *Bourke*, 21 L. R. Ir. 92; *Rosewell* v. *Bennett*, 3 Atk. 77; *Trimmer* v. *Bayne*, 7 Ves. 508; *Re Smythies*, [1903] 1 Ch. 259 (infant—testator not *in loco parentis*—no ademption); *Re Corbett*, [1903] 2 Ch. 326 (charity—ademption); *Re Jupp*, [1922] 2 Ch. 359.

(*k*) See *Pankhurst* v. *Howell*, L. R. 6 Ch., at p. 136.

(*l*) *Re Fletcher*, 38 Ch. D. 373.

(*m*) *Re Shields*, [1912] 1 Ch. 591.

(*n*) *Re Aynsley*, [1915] 1 Ch. 172.

(*o*) Portions can also be satisfied by subsequent portions, though in this case the presumption is not so strong. See *Jesson* v. *Jesson*, 2 Vern. 255; *Davis* v. *Chambers*, 7 De G. M. & G. 386; *Palmer* v. *Newell*, 8 De G. M. & G. 74.

(*p*) *Dawson* v. *Cleveland*, West. t. Hard. 106; *Re Battersby*, 19 L. R. Ir. 359.

(*q*) p. 1071.

(*r*) *Bruen* v. *Bruen*, 2 Vern. 439; *Blois* v. *Blois*, 2 Chan. Rep. 163; *Moulson* v. *Moulson*, 1 B. C. C. 82; *Warren* v. *Warren*, 1 B. C. C. 305; *Ackworth* v. *Ackworth*; *Byde* v. *Byde*; and *Somerset* v. *Somerset* (all in

to be a little too wide, for the rule probably does not extend to the case of a mother. In *Re Ashton* (*s*) Stirling, J., said: "The rule against double portions is generally stated to apply to provision made by a parent or person *in loco parentis*: but in all the cases so far as they have been brought to my attention the parent referred to is the father. . . . *Prima facie* the duty of making a provision for a child falls on the father, but may fall on or be assumed by some other person. I do not say that in no case and under no circumstance can the duty fall on or be assumed by the mother of the child; but it appears to me that the burden of proving such to be the case lies on those who assert the fact so to be." The meaning of "*in loco parentis*" has already been dealt with in considering ademption. Mr. Roper's statement appears to be not quite accurate in another respect, for the satisfaction is only *pro tanto* if the legacy is less than the portion (*t*).

It is easier to presume an intention to adeem than an intention to give a legacy in lieu or in satisfaction of an existing obligation (*u*), and there are very few cases in which a gift by will has been held a satisfaction of a previous liability, in which the persons interested under the will have not included all the persons interested under the settlement. But there are such cases (*x*); in them, however, as is obvious, the satisfaction only extends to those objects who are beneficiaries under the will. In *Lord Chichester* v. *Coventry*, Lord Romilly put the matter thus: "In cases of satisfaction, where the testator has first entered into a covenant to settle a sum of money upon his child for life, with remainder to the issue of the marriage, that covenant is not satisfied by a bequest of a like sum of money to that child absolutely; it is only satisfied *pro tanto*, that is, so far as the child is concerned. So if the bequest be to the children of the marriage, omitting the parent, that may be a satisfaction of so much of the covenant as relates to them, but is no satisfaction

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the notes to *Warren* v. *Warren*); *Copley* v. *Copley*, 1 P. W. 147; *Finch* v. *Finch*, 1 Ves. 534; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; *Sparkes* v. *Cator*, 3 Ves. 530; *Pole* v. *Lord Somers*, 6 Ves. 309; *Bengough* v. *Walker*, 15 V. 507.

(*s*) [1897] 2 Ch. 574, reversed on another point, [1898] 1 Ch. 142. There is, of course, no satisfaction if the portions come from different persons. *Walpole* v. *Conway*, Barn. Ch. 153. See also *Bannatyne* v. *Ferguson*, [1896] 1 Ir. R. 149.

(*t*) *Warren* v. *Warren*, 1 B. C. C. 305, 1 Cox, 41; unless accepted as a complete satisfaction; *Byde* v. *Byde*, 2 Ed. 19.

(*u*) *Re Tussaud's Estate*, 9 Ch. D. 363; *Chichester* v. *Coventry*, L. R., 2 H. L. 71; *Montagu* v. *Sandwich*, 32 Ch. D. 525; *Dawson* v. *Dawson*, L. R., 4 Eq. 504.

(*x*) See *McCarogher* v. *Whieldon*, L. R. 3 Eq. 236; *Campbell* v. *Campbell*, L. R. 1 Eq. 383; *Bennett* v. *Houldsworth*, 6 Ch. D 671; *Bethell* v. *Abraham*, 3 Ch. D. 590, n. *Thynne* v. *Glengall*, 2 H. L. C. 131; *Mayd* v. *Field*, 3 Ch. D. 587; *Re Vernon*, 95 L. T. 48.

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of the covenant to the parent. Accordingly, in these cases, if the bequest be to the parent, the parent may elect, or if the bequest be to the children of the marriage alone, the children may elect, to take under the will, instead of taking under the covenant; but this cannot affect the right of the other covenantees, who take no interest under the will" (*y*).

Persons taking derivatively not put to election.

The obligation to elect only extends to persons taking directly under the will: it does not extend to persons taking derivatively under a disposition made by a legatee. In *Re Blundell* (*z*) the testator on the marriage of his daughter covenanted to settle a sum (say £5,000) on certain trusts for her and her husband and children; the settlement contained the usual after-acquired property clause: by his will the testator gave a share of his personal estate to the daughter absolutely: this share was caught by the after-acquired property clause, so that the husband and children took interests in it: it was held that the wife was the only person put to election.

Evidence.

The presumption of satisfaction can be rebutted by extrinsic evidence (*a*), for the rule of presumption may be rebutted or confirmed by parol evidence; and also by intrinsic evidence. That is, where the two provisions are so inconsistent in their nature as to lead the Court to the conclusion that the gifts were intended to be cumulative.

The presumption may be rebutted by—

We have now to consider what differences between the portion and the legacy are sufficient to rebut the presumption. In the case of satisfaction, the presumption is more easily rebutted than in the case of ademption. Hence, although the cases on ademption are not, for this purpose, authorities on cases of satisfaction, yet cases on satisfaction apply *a fortiori* to cases of ademption. These observations apply only where there is no extrinsic evidence and where, apart from the differences, there is no intention manifested in the will; for in cases of satisfaction the will is subsequent to the settlement, and the intention is to be found in the will and not in the settlement. As in the case of ademption, the rule applies to gifts of residue, though, as will be seen later, a gift of residue is not considered to be in satisfaction of a debt other than a portion (*b*).

(*y*) Cited with approval by Swinfen Eady, J., in *Re Blundell*, [1906] 2 Ch. at p. 229.

(*z*) [1906] 2 Ch. 222.

(*a*) *Re Tussaud*, 9 Ch. D. 363. As to the admission of evidence, see *Jeacock* v. *Falkener*, 1 Br. C. C. 295; *Haynes* v. *Mico*, 1 Br. C. C. 129; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves 516; *Pole* v. *Lord Somers*, 6 Ves. 309; *Weall* v. *Rice*, 2 R. & M. 251; *Kirk* v. *Eddowes*, 3 Ha. 509; *Hall* v. *Hill*, 1 Dr. & W. 94.

(*b*) *Thynne* v. *Glengall*, 2 H. L. C. 131; *Rickman* v. *Morgan*, 1 B. C. C.

difference in the nature of the property.

Differences in the nature of the property may be sufficient to rebut the presumption (*c*). Thus, land will not be presumed to be in satisfaction for money, or money for land (*d*). But if the testator considers the pecuniary value of the gift there may be a satisfaction; thus in *Bengough* v. *Walker* (*e*) a share in a powder works to be made up in value to £10,000, charged with an annuity of £30 per annum, was held to be in satisfaction of a portion of £2,000, and a gift of a rent-charge may be a satisfaction of a gross sum charged on land (*f*).

The fact that the portion is vested, and the legacy contingent, is sufficient to rebut the presumption (*g*); or that the legacy is in reversion (*h*).

Differences which are not sufficient to rebut the presumption.

But on the other hand, slight differences, as in the time of payment, or in the limitations, are not sufficient to rebut the presumption. Thus the circumstance that by the will the legacy is to be paid three months after the wife's death instead of at her death, is not sufficient to rebut the presumption (*i*). In *Thynn* v. *Glengall* (*k*), by the settlement the husband and wife had a joint power of appointment amongst the children; by the will the wife alone had the power. This difference was not considered sufficient to rebut the presumption; and in the same case the power under the settlement extended only to the children of the marriage, and the power under the will to all the wife's children.

In *Weall* v. *Rice* (*l*), Sir J. Leach, M.R., stated the difference as follows: "In the present case the two provisions appear to me substantially of the same nature: and I consider that the wife taking in both instruments to her separate use, it is but a slight difference that in the will she is restrained from anticipation and alienation—that, the husband taking in both instruments an estate for life in remainder, it is but a slight difference that

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63; *Re Blundell*, [1906] 2 Ch. 222; but not to a life interest in residue: *Alleyn* v. *Alleyn*, 2 Ves. sen. 37.

(*c*) *Bellasis* v. *Uthwatt*, 1 Atk. 426; *Goodfellow* v. *Burchett*, 2 Vern. 298; *Ray* v. *Stanhope*, 2 Ch. R. 159; *Saville* v. *Saville*, 2 Atk. 458; *Grave* v. *Lord Salisbury*, 1 B. C. C. 425; *Pierce* v. *Locke*, 2 Ir. Ch. R. 205; *Chaplin* v. *Chaplin*, 3 P. W. 245; *Re Gleeson*, [1911] 1 Ir. R. 113.

(*d*) See *Lewis* v. *Lewis*, Ir. R. 11 Eq. 340.

(*e*) 15 Ves. 507.

(*f*) *Williams* v. *Duke of Bolton*, 1 Dick. 405; 4 Dr. & W. 225 n.; *Re Jaques*, [1903] 1 Ch. 267, dissenting from *Re Vickers*, 37 Ch. D. 525, and *Re Lawes*, 20 Ch. D. 81, and approving *Holmes* v. *Holmes*, 1 B. C. C. 555.

(*g*) *Bellasis* v. *Uthwatt*, 1 Atk. 426; *Hanbury* v. *Hanbury*, 2 B. C. C. 352; *Pierce* v. *Locke*, 2 Ir. Ch. 205.

(*h*) *Sir W. Davies' Case* 5 Vin. Ab. 292. pl. 38.

(*i*) *Sparkes* v. *Cator*, 3 Ves. 530; *Copley* v. *Copley*, 1 P. W. 147; *Bethell* v. *Abraham*, 22 W. R. 745.

(*k*) 2 H. L. C. 131. See also *Russell* v. *St. Aubyn*, *post*, p. 1134; *Romaine* v. *Onslow*, 24 W. R. 899.

(*l*) 2 R. & M. 251, at p. 268.

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in the will it is expressed that he is to maintain and educate his children—that it is but a slight difference that by the settlement the children take as tenants in common in tail with cross remainders, and that by the will they take as tenants in common in fee, and that the testator has expressed an intention to give them cross remainders by a void executory devise, if any of them die under twenty-five. These differences, as I have before observed, appear to me to leave the two provisions substantially of the same nature."

In *Russell* v. *St. Aubyn* (*m*), Sir J. Bacon, V.-C., thus described the difference: "Now what is the difference between the obligation which the testator assumed in the present case, and the provision which he has made by way of portion for his daughter by the will? By the settlement the husband would take an interest for life; by the will the wife takes the first life interest to her separate use, and the subsequent life interest is given to the husband determinable upon his bankruptcy or alienation. By the settlement there is a joint power of appointment by the husband and wife or the survivor of them, among the children of the marriage; by the will a power of appointment is given to the wife among her children generally, or more remote issue, with an ultimate limitation in default of such issue upon the trusts declared of the other moiety of the testator's estate in favour of his daughter Mrs. M.," and held that a case of satisfaction arose.

In *Mayd* v. *Field* (*n*), Sir G. Jessel, M.R., said: "Here the difference is slight; but there is a life estate given to the husband in the settlement, and there is no such gift in the testamentary appointment. Then what is to be done as to the testamentary appointment? It is impossible to deprive the trustees of their right as creditors under the covenant; and consequently the question is, how far is the testamentary appointment satisfied by the provisions of the settlement? The answer is, to the extent to which the daughter and her children take under the settlement. The result is, that there will be nothing coming to the daughter nor anything to her children under the provisions of the will, unless the daughter's husband survive her. To that extent, therefore, the gift by the will is not duplicated in favour of the daughter and her children."

Instances where the differences have been sufficient to rebut the presumption are *Chichester* v. *Coventry* (*o*), *Lewis* v. *Lewis* (*p*), *Re Tussaud's Estate* (*q*), and *Re Vernon* (*r*).

(*m*) 2 Ch. D. 398, at p. 406. See also *Romaine* v. *Onslow*, 24 W. R. 899.
(*n*) 3 Ch. D. 587.
(*o*) L. R., 2 H. L. 71.
(*p*) Ir. R. 11 Eq. 310, 340.
(*q*) 9 Ch. D. 363.
(*r*) 95 L. T. 48.

Indications of intention in will—

If the testator in his will states that he intends the legacy to be in satisfaction of the portion, or that it is not to be in satisfaction, but to be in addition, no question can arise; but it is sometimes difficult to ascertain whether certain expressions of the testator show this intention (*s*). Thus, in *Montagu* v. *Earl of Sandwich* (*t*), a case which gave rise to considerable differences of judicial opinion, the testator by a settlement covenanted to pay his second son an annuity of £1,000 a year for life, and to charge the annuity on a sufficient part of the real estate he might be seised of. By his will he devised his real estate (subject to the charges and incumbrances thereon) in strict settlement, and gave legacies to his second son, the income of which would exceed £1,000 per annum. It was held that the words subject to the charges and incumbrances thereon were too general to rebut the presumption.

subject to charges.

Direction to pay debts.

And a direction in the will to pay debts is not alone sufficient to rebut the presumption (*u*).

Construction of declaration in the settlement.

Although the testator's intention must be found in the will, or presumed by law, and cannot be found in the settlement, yet questions may arise where the settlement declares that advances shall be in part satisfaction of the portion, for it becomes necessary to decide whether a bequest is an advancement within the meaning of the clause. If the declaration is that an advancement in the testator's lifetime is to go in part satisfaction of the portion, a legacy (*x*) or a share under an intestacy (*y*) will not be held to be an advancement within the meaning of the clause; but if the words "or at the time of my death," or "or otherwise" are added, the bequest may be held to be an advancement (*z*).

The cases where a distributive share of personal or real estate, which devolves upon a child, is held to be a performance or satisfaction of the obligation are not within the scope of this treatise. They are discussed by Mr. Roper at pp. 1109 *seq.* of his work on Legacies.

(*s*) *Burges* v. *Mawbey*, 10 Ves. 319; *Douce* v. *Torrington*, 2 M. & K. 600. See *Foster* v. *Evans*, 6 Sim. 15.

(*t*) 32 Ch. D. 525. See *Lethbridge* v. *Thurlow*, 15 Bea. 334.

(*u*) *Lord Chichester* v. *Coventry*, L. R., 2 H. L. 71; *Paget* v. *Grenfell*, 6 Eq. 7; *Bennett* v. *Houldsworth*, 6 Ch. D. 671.

(*x*) *Cooper* v. *Cooper*, L. R. 8 Ch. 813; *Douglas* v. *Willes*, 7 Ha. 318.

(*y*) *Twisden* v. *Twisden*, 9 V. 413.

(*z*) *Richman* v. *Morgan*, 1 B. C. C. 63, 2 B. C. C. 394; *Leake* v. *Leake*, 10 Ves. 477; *Onslow* v. *Michell*, 18 Ves. 490; *Golding* v. *Haverfield*, 13 Price, 593; *Fazakerley* v. *Gillibrand*, 6 Sim. 591; *Noel* v. *Lord Walsingham*, 2 Sim. & St. 99; *Papillon* v. *Papillon*, 11 Sim. 642. In *Re Vernon*, 95 L. T. 48, the settlement (made on the marriage of the testator's daughter) contained a provision that any share passing to the daughter under her father's will should, if she elected to claim under the will, be a satisfaction of the father's covenant.

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Mode of ascertaining residue.

There is a presumption that the satisfaction enures for the benefit of the other children entitled under the settlement, but circumstances may show that this is not intended to be the case (*a*).

In *Chichester* v. *Coventry* (*b*), the testator on the marriage of his daughter A covenanted to pay to the trustees of her settlement £10,000, with interest until payment : the £10,000 was not paid during his lifetime : by his will he directed payment of his debts, and gave his residue in equal moieties upon trusts for the benefit of his daughters A and B for life, with limitations over : it was held that the gift by the will was not a satisfaction of the covenant, and that the £10,000 must be deducted before the residue was divided.

But a covenant by a settlor that on his death an aliquot share of his estate shall be settled for the benefit of his daughter and her family does not constitute a debt, and if by his will the settlor gives benefits to the persons who are absolutely entitled under the settlement, they are bound to elect between the benefits under the settlement and under the will (*c*).

Portion may be a "debt" for certain purposes.

V.—Satisfaction of Debts by Legacies.—Although, as above mentioned, a covenant to settle a sum of money on the marriage of a child constitutes a debt, yet with reference to the question of satisfaction, it is regarded as a portion (*d*).

Satisfaction of debts by legacies.

With regard to ordinary debts, the rule as to their satisfaction by legacies is stated in the leading case of *Talbot* v. *Shrewsbury* (*e*), as follows : "If one being indebted to another in a sum of money does, by his will, give him a sum of money as great as or greater than the debt without taking any notice at all of the debt that this shall nevertheless be in satisfaction of the debt so as that he shall not have both the debt and the legacy."

This rule is, however, not favoured, and it has been said, rather paradoxically (*f*), that equity leans against legacies being taken in satisfaction of debts. It is probably more accurate to say that though Courts of Equity raise the presumption, yet it is a presumption which can very easily be rebutted (*g*).

(*a*) *Folkes* v. *Western*, 9 Ves. 456; *Brownlow* v. *Meath*, 2 D. & Wa. 674; *Lee* v. *Head*, 1 K. & J. 620; *Bradford* v. *Romney*, 31 L. J. Ch. 497; *Noel* v. *Walsingham*, 2 S. & St. 99; *Ford* v. *Tynte*, 2 H. & M. 324; *Noblett* v. *Lichfield*, 7 Ir. Ch. R. 575. (*b*) L. R. 2 H. L. 71.

(*c*) *Bennett* v. *Houldsworth*, 6 Ch. D. 671; *Re Vernon*, 95 L. T. 48. See also *Att.-Gen.* v. *Murray*, 20 L. R. Ir. 124.

(*d*) *Ante*, p. 1123.

(*e*) Pr. Ch. 394, White & Tudor, L. C. (9th ed.), vol. II, 323, and see *Fowler* v. *Fowler*, 3 P. W. 353; *Atkinson* v. *Littlewood*, 18 Eq. 595; *Brown* v. *Dawson*, Pr. Ch. 240; *Bensusan* v. *Nehemias*, 4 De G. & Sm. 381; *Wood* v. *Wood*, 7 Bea. 183; *Ellard* v. *Phelan*, [1914] 1 Ir. R. 76 (bequest to servants).

(*f*) By Lord Cottenham, C., 2 H. L. C. at p. 153.

(*g*) See also *Carr* v. *Eastabrooke*, 3 Ves. 561, which decides that a negotiable bill of exchange is not satisfied by a legacy.

If the debt was contracted subsequently to the will, no presumption can arise, for the testator could not have intended that a legacy should go in satisfaction of a non-existent debt; and section 24 of the Wills Act cannot have the effect of altering the testator's intention at the time when he is making his will (*h*).

The debt must be contracted before the will.

If the testator pays off the debt in his lifetime, the legacy is adeemed (*i*).

Effect of payment.

The presumption may be rebutted by extrinsic evidence, by expressions of intention in the will, and by differences between the debt and the legacy.

The presumption may be rebutted

by extrinsic evidence

On the admissibility of extrinsic evidence, the reader is referred to the cases mentioned in the previous section, which show that a presumption may be rebutted in this way.

—by a direction to pay debts and legacies

In *Chancey's Case* (*k*), is was decided that a direction that all the testator's debts and legacies should be paid was sufficient to rebut the presumption. In that case, the testator was indebted to his servant for wages in £100, and gave her a bond for that sum, and afterwards by will gave her £500, and directed that all his debts and legacies should be paid; Lord Chancellor King said: "This £100 bond being then a debt, and the £500 being a legacy, it was as strong as if he had directed that both the bond and the legacy should be paid."

But if the direction is contained in the will, the debt is incurred subsequently, and the legacy then given by a codicil, the presumption is not rebutted (*l*).

—or debts alone

Whether a direction to pay debts alone is sufficient to rebut the presumption has given rise to some difference of opinion. In *Edmunds* v. *Low* (*m*), it was held that this was not sufficient to rebut the presumption, but in *Re Huish* (*n*), Kay, J., said: "Now what difference is there between a direction to pay debts and legacies, and a direction to pay debts only? There is none, because the gift of a legacy is in itself a direction that the legacy shall be paid. Therefore, all that is material is, that there should be a direction that all debts should be paid. If, after giving a legacy to his creditor, a testator says: 'I direct my debt to be paid,' that means, 'although I have given a

(*h*) *Cranmer's Case*, 2 Salk. 508; *Thomas* v. *Bennet*, 2 P. W. 341; *Plunkett* v. *Lewis*, 3 Ha. 316; *Minuel* v. *Sarazine*, Mos. 295; *Graham* v. *Graham*, 1 Ves. sen. 262.

(*i*) *Re Fletcher*, 38 Ch. D. 373.

(*k*) 1 P. W. 408, White & Tudor. L. C. vol. II, 376. See *Lethbridge* v. *Thurlow*, 15 Bea. 334; *Richardson* v. *Greese*, 3 Atk. 65; *Field* v. *Mostin*, 2 Dick, 543; *Jefferies* v. *Michell*, 20 B. 15; *Hassell* v. *Hawkins*, 4 Dr. 468; *Hales* v. *Darell*, 3 Bea. 324.

(*l*) *Gaynor* v. *Wood*, 1 P. W. 409, n.

(*m*) 3 K. & J. 318.

(*n*) 43 Ch. D. 260.

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legacy to my creditor, I direct my debt to him be paid also.' It seems to me to make no difference where the testator directs that his legacies shall be paid. Accordingly I think that the case of *Edmunds* v. *Low*, which appears to have drawn a distinction between a direction to pay debts and legacies and a direction to pay debts only, was not sufficiently considered, and I find that the balance of authority is against it" (*o*).

In *Wathen* v. *Smith* (*p*), Sir John Leach, V.-C., considered that a direction to pay debts did not refer to the testator's liability on bond, or covenant made on his marriage, but this view was disapproved by Sir J. Romilly, M.R., in *Cole* v. *Willard* (*q*).

In *Re Hall* (*r*) it was held that a direction to pay debts did not include a prospective liability under a covenant in a marriage settlement.

If the documents are contemporaneous, it is a circumstance to be considered, for the presumption arises not in the will but in the circumstances of the case, and in such a case it is easier to rebut the presumption (*s*).

—by assigning a motive for the legacy.

The testator rebuts the presumption by assigning a motive for the gift, or by giving it in satisfaction of some right, *e.g.*, dower (*t*).

The rule only applies where the debt is certain. That is, the testator should know that a certain amount, not a fluctuating liability is due, and to whom it is due (*tt*).

The legacy must be at least equal to the debt—

From the statement of the rule in *Chancey's Case*, we see that the legacy must be at least equal to the debt (*u*): there is no satisfaction *pro tanto*, as in the case of satisfaction of portions by legacies, unless there is a special arrangement with the creditor (*x*).

(*o*) See *Dawson* v. *Dawson*, 4 Eq. 504; *Horlock* v. *Wiggins*, 39 Ch. D. 142; *Hales* v. *Darell*, 3 Bea. 324; *Jefferies* v. *Michell*, 20 Bea. 15; *Cole* v. *Willard*, 25 Bea. 568; *Pinchin* v. *Simms*, 30 Bea. 119; *Charlton* v. *West*, 30 B. 124; *Atkinson* v. *Littlewood*, L. R. 18 Eq. 595.

(*p*) 4 Mad. 325.

(*q*) 25 Bea. 568. In *Glover* v. *Hartcup*, 34 Bea. 74, a direction to pay debts was one of the indications that an annuity was additional.

(*r*) [1918] 1 Ch. 562.

(*s*) *Horlock* v. *Wiggins*, 39 Ch. D. 142.

(*t*) *Mathews* v. *Mathews*, 2 Ves. sen. 635; *Charlton* v. *West*, 30 Bea. 124; *Pinchin* v. *Simms*, 30 Bea. 119; *Glover* v. *Hartcup*, 34 Bea. 74; *Drewe* v. *Bidgood*, 2 Sim. & Stu. 424; *Rawlins* v. *Powel*, 1 P. W. 297; *Carr* v. *Eastabrooke*, 3 Ves. 561; *Buckley* v. *Buckley*, 19 L. R. Ir. R. 544; *Smith* v. *Smith*, 3 Giff. 263; but see *Edmunds* v. *Low*, 3 K. & J. 318.

(*tt*) This does not mean that there can be no satisfaction of an interest bearing debt: *Fitzgerald* v. *National Bank, Ltd.*, [1929] 1 K. B. 394.

(*u*) *Cranmer's Case*, 2 Salk. 508; *Atkinson* v. *Webb*, 2 Vern. 478; *Eastwood* v. *Vinke*, 2 P. W. 614; *Gee* v. *Liddell*, 35 Bea. 621; *Minuel* v. *Sarazine*, Mos. 295; *Graham* v. *Graham*, 1 Ves. sen. 262; *Richardson* v. *Elphinstone*, 2 Ves. jun. 463; *Reade* v. *Reade*, 9 L. R. Ir. 409; *Coates* v. *Coates*, [1898] I Ir. R. 258.

(*x*) *Hammond* v. *Smith*, 33 Bea. 452.

if the legacy is contingent or uncertain,

If the legacy is contingent, there will be no satisfaction (*y*), and the rule does not extend to a gift of the whole or part of a residue, because the amount being uncertain, it may prove to be less than the debt (*z*).

or payable at a different time to the debt—

Almost any difference between the legacy and the debt, except that the legacy is greater in amount, is sufficient to rebut the presumption (*a*). Thus, if the debt is payable before the legacy, as where the debt is payable within three months of the testator's death, and no time is fixed for payment of the legacy, or where the debt is payable at once, and the legacy is by the will itself payable at a future time (*b*). And similarly an annuity payable by half-yearly payments under a covenant is not satisfied by an annuity given by will. Or if in any other way the legacy is less advantageous than the debt, as where the debt is secured and the legacy is not (*c*), or the debt is to separate use and the legacy is not (*d*); or where the testator is trustee of a sum of £1,000 for A for life, with remainder to his children, and by his will bequeaths £1,000 to A absolutely (*e*).

by the nature of the legacy being different from the debt.

A devise of land cannot be taken in satisfaction of a debt, because money and land are different things (*f*); nor can a specific chattel be in satisfaction of a debt. Nor can there be a satisfaction where the interest is of a different nature, as where the legacy is an interest for life (*g*).

A covenant may be satisfied by an intestacy (*h*).

If the debt or legacy is payable to trustees.

Further cases of difference arise where trustees are interposed. Thus the fact that the debt is due to one set of trustees, and the

(*y*) *Tolson* v. *Collins*, 4 Ves. 483; *Mathews* v. *Mathews*, 2 Ves. sen. 635; *Crompton* v. *Sale*, 2 P. W. 553; *Hanbury* v. *Hanbury*, 2 Br. C. C. 352; *Nicholls* v. *Judson*, 2 Atk. 300.

(*z*) *Barret* v. *Beckford*, 1 Ves. sen. 519; *Re Keogh's Estate*, 23 L. R. Ir. 257; *Devese* v. *Pontet*, 1 Cox, 188; *Thynne* v. *Glengall*, 2 H. L. C. 154.

(*a*) *Atkinson* v. *Webb*, 2 Vern. 478, Pr. Ch. 236; *Nicholls* v. *Judson*, 2 Atk. 300; *Hales* v. *Darell*, 3 Bea. 324; *Charlton* v. *West*, 30 Bea. 124; *Fairer* v. *Park*, 3 Ch. D. 309; *Haynes* v. *Mico*, 1 B. C. C. 129; *Devese* v. *Pontet*, 1 Cox. 188; *Adams* v. *Lavender*, 1 M'C. & Y. 41; *Re Horlock*, [1895] 1 Ch. 516; *Clark* v. *Sewell*, 3 Atk. 96; *Jeacock* v. *Falkener*, 1 B. C. C. 295; *Re Dowse*. 50 L. J. Ch. 285; *Re Roberts*, 50 W. R. 469.

(*b*) But the fact that by the rules of administration a legacy is not payable until a year after the testator's death does not prevent satisfaction : *Re Rattenberry*, [1906] 1 Ch. 667, where the authorities were examined. It was also held in that case that the fact of the creditor being appointed executrix made no difference.

(*c*) *Hales* v. *Darell*, 3 Bea. 324.

(*d*) *Bartlett* v. *Gillard*, 3 Russ. 149; *Rowe* v. *Rowe*, 2 De G. & Sm. 294; *Fourdrin* v. *Gowdey*, 3 My. & K. 383; *Atkinson* v. *Littlewood*, L. R. 18 Eq. 595.

(*e*) *Fairer* v. *Park*, 3 Ch. D. 309.

(*f*) *Eastwood* v. *Vinke*, 2 P. W. 614; *Richardson* v. *Elphinstone*, 2 Ves. jun. 463; *Coates* v. *Coates*, [1898] 1 Ir. R. 258; *Forsight* v. *Grant*, 1 Ves. jun. 298; *Byde* v. *Byde*, 1 Cox, 44. In *Goodfellow* v. *Burchett*, 2 Vern. 297, a devise of lands was held not to be a satisfaction of a bond debt.

(*g*) *Forsight* v. *Grant*, 1 Ves. 298; *Cole* v. *Willard*, 25 Bea. 568; *Alleyn* v. *Alleyn*, 2 Ves. sen. 37; *Barret* v. *Beckford*, 1 Ves. sen. 519.

(*h*) *Garthshore* v. *Chalie*, 10 Ves. 1.

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legacy is given to another set, is an important circumstance, but it is not conclusive. Thus, in *Atkinson* v. *Littlewood* (*i*), the testator, by a deed of separation, covenanted with the trustee of the deed to pay him an annual sum of £52 during the life of the testator's wife, to be paid on four special quarterly days for her separate use. By his will the testator gave certain property to trustees to pay out of the rent an annuity of £52 to his wife generally, on the same quarter days. Sir R. Malins, V.-C., held that the second annuity was given in satisfaction of the first.

The fact that the creditor is the testator's child makes no difference to the application of the rule (*k*), unless the debt is a portion; in like manner it makes no difference that the debtor is the testator's wife or relation (*l*).

Equitable claim.

Evidence may be given to show that a legacy was bequeathed in satisfaction of an equitable claim (*m*).

Hotchpot.

VI.—Hotchpot.—In many cases the testator does not rely upon the presumption of law against double portions, but directs that any advances made by him to his children shall, on the distribution of his estate, be brought into hotchpot and accounted for accordingly (*n*); or he may direct that sums covenanted to be paid shall be brought into hotchpot instead of trusting to the law of satisfaction (*o*). The object of such provisions is to equalise the children's shares. With the same object an express clause of hotchpot is generally inserted where there is a power of appointment among children, or the like (*p*). Sometimes, also, where a child is entitled in his own right to

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(*i*) L. R. 18 Eq. 595. *Pinchin* v. *Simms*, 30 Bea. 119; *Smith* v. *Smith*, 3 Giff. 263.

(*k*) *Tolson* v. *Collins*, 4 Ves. 483; *Stocken* v. *Stocken*, 4 Sim. 152; but see *Plume* v. *Plume*, 7 Ves. 258.

(*l*) *Shadbolt* v. *Vanderplank*, 29 Bea. 405; *Atkinson* v. *Littlewood*, L. R. 18 Eq. 595; *Brown* v. *Dawson*, Pr. Ch. 240; *Fowler* v. *Fowler*, 3 P. W. 353.

(*m*) *Central Trust & Safe Deposit Company* v. *Snider*, [1916] A. C. 266.

(*n*) See *Nugee* v. *Chapman* (*No.* 1), 29 Bea. 288, where a testator directed £10,000 to be deducted from a son's share of residue as an equivalent for an estate devised to him, which the testator did not eventually acquire; and *Stares* v. *Penton*, L. R. 4 Eq. 40, where the Court refused to give effect to the testator's direction. See also *Smith* v. *Crabtree*, 6 Ch. D. 591, where advances were decided to be set off against shares of residue, and it was held that there was no satisfaction of a general legacy.

(*o*) As in *Fox* v. *Fox*, L. R. 11 Eq. 142. As to the effect of a proviso for satisfaction in a settlement, see *Watson* v. *Lincoln*, Amb. 325. In *Limpus* v. *Arnold*, 15 Q. B. D. 300, a testator gave his residue to his wife for life, and after her death to his children, and declared that any advances made by him to any child should be taken in part satisfaction of that child's share; he had advanced £2,000 by way of loan (bearing interest) to one of his sons: it was held the widow was entitled to receive interest on that sum during her life. The trusts for conversion, investment, etc., were extremely obscure.

(*p*) *Ante*, p. 827.

property, the testator requires it to be brought into hotchpot in the division of his residuary estate (*q*).

Re Arbuthnot.

In *Re Arbuthnot* (*r*) the testator's children took shares in residue under the will and a codicil. The will provided that moneys which the testator had given or covenanted to give to any child on his or her marriage should, in default of any direction to the contrary under his hand, be taken towards satisfaction of the child's share and brought into hotchpot. Subsequently in a settlement made on the marriage of a child the testator covenanted to pay an annual sum and directed that the sums payable under the covenant should not be taken in satisfaction of any share the child might take in his residuary estate. It was held that the hotchpot clause was not invalid as being in conflict with the Wills Act as the words might be construed as requiring to be brought into hotchpot only sums advanced free of a certain condition and that the moneys paid under the covenant had a condition attached and were not subject to the hotchpot clause.

Stewart v. *Stewart.*

In *Stewart* v. *Stewart* (*s*), the testator had made an advance of £500 to his son J.; by his will he gave a share of his residue to J., which he afterwards revoked by a codicil, so that he died intestate as to that share, and J. became entitled to part of it as one of the testator's statutory next-of-kin : the will contained a direction that none of his children who had received from him any sum by way of advancement should be entitled to any part of his residuary estate, without bringing the advance into hotchpot. It was held that this clause applied to J.'s part of the undisposed-of share of residue, and that he must bring the £500 into hotchpot.

In *Brocklehurst* v. *Flint* (*t*) a testator gave a fund to four persons in such shares as A. B. should appoint, and in default equally, and directed that advances made by him to any of them should be brought into hotchpot. Sir J. Romilly, M.R., held that the hotchpot clause only applied to the unappointed part of the fund, since to hold otherwise would fetter A. B.'s power of appointment.

Advances in testator's lifetime.

Frequently the hotchpot clause refers to advances, gifts or payments made by B in his lifetime, and at one time it was thought that a gift by B's will, or a share under his intestacy, was a gift in his lifetime (*u*), but this view was strongly dis-

(*q*) *Middleton* v. *Windross*, L. R. 16 Eq. 212.
(*r*) [1915] 1 Ch. 422.
(*s*) 15 Ch. D. 539. As to hotchpot in cases of intestacy or partial intestacy, see the end of this chapter.
(*t*) 16 Bea. 100.
(*u*) *Rickman* v. *Morgan*, 1 B. C. C. 63, 2 B. C. C. 394; *Twisden* v. *Twisden*, 9 Ves. 413; *Leake* v. *Leake*, 10 Ves. 477; *Golding* v. *Haverfield*,

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approved in *Cooper* v. *Cooper* (*x*), and cannot any longer be considered law. In that case Lord Selborne, C., said: "When examined, these cases are found to present a most remarkable example of the extraordinary manner in which the use of precedents has sometimes caused the courts of this country, first to slide into manifest error, and afterwards to follow that error under the notion that they are bound to do so."

What are advances.

The chief difficulty is to determine what are advances within the meaning of the instrument (*y*). In *Douglas* v. *Willes* (*z*), a case arising on a post-nuptial settlement, it was decided on the words of the hotchpot clause that the assignment of a leasehold house to a child, and the advance of a sum of money to a daughter for the purpose of apprenticing her son, were not advances and need not be brought into account. In *Re Whitehouse* (*a*) a son of a testator agreed to purchase a business for £1,500, of which £300 was to be paid at once and the residue by instalments, secured by the promissory notes of the testator and his son. The sum of £300 was paid by the testator, and the first promissory note was paid by him, and others by his executors after his death. The £300, and the sum paid on the first promissory note, were held to be advances, but the sums paid by the executors not to be advances made in the testator's lifetime (*b*).

Where debts are due, and are to be brought into account, the whole debt (even if it, or part of it, is statute barred) must be considered an advance (*c*).

If a testator gives a share of his residue to his son A for life, with limitations over for A's wife and children, and directs any debts owing to him by A to be brought into hotchpot, it may be a question whether A's debt is to be brought in account as against A's life interest, or as against the share settled on A and his wife and children. The question turns on the precise wording of the will. *Silverside* v. *Silverside* (*d*) is an illustration of the former, *White* v. *Turner* (*e*) of the latter construction.

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13 Price, 393; McCl. 345; *Onslow* v. *Michell*, 18 V. 490; *Fazakerly* v. *Gillibrand*, 6 Sim. 591; *Papillon* v. *Papillon*, 11 Sim. 642; Roper (4th ed.), p. 1098.

(*x*) L. R. 8 Ch. 813.

(*y*) See *M'Clure* v. *Evans*, 29 Bea. 422.

(*z*) 7 Hare, 318; *Re Jaques*, [1903] 1 Ch. 267.

(*a*) 37 Ch. D. 683.

(*b*) As to the effect of bankruptcy, see *Auster* v. *Powell*, 1 D. J. & S. 99; *Re Ainsworth*, [1922] 1 Ch. 22.

(*c*) *Poole* v. *Poole*, L. R. 7 Ch. 17; *Mathews* v. *Keble*, L. R. 4 Eq. 467, L. R. 3 Ch. 691. As to a debt released by a composition, see *Golds* v. *Greenfield*, 2 Sm. & G. 476. As to arrears of rent owing by a legatee, where the testator's title has been barred by lapse of time, see *Re Jolly*, [1900] 2 Ch. 616, reversing [1900] 1 Ch. 292.

(*d*) 25 Bea. 340. *Re Sparkes*, 56 Sol. J. 90. See also *Hewitt* v. *Jardine*, L R. 14 Eq. 58; *Re Gist*, [1906] 2 Ch. 280 (order in lunacy).

(*e*) 25 Bea. 505.

Settled property.

Sometimes settled property has to be brought into hotchpot, and a clause directing that any sum which the testator had given to or with any child on his or her marriage, should be brought into hotchpot, caused considerable difficulty in the case of *Wheeler* v. *Humphreys* (*f*). In that case, the testator, on the marriage of his son, covenanted that his executors should pay the trustees of the son's marriage settlement a sum of £10,000, to be held in trust for the son for life, with an ultimate reversion (in the events which happened) to the testator himself. It was finally decided that the testator did not give this reversion either to or with the son. The House of Lords held that what a donor keeps back is no gift, and in doing so prevented the hotchpot clause from operating to produce an inequality. The result of the decision was, therefore, highly satisfactory, and probably in accordance with the testator's intention, although it may be doubted whether the testator would not have considered that he had given £10,000 with his son, and not merely some interest in the £10,000. The difficulty seems to have been caused by considering whether, when on a division of the estate £10,000 had been brought into hotchpot, the hotchpot clause did not have a second operation on the reversionary interest (which was then in possession) in the £10,000.

Wheeler v. *Humphreys.*

Debt brought into hotchpot.

The question sometimes arises whether a hotchpot clause referring to debts releases the personal liability of the debtor to the testator's estate. Astbury, J., in *Re Barker* (*g*), states the matter as follows : " In the first place if a testator makes an absolute gift to a debtor and directs that his debt shall be brought into hotchpot, the debt is extinguished, certainly in the case where the share given by the will exceeds the amount of the debt (*h*). I do not propose to discuss whether in that case, if the debt exceeded the amount of the share, a mere hotchpot clause, without more, would extinguish the balance of the debt. Another case, however, which is the case before me, is whether where a hotchpot clause expressly referring to debts is applied to a share which is settled by the testator upon the debtor for life with remainder over, any such extinguishment can be validly contended for " ; and held that in the last-mentioned case there was no extinguishment. But a direction that advances should be brought into hotchpot applies primarily to an advance by way of portion and not to a mere loan, and does not relieve the debtor from personal liability (*i*).

Advance.

(*f*) [1898] A. C. 506.
(*g*) [1918] 1 Ch. 128.
(*h*) See *Re Trollope*, [1915] 1 Ch. 853; *Re Cosier*, [1897] 1 Ch. 325; *Limpus* v. *Arnold*, 15 Q. B. D. 300; see *ante*, p. 1126, n. (*m*).
(*i*) *Re Warde*, 111 L. T. 35; *Re Young*, [1911] 1 Ch. 581, 976; *Re Barber*, 62 Sol. J. 142; *Re Clark*, [1924] W. N. 75.

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Directions for hotchpot in lunacy order.

In *Re Merrall* (*k*) the testatrix after making her will became of unsound mind. A receiver was appointed, and until her death the Master in Lunacy from time to time directed the receiver to make allowances out of her surplus income to various members of the family of the testatrix, including sons' wives and grandchildren, with provisions for such allowances to be treated as advancements and to be brought into hotchpot against the respective shares, if any, of the recipients, their husbands or issue under the will. The directions were not made in the presence of the parties who were to be accountable. Some of such parties predeceased the testatrix, others took only life interests, and others were infants. Tomlin, J., held that the directions that the allowances should be treated as advancements and brought into hotchpot were only binding so far as they could affect the consciences of the recipients, and that the Court in administering the testatrix's estate had a discretion not to enforce and would not do so, as by reason of the terms of the will and the events which had happened the discretions would not do equity.

Several funds.

Where more than one fund is settled, the question arises whether a separate hotchpot clause is to be applied to each, or whether the funds are for the purpose of hotchpot to be treated as one fund. The question is stated by Sargant, J., in *Re Fraser* (*l*) as follows (he is dealing with a case where both funds are settled by the same instrument): "Is the second set of words which settles the additional fund really a separate settlement of the additional fund upon the like trusts as the first or original fund, the words being merely words of reference so as to operate by way of compendious introduction of the earlier trusts, or does the second set of words operate as an amalgamation of the second fund with the first fund so as to make it an augmentation of or accretion to the first fund? In the former case *prima facie* it would seem proper to introduce into the trusts of the second fund a hotchpot clause which was limited to that fund, just as the original hotchpot clause was limited to the original fund. But in the latter case it *prima facie* seems proper to treat the whole of the trusts of the original fund, including the hotchpot clause, as being applicable to the amalgamated or augmented fund, by virtue of the amalgamation, or augmentation or accretion that has been directed." The question is one of construction. In *Re Perkins* (*m*) it was held that the second and third funds

Several funds —hotchpot clause.

(*k*) [1924] 1 Ch. 45, distinguishing *Re Gist*, [1906] 1 Ch. 58; [1906] 2 Ch. 280.
(*l*) [1913] 2 Ch. at p. 233.
(*m*) 67 L. T. 743.

were an accretion to the first fund, so that the hotchpot clause applied to the three funds as a whole. In *Re North* (*n*) and in *Re Marquess of Bristol* (*o*) and in *Re Cavendish* (*p*) (after-acquired property) it was held that there was no accretion. In *Re Beaumont* (*q*) the funds were settled by separate instruments, and it was held that there was no amalgamation, with the result that a power of charging was multiplied. In *Re Marke Wood* (*r*) there was only one instrument, and it was held that the different parts were not subject to a common hotchpot clause. In *Re Fraser* (*s*) the funds were settled by one instrument, and it was held that the funds were subject to a common hotchpot clause. In *Re Campbell's Trusts* (*t*) it was held that each fund was subject to a separate hotchpot clause.

Recital of advances.

If the testator himself recites what the amounts advanced are, the legatees will be bound by the recital (*u*); the case of *Re Taylor's Estate* (*w*) was based on the very special words of the will and codicil. Sometimes the testator refers to entries in ledgers to show the amount of the advances, but entries or letters subsequent to the will cannot be admitted to vary any declaration in the will (*x*).

In setting off advances against legacies, any necessary abatement must be calculated on the whole legacy, and not on the difference between the legacy and the advance (*y*).

An omission in a hotchpot clause has been supplied by implication (*z*).

Rules for a common hotchpot clause.

The rules for working out the consequences of a common hotchpot clause are stated by Lord Cozens-Hardy, M.R., in *Re Willoughby* (*a*) as follows: (1) that no interest is charged against an advanced child prior to the testator's death; (2) that where the period of distribution of the testator's property is at the testator's death, interest is charged against an advanced child from the death and not from the subsequent date at which in fact the distribution takes place; (3) that if the period of distribution is at the expiration of a period of accumulation or of a prior life estate, interest is charged not from the death but

(*n*) 76 L. T. 186; *Montague* v. *Montague*, 15 Bea. 565.
(*o*) [1897] 1 Ch. 946; *Hutchinson* v. *Tottenham*, [1898] 1 Ir. R. 403.
(*p*) [1912] 1 Ch. 794.
(*q*) [1913] 1 Ch. 325.
(*r*) [1913] 2 Ch. 574, affg. [1913] 1 Ch. 303.
(*s*) [1913] 2 Ch. 224.
(*t*) [1922] 1 Ch. 551.
(*u*) *Re Aird's Estate*, 12 Ch. D. 291; *Re Wood*, 32 Ch. D. 517.
(*w*) 22 Ch. D. 495.
(*x*) *Smith* v. *Conder*, 9 Ch. D. 170; *Whateley* v. *Spooner*, 3 K. & J. 542; *Re Coyte*, 56 L. T. 510; *Re Deprez*, [1917] 1 Ch. 24.
(*y*) *Re Schweder*, [1893] W. N. 12.
(*z*) *Re Haygarth*, [1913] 2 Ch. 9. See *ante*, Chap. XIX.
(*a*) [1911] 2 Ch. at p. 597.

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from the period of distribution; and (4) that the effect of a charge upon the residue, such as a life annuity secured by a fund set apart to meet it, does not alter the period of distribution." In bringing a sum into account under a hotchpot clause the estate duty charged on such sum is deducted (*b*).

In *Fox* v. *Fox* (*c*) the testator gave his residuary estate to his children in shares, which depended on whether it did or did not exceed £40,000, and he directed that a sum which he had covenanted to settle on his daughter should be taken towards satisfaction of her share under the will: it was held by Malins, V.-C., that by reason of this direction the estate available for distribution "virtually included" the amount payable under the covenant, the result being that it exceeded £40,000. It is submitted that the decision is erroneous. The object of the direction was to produce equality.

Interest on advances.

In the absence of any directions by the testator to the contrary, advances to his children on account of their portions bear no interest up to his death, but from his death they bear interest at 4 per cent. (*d*); if the period of distribution is not the testator's death, interest is charged only from the period of distribution (*e*).

Where the residue is settled, so that the interest on outstanding advances has to be brought into account, the general rule is that interest at 4 per cent. per annum on the advances is added to the actual income of the estate, for the purpose of computation, and when the aggregate income so arrived at has been divided into the proper number of shares, the amount of the interest on each advance is deducted from the respective beneficiary's share of the aggregate income (*f*). The income to be brought is the income before the deduction of tax, and when the distributive shares of income are ascertained the income tax is deducted from each (*g*).

(*b*) *Re Crocker*, [1916] 1 Ch. 25, following *Re Beddington*, [1900] 1 Ch. 771.

(*c*) L. R. 11 Eq. 142.

(*d*) *Stewart* v. *Stewart*, 15 Ch. D. 539 (5 per cent. per annum up to the testator's death, and 4 per cent. per annum afterwards); *Andrewes* v. *George*, 3 Sim. 393; *Hilton* v. *Hilton*, L. R. 14 Eq. 468 (the report is corrected in *Re Whiteford*, *infra*); *Field* v. *Seward*, 5 Ch. D. 538; *Re Hargreaves*, 86 L. T. 43; *Re Davy*, [1908] 1 Ch. 61, overruling some previous decisions or dicta to the contrary to the cases cited in the next note. As to interest on advances made by strangers see *Poole* v. *Poole*, L. R. 7 Ch. 17.

(*e*) *Re Lambert*, [1897] 2 Ch. 169; *Re Dallmeyer*, [1896] 1 Ch. 372; *Re Rees*, 17 Ch. D. 701; *Re Whiteford*, [1903] 1 Ch. 889; *Re Forster-Brown*, [1914] 2 Ch. 584.

(*f*) *Re Poyser*, [1908] 1 Ch. 828; *Re Craven*, [1914] 1 Ch. 358; *Re Tod*, [1916] 1 Ch. 567; *Re Forster-Brown*, [1914] 2 Ch. 584; *Re Cooke*, [1916] 1 Ch. 480 (*Re Hargreaves*, 88 L. T. 100 (followed in *Re Gilbert*, [1908] W. N. 63; and *Re Hart*, 107 L. T. 757) was a special case). See also an article in L. Q. R., vol. XXXI, p. 314.

(*g*) *Re Foster*, [1920] 1 Ch. 391.

An annuity may be an advance which is to be brought into hotchpot (*h*). How the annuity is to be valued for this purpose is a difficult question. Probably the correct method is to value it as an advance of a capital sum equal to the actuarial value of the annuity at the time when the annuity was granted (*i*), but there is authority for the proposition that if the annuity has ceased the annuitant has the option of claiming that the value of the payment received is the amount to be brought into hotchpot (*k*).

Annuities: how valued.

When life and reversionary interests have to be brought into hotchpot, as is not infrequently the case, it is difficult to say how they should be valued. In *Eales* v. *Drake* (*l*), Jessel, M.R., said that their value "must be ascertained in the best way you can." In *Re Heathcote* (*m*) a case on a settlement, Kekewich, J., held that the value of certain life interests, which were to be brought into hotchpot, must be calculated not by reference to the duration of the interests but by an actuarial valuation of them at the time when they first took effect. In *Wheeler* v. *Humphreys* (*n*), the House of Lords do not seem to have considered the point, but their decision appears to involve the view that actual, and not actuarial values are to be taken. With great diffidence it is submitted that the correct method is that stated above in the case of annuities, namely, that you consider the state of facts and contingencies at the time when the life interest or reversion is to be brought into hotchpot. If you know the actual value, because the life interest has ceased, you take that; if you do not, you take the actuarial value. This method seems fair, and does not involve the difficulty that the rights of parties may be seriously altered owing to the chance that there has been a delay in bringing the amounts into hotchpot. But in the light of *Wheeler* v. *Humphreys* (*n*), it is impossible to state with any confidence that this view is correct (*o*).

Life and reversionary interests: how valued.

Questions of hotchpot sometimes arise in the case of appointments under powers—these are considered elsewhere (*p*).

Powers of appointment.

(*h*) *Kircudbright* v. *Kircudbright*, 8 V. 51.

(*i*) See *per* Thesiger, L.J., in *Hatfeild* v. *Minet*, 8 Ch. D. 136, and *Kircudbright* v. *Kircudbright*, *supra*.

(*k*) *Kircudbright* v. *Kircudbright*, *supra*.

(*l*) 1 Ch. D. 217, where *Rucker* v. *Scholefield*, 1 H. & M. 36, was cited.

(*m*) [1891] W. N. 10; *Re Crichton's Settlement*, 106 L. T. 588.

(*n*) [1898] A. C. 506.

(*o*) This paragraph is quoted with approval by Astbury, J., in *Re West*, [1921] 1 Ch. at p. 542. As to valuation of reversionary annuities where there is abatement, see *Re Metcalf*, [1903] 2 Ch. 424. In *Re Kelly's Settlement Trusts*, [1910] 1 Ch. 78, the fact that the tenant for life surrendered her life interest was held not to accelerate the period of valuation.

(*p*) *Ante*, p. 827.

Hotchpot under the Statute of Distributions.

In the case of intestacy as to personal estate, section 5 of the Statute of Distributions (22 & 23 Car. 2, c. 10) made provision for bringing advances into hotchpot by providing for the distribution as follows: one third part to the wife of the intestate, "and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made; and in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid, then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated; but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate."

The Statute of Distributions.

When the Statute of Distributions (*q*) is applied by analogy to the case of partial intestacy of the beneficial interest in undisposed-of residue, advances need not be brought into hotchpot (*r*). On the other hand, the provisions of section 5 as to hotchpot apply to an intestacy occasioned by a will becoming wholly inoperative in consequence of the death of the sole executrix and legatee in the lifetime of the testator (*s*). It will be noticed that land given to an heir does not have to be brought into hotchpot (*t*); and that advances to brothers and sisters are not within the provisions of the section (*u*).

Under section 47, sub-section 1 (iii), of the Administration

(*q*) Repealed by the Administration of Estates Act, 1925.

(*r*) *Re Roby*, [1907] 2 Ch. 84; [1908] 1 Ch. 71.

(*s*) *Re Ford*, [1902] 1 Ch. 218; [1902] 2 Ch. 605, following *Harte* v. *Meredith*, 13 L. R. Ir. 341. And see *Stewart* v. *Stewart*, stated *ante*, p. 1141.

(*t*) *Edwards* v. *Freeman*, 2 P. W. 435; *Chantrell* v. *Chantrell*, 37 L. T. 220 (annuity charged on land); *Re Lyons*, [1903] 1 Ir. R. 156 (lease *pur auter vie*).

(*u*) *Re Gist*, [1906] 2 Ch. 280; *Re White*, 111 L. T. 274. See *Re Merrall*, [1924] 1 Ch. 45, stated *ante*, p. 1144.

of Estates Act, 1925, where the property held on statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account. This also applies to cases of partial intestacy : see section 49.

CHAPTER XXXIII.

ABSOLUTE INTERESTS IN PERSONALTY.

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What words will create an absolute interest.

I.—What Words will give an Absolute Interest.—Express words of gift are not necessary to create an absolute interest. Almost any words which profess to give the legatee complete control over the property are sufficient to create an absolute interest, unless the testator draws a distinction between ownership and a power of disposition. Thus a direction that A shall have certain property "at his disposal" (*a*) or a bequest of property to A "to be disposed of by him by his will as he sees fit," gives an absolute interest to A (*b*), unless the property is expressly given to A for life, with a power of appointment, either general or special (*c*), or unless the context shows that A is only intended to have a power of appointment or disposition, with or without a life interest (*d*). The cases in which an express gift for life may be enlarged by the context into an absolute interest are considered in the next section.

(*a*) *Kellett* v. *Kellett*, L. R. 3 H. L. 160.

(*b*) *Robinson* v. *Dusgate*, 2 Vern. 181; *Maskelyne* v. *Maskelyne*, Amb. 750; *Hixon* v. *Oliver*, 13 Ves. 108 ("to be disposed of as she thinks proper to be paid after her death"); *Bull* v. *Kingston*, 1 Mer. 314 (right of disposing of by will "excepting to E. P."); *McKenna* v. *McCarten*, [1915] 1 Ir. R. 282; see *ante*, p. 878. The first three cases are cited by Mr. Roper (Legacies, 642) without disapprobation, but it seems difficult to justify them, and equally difficult to say what the respective testators meant.

(*c*) *Birch* v. *Wade*, 3 V. & B. 198; *Nannock* v. *Horton*, 7 Ves. 391. If the testator goes on to give the property in default of appointment to A's executors or administrators, this is generally tantamount to an absolute interest, *post*, p. 1158.

(*d*) *Blakeney* v. *Blakeney*, 6 Sim. 52. See *Espinasse* v. *Luffingham*, 3 Jo. & Lat. 186, *post*, p. 1157, and Chap. XXIII, *ante*, p. 765.

Although in general a gift to A upon trust for the provision of a certain interest for B without more will not be construed as a gift to A of all that is not required to satisfy B's interest (*e*), yet small indications are sufficient to show that A is to take beneficially what is not required to provide for the trust for B (*f*).

Gift conditional in form.

And a gift may operate to confer an absolute interest, although it is expressed in qualified or conditional terms. Thus a bequest of pictures to A, "to go to him when he is married and has a house of his own," was held to give A an absolute interest (*g*).

Qualification void for repugnancy.

Sometimes the expressed intention of a testator to give only a limited interest is defeated by a rule of law. Thus if a gift is accompanied by a direction or provision which is inconsistent with ownership, the direction or provision is rejected, and the gift becomes absolute (*h*). So the general rule is that if consumable articles (*res quae ipso usu consumuntur*), such as wines and provisions, are bequeathed to A for life, with a gift over, they belong absolutely to A (*i*). A gift of ordinary chattels to A for life, and after his death to B, in theory vests the absolute ownership in A (*k*), but the rights of B are enforced in equity (*l*). And executory bequests of terms of years are recognised at law (*m*). But it will, of course, be remembered that personal property could not (before 1926) be entailed (*n*).

Things incapable of limited ownership.

Doctrine of *Lassence* v. *Tierney*.

It sometimes happens that a gift becomes absolute *ex post facto*, for there is a general principle (sometimes called the doctrine in *Lassence* v. *Tierney*) that "if a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails" (*o*). And the doctrine is not confined to cases where the restrictions are for the benefit of the legatee personally; the general rule is that whenever there is an absolute gift to a legatee in the first instance, followed by a gift over which fails, either because there is no one in existence to take under it, or from lapse or invalidity or any other reason, then the absolute gift takes effect, to the exclusion of the testator's residuary

(*e*) See Chap. XXI (resulting trusts for next-of-kin), *ante*, p. 696.
(*f*) *Re Foord*, [1922] 2 Ch. 519; *Croome* v. *Croome*, 59 L. T. 582.
(*g*) *Re Panter*, 22 T. L. R. 431.
(*h*) *Ante*, p. 536.
(*i*) See Chap. XXXVIII, where the exceptions are stated.
(*k*) Williams, Pers. Pr. (18th ed.), p. 439.
(*l*) *Post*, p. 1427.
(*m*) *Ib.*
(*n*) *Byng* v. *Lord Strafford*, 5 Bea. 558; *Pole* v. *Pole*, [1908] 2 Ch. 276.
(*o*) *Per* Lord Cottenham in *Lassence* v. *Tierney*, 1 Mac. & G. 551, cited with approval by Lord Cairns in *Kellett* v. *Kellett*, L. R. 3 H. L. 160.

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legatee or next-of-kin, as the case may be (*p*). The rule in *Lassence* v. *Tierney* applies to real estate (*q*). It also applies to the case where a legacy is bequeathed to trustees in trust for the legatee as well as to the case where it is bequeathed directly to the legatee in the first instance (*r*).

The difficulty in many cases is to say whether an absolute interest is given or not (*s*). With reference to this the following rules may be mentioned :

Absolute interest may be cut down by clear words.

(i) *Absolute Gift may be cut down.*—A bequest of personal property to A without more (*t*), gives him an absolute interest. But it may appear from the context, or from other provisions in the will, that the testator intended to give A a limited interest, such as a life interest, with or without a power of appointment (*u*). As a general rule, an absolute interest cannot be cut down except by clear words (*x*). And even clear words will not cut down an absolute gift if the intended restriction or gift over is repugnant, or mere surplusage. As where there is a gift to A absolutely, with a direction to apply the income in a certain way for his benefit during life (*y*); or a gift to A

(*p*) *Hancock* v. *Watson*, [1902] A. C. 14, affirming C. A. in *Re Hancock*, [1901] 1 Ch. 482; *Re Cohen*, 60 Sol. J. 239; and see *Re Wilcock*, [1898] 1 Ch. 95. The older cases are *Whittell* v. *Dudin*, 2 J. & W. 279; *Arnold* v. *Congreve*, 1 Russ. & M. 209; *Hulme* v. *Hulme*, 9 Sim. 644; *Campbell* v. *Brownrigg*, 1 Ph. 301; *Mayer* v. *Townsend*, 3 Bea. 443; *Ridgway* v. *Woodhouse*, 7 Bea. 437; *Winckworth* v. *Winckworth*, 8 Bea. 576; *Dawson* v. *Bourne*, 16 Bea. 29; *Gompertz* v. *Gompertz*, 2 Ph. 107; *Watkins* v. *Weston*, 3 D. J. & S. 434; *Re Corbett's Trust*, Johns. 591. As to *Stephens* v. *Gadsden*, 20 Bea. 463; *Gerrard* v. *Butler*, *ib.* 541; *Churchill* v. *Churchill*, L. R. 5 Eq. 44, see *ante*, p. 821, where other cases on the subject are referred to. See also *Lyddon* v. *Ellison*, 19 Bea. 565, and other cases referred to *post*, p. 1432. The cases of *Carver* v. *Bowles*, 2 R. & My. 301; *Kampf* v. *Jones*, 2 Keen, 756; and *Ring* v. *Hardwick*, 2 Bea. 352, are referred to in connection with the Rule against Perpetuities (Chap. X).

(*q*) *Moryoseph* v. *Moryoseph*, [1920] 2 Ch. 33.

(*r*) *Re Harrison*, [1918] 2 Ch. 59; *Re Currie's Settlement*, [1910] 1 Ch. 328; *Re Connell's Settlement*, [1915] 1 Ch. 867; *Re Atkinson*, [1925] W. N. 30; *Re Monk*, [1927] 2 Ch. 197, at p. 211; *Re Marshall*, [1928] 1 Ch. 661, distinguishing *Re Payne*, [1927] 2 Ch. 1.

(*s*) *Lambe* v. *Eames*, L. R. 6 Ch. 597.

(*t*) Or to A and his personal representatives : *Taylor* v. *Beverley*, 1 Coll. 108. See *Lugar* v. *Harman*, 1 Cox, 250 (" lawful representatives "), and *Appleton* v. *Rowley*, L. R. 8 Eq. 139 (" heirs or representatives "), and *post*, p. 1590, as to the use of the words executors or representatives as words of limitation. A bequest to A and to her heirs after her is an absolute bequest to A : *Atkinson* v. *L'Estrange*, 15 L. R. Ir. 340.

(*u*) *Ante*, pp. 764 *seq.* As to gifts upon condition, see Chap. XXXIX, and *Shields* v. *Shields*, [1910] 1 Ir. R. 116.

(*x*) *Ante*, p. 541. An absolute gift in a will may of course be cut down to a life interest by a codicil, if the intention is clear, as in *Re Margitson*, 31 W. R. 257, see Chap. VII, *ante*, p. 174.

(*y*) Chap. XXXIV. The decision in *Billing* v. *Billing*, 5 Sim. 232, is generally referred to this ground. There the testator gave his property to trustees upon trust to invest for the use and benefit of A, to be paid at such time and in such manner as they should think proper, and that when A attained twenty-one they should pay the income as they might think most for his advantage, in weekly or quarterly payments, during his life. The

with a superadded power to dispose of the property (*z*), or where property is given to A absolutely, with a gift over in the event of his not disposing of it (*a*). So if a restriction or gift over is void for remoteness, or otherwise fails, the result may be that the original gift becomes absolute (*b*).

Power of appointment.

It is hardly necessary to say that where there is no absolute gift, a power of appointment or disposition among a certain class of persons does not give any interest to the donee of the power (*c*), although the objects of the power may take an interest by implication (*d*), or by way of trust (*e*).

Where no trust created.

It often happens that a testator gives property to a person, for example, his widow, "to be at her disposal in any way she may think best for the benefit of herself or family" (*f*) or "with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do" (*g*) : the additional words not being sufficiently strong to create a trust in favour of the "family" the gift to the widow is absolute. In *Re Hill* (*h*) the testator bequeathed personal estate to his five brothers and sisters "for the benefit of themselves and their respective families." It was held that this was a bequest to the brothers and sisters absolutely. In *Re Nolan* (*i*) a gift to the testator's daughter A, to be used by her for her own support and that of his children B and C (who were adults), was held to be a gift to A, B and C as joint tenants. If, however, the attempt to create a trust fails by reason of its uncertainty (*k*) or illegality, a different rule prevails. This subject is discussed in detail elsewhere (*l*).

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testator's intention obviously was to provide for A's personal maintenance, and this construction is confirmed by the fact that A was deaf and dumb. However, Shadwell, V.-C., held that he took an absolute interest. In *Gurney* v. *Goggs*, 25 Bea. 334, there was more difficulty in giving effect to the testator's intention, see *ante*, p. 536.

(*z*) *Hales* v. *Margerum*, 3 Ves. 299; *Comber* v. *Graham*, 1 R. & M. 450; *Howorth* v. *Dewell*, 29 Bea. 18 (where the power was in favour of the testator's children); and see Chap. XIV.

(*a*) *Bull* v. *Kingston*, 1 Mer. 314 (gift over of "what may remain at her decease"). See *Re Yalden*, 1 D. M. & G. 53; *Re Mortlock's Trust*, 3 K. & J. 456, and other cases cited *ante*, p. 438.

(*b*) See *ante*, p. 821. As to the cases where property is given upon a trust which fails, see *ante*, p. 913.

(*c*) *Blakeney* v. *Blakeney*, 6 Sim. 52.

(*d*) *Birch* v. *Wade*, 3 V. & B. 198, and other cases cited pp. 628 *seq.*

(*e*) *Blakeney* v. *Blakeney*, *supra*, and other cases cited in Chap. XXIV.

(*f*) See this question discussed *ante*, p. 849.

(*g*) *Re Hutchinson and Tenant*, 8 Ch. D. 540. Compare *Morrin* v. *Morrin*, 19 L. R. Ir. 37. See the cases on precatory trusts, *ante*, pp. 842 *seq.*

(*h*) [1925] 2 Ch. 259, following *Lambe* v. *Eames*, L. R. 6 Ch. 597, and discussing *Armstrong* v. *Armstrong*, L. R. 7 Eq. 518. See also *Re Berryman*, [1913] 1 Ir. R. 21 (to be disposed of as she may think best for the good of our children).

(*i*) [1912] 1 Ir. R. 416. (*k*) *Re Bannister*, 125 L. T. 54.

(*l*) *Ante*, p. 456.

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Absolute interest subject to executory gift over.

In *Re Hanbury* (*m*) a testator gave all his property to his wife absolutely, in full confidence that at her death she would devise it to such one or more of his nieces as she thought fit, and in default of any disposition by her by will, he directed his property to be equally divided among his surviving nieces: it was held that this was a gift to the wife for life, with a power of appointment among the nieces, and a gift to the surviving nieces in default of appointment, and if no niece survived the wife, she took absolutely. The rule in *Allhusen* v. *Whittell* (*n*) does not apply to such a case (*o*).

Indefinite gift of income.

(ii) *Indefinite Gift of Income.*—Numerous cases decide that an indefinite gift of the income of a fund to a person is a gift of the corpus; and this may be so even where legacies are given payable on the death of the legatee of the income. Thus in *Jenings* v. *Baily* (*p*) the testatrix directed her executors to pay to A or her assigns the interest, dividends, and annual profit and produce of her personal estate (after payment of debts and funeral expenses); she then gave certain legacies after the death of A; Sir J. Romilly, M.R., said it was quite clear that the gift of income of the personal estate standing alone would have been an absolute gift, and he declared that the whole of the residuary estate passed to A subject to the legacies. It has even been held that if the gift of income is followed by a power to dispose of the corpus by will, with a gift over in default, this does not prevent the legatee from taking an absolute interest (*q*).

Form of gift immaterial.

It makes no difference that the income is given to the legatee directly or through the intervention of trustees, or that it is given to the separate use of a married woman (*r*).

Rents of leaseholds.

So a gift of the rents of leaseholds will generally pass an absolute interest in them (*s*).

(*m*) [1904] 1 Ch. 415; *S. C. sub nom. Comiskey* v. *Bowring-Hanbury*, [1905] A. C. 84. Compare *Bradshaw* v. *Bradshaw*, [1908] 1 Ir. R. 288.

(*n*) L. R. 4 Eq. 295. See *post*, p. 1194.

(*o*) *Re Hanbury*, [1909] W. N. 157.

(*p*) 17 Bea. 118. See also *Re Morgan*, [1893] 3 Ch. 222; *Philipps* v. *Chamberlaine*, 4 Ves. 51; *Rawlings* v. *Jennings*, 13 Ves. 39; *Boosey* v. *Gardner*, 18 Bea. 471; *Clough* v. *Wynne*, 2 Mad. 188; *Penny* v. *Pippin*, 15 W. R. 306; *Re Tandy*, 34 W. R. 748; *Davidson* v. *Kimpton*, 18 Ch. D. 213; *Humphrey* v. *Humphrey*, 1 Sim. (N.S.) 536; *Re Andrew's Will*, 27 Bea. 608; *Re Coward*, 57 L. T. 285; *S. C., Coward* v. *Larkman*, 60 L. T. 1; *Wiley* v. *Chanteperdrix*, [1894] 1 Ir. R. 209; *Re Lawes-Wittewronge*, [1915] 1 Ch. 408. (The rule does not apply to a gift of the net income of a share in a private partnership.)

(*q*) *Weale* v. *Ollive*, 32 Bea. 421. See *Southouse* v. *Bate*, 16 Bea. 132. A trust to apply the corpus for maintenance does not give an absolute interest: *Hughes* v. *McMaull*, [1923] 1 Ir. R. 78.

(*r*) *Haig* v. *Swiney*, 1 Sim. & St. 487; *Elton* v. *Shepard*, 1 Br. C. C. 532; *Coward* v. *Larkman*, *supra*.

(*s*) *Bignall* v. *Rose*, 24 L. J. Ch. 27; *Watkins* v. *Weston*, 3 D. J. & S. 434.

In *Tredennick* v. *Tredennick* (*t*) a testator bequeathed to A all the dividends due from January to July on certain specified stocks and shares, and to B the corresponding dividends payable from July to December : it was held that A and B took the capital of the stocks and shares in equal moieties.

Alternate gift of income to two persons.

A power of appointing the income of a fund for an indefinite time is equivalent to a power over the capital (*u*).

Power of appointment.

If the income of property is given indefinitely, but it appears from the scheme of the will that the corpus is to be disposed of when all the legatees of the income are dead, they take only life interests (*x*). The intention that a legatee of income shall only take for his life may be shown in various ways (*y*). Thus under a gift of income to B and C and the survivor of them, the survivor takes only a life interest (*z*).

Contrary intention.

It has been held that a gift of income so long as the legatee shall remain single and unmarried must be considered as requiring the act of marriage to determine the interest, and that the gift is therefore one of the dividends of stock without limitation as to time (if the legatee do not marry), and therefore carries the absolute interest. In *Rishton* v. *Cobb* (*a*), where this opinion is given, Lord Cottenham decided that the legatee took an absolute interest although she was married at the testator's death. The decision is not altogether satisfactory; a gift of income to the testator's widow " so long as she shall continue my widow and unmarried " only carries the income during widowhood or life, and is not a gift of the corpus, and it is difficult to see why a gift of income to A, so long as she remains unmarried, should give an absolute interest if A die unmarried. Lord Selborne in *Re Boddington* (*b*) criticised *Rishton* v. *Cobb*, but the latter case has been followed by Farwell, J., in *Re Howard* (*c*).

Gift during spinsterhood or widowhood.

II.—Express Gift for Life enlarged into Absolute Interest. The question whether a gift of personal property to A for life, followed by words which, if the property were real, would give him an estate tail, gives him an absolute interest, is discussed later (*d*). In other cases, the principal rules are as follows :

(*t*) [1900] 1 Ir. R. 354.
(*u*) *Re L'Herminier*, [1894] 1 Ch. 675.
(*x*) *Buchanan* v. *Harrison*, 8 Jur. (N.S.) 965. Compare *Re Morgan*, [1893] 3 Ch. 222.
(*y*) See *Coward* v. *Larkman*, *supra*.
(*z*) *Blann* v. *Bell*, 2 D. M. & G. 775. Compare *Re Tandy*, 34 W. R. 748.
(*a*) 5 My. & Cr. 145.
(*b*) 25 Ch. D. at p. 689.
(*c*) [1901] 1 Ch. 412. See also *Re Rowland*, 86 L. T. 78, and *Re Seaton*, [1913] 2 Ch. 614.
(*d*) *Post*, p. 1161.

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Gift for life when enlarged.

(i) *General Rule.*—An express gift for life will not, as a general rule, be enlarged into an absolute interest by implication (*e*), but it sometimes happens that a testator gives a life interest in express words, while the will, taken as a whole, shows an intention to confer an absolute interest : as where a testator gives his property to his wife for life, and after her death bequeaths certain legacies, and leaves the remainder at her disposal (*f*).

In some cases this result follows from the fact that the nature of the property makes it impossible to give full effect to the testator's intention. Thus a gift of things *quæ ipso usu consumuntur* to A for life, with remainder to B, generally gives A an absolute interest (*g*).

Things *quæ ipso usu consumuntur.*

A for life, remainder to executors.

(ii) *Gift for Life followed by Gift to Executors, etc.*—A bequest to A for life, with remainder to his executors and administrators (*h*) or to his personal representatives (*i*), is a gift of an absolute interest.

Whether next-of-kin are meant.

The question sometimes arises whether the words " executors and administrators " or " personal representatives " are used not as words of limitation, but in the sense of next-of-kin. This topic is discussed in Chap. XLI (Gifts to Personal Representatives, Executors, etc.).

In *Re Bogle* (*k*), a testator bequeathed a legacy upon trust to pay the income to A for life, and after his death, if he should have two children who should attain twenty-one, upon trust as to one moiety for his executors or administrators; A had two children who attained twenty-one, and he was held to be absolutely entitled to one moiety of the fund.

Life interest and power of appointment or disposition.

(iii) *Gift for Life followed by General Power of Appointment.*—There are some cases in which a combination of a life interest in personalty, with a power of appointment or disposition over the corpus, may in effect be an absolute gift, without any necessity for the donee of the power either to exercise or release it.

(*e*) *Scawin* v. *Watson*, 10 Bea. 200, and cases there cited; *Kay* v. *Winder*, 12 Bea. 610; *Savage* v. *Tyers*, L. R. 7 Ch. 356; *Re Richards*, 50 L. T. 22; *Allen* v. *Allen*, 21 W. R. 747. See further on this subject Chap. XXXIV.

(*f*) *Nowlan* v. *Walsh*, 4 De G. & S. 584; *Re Maxwell's Will*, 24 Bea. 246; *Re Davids' Trusts*, John. 495; *Reid* v. *Carleton*, [1905] 1 Ir. R. 147. See *Bull* v. *Kingston*, 1 Mer. 314.

(*g*) *Post*, p. 1429. As to farming stock, see *Myers* v. *Washbrook*, [1901] 1 K. B. 360. In *Terry* v. *Terry* (33 Bea. 232) A and B were directed to carry on the testator's business during A's lifetime, and for that purpose they were to have the use of the testator's book debts or capital; it was held that this gave them an absolute interest in " the book debts or capital."

(*h*) *Long* v. *Watkinson*, 17 Bea. 471; explained in *Webb* v. *Sadler*, L. R. 8 Ch. 419; *Re Bogle*, 78 L. T. 467. As to *Avern* v. *Lloyd*, L. R. 5 Eq. 383, see *Re Hargreaves*, 43 Ch. 401; Gray, Perp. § 277 (second ed.).

(*i*) *Alger* v. *Parrott*, L. R. 3 Eq. 328; *Saberton* v. *Skeels*, 1 R. & M. 587; *Wing* v. *Wing*, 24 W. R. 878.

(*k*) 78 L. T. 457.

If personalty is given to A for life, with a general power of appointment by deed or will, and a gift over in default of appointment to some persons other than A or his legal personal representatives, it is clear that on the one hand A can appoint the property to himself, and so become absolute owner of it, and on the other hand, that in case he dies without having effectually exercised his power of appointment, the gift over will take effect.

So if the power is one of disposition. Thus in *Pennock* v. *Pennock* (*l*) the gift was to a person for life with power to take and apply the whole or any part of the capital for his own benefit, with a gift over on his death: it was held that on his death without having exercised the power, the gift over took effect. And if the power of disposition is only given to afford the tenant for life an additional fund for maintenance, then he can only dispose of such part of the capital as is required for that purpose (*m*).

In the event, however, of there being no gift over, or none except to A or his legal personal representatives, different considerations may arise, and it is a matter of some nicety to determine whether A is in effect the absolute owner of the property.

Question of intention.

If the testator draws a clear distinction between power and property (*n*), a gift to A for life with a power of appointment by will, gives A nothing more than what is expressed; as where the gift is to A for life, and after his death to such person as he shall by will appoint (*o*). But where the wording is ambiguous, the question is more difficult. In *Reith* v. *Seymour* (*p*) the gift was to A for life, and after her death to be at her entire disposal, either by will or otherwise, and it was held to give her only a life estate with a power of appointment. Again, in *Espinasse* v. *Luffingham* (*q*) a testator gave various chattels to his wife absolutely, and bequeathed to her "the use of my plate, with power to dispose of such portion thereof as she shall think proper"; the difference between the two gifts was held to show that in the case of the plate she was only intended to take a life interest

(*l*) L. R. 13 Eq. 144 (considered in *Parnell* v. *Boyd*, [1896] 2 Ir. R. 571); *Re Richards*, [1902] 1 Ch. 76.

(*m*) *Re Pedrotti's Will*, 27 Bea. 583; *Re Fox*, 62 L. T. 762; see *Re Richards*, *supra*; and *Re Ryder*, [1914] 1 Ch. 865, where the legatee for life appointed the corpus to himself by a deed poll.

(*n*) The difference between the two ideas is explained by Fry, L.J., in *Ex p. Gilchrist*, 17 Q. B. D. 521.

(*o*) *Per* Sir W. Grant, *Bradly* v. *Westcott*, 13 Ves. at p. 453; *Nannock* v. *Horton*, 7 Ves. 391. See *Scott* v. *Josselyn*, 26 Bea. 174, where the legatee had (i) a life interest; (ii) a power of disposition over the capital during her life, and (iii) a power of appointment by will over the balance.

(*p*) 4 Russ. 263; *Archibald* v. *Wright*, 9 Sim. 161; *Roberts* v. *Thorp*, 56 Sol. J. 13 (power to appoint during lifetime); *Re Burkitt*, [1915] 1 Ir. R. 205.

(*q*) 3 Jo. & Lat. 186.

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with a power of disposition. On the other hand, in *Nowlan* v. *Walsh* (*r*), where the testator bequeathed to his wife the income of all his property, and after her death bequeathed some legacies and left the remainder of his property at the disposal of his wife if she remained a widow, with a gift over in the event of her marrying, it was held by Knight-Bruce, V.-C., that the widow, who did not marry again, took the residue absolutely, subject to the legacies. He said : " There is nothing in the word ' disposal ' essentially indicating power rather than property, independently of the context. There are several reasons here for referring it to property, more than for referring it merely to power." The decisions in *Hoy* v. *Master* (*s*), *Re Maxwell's Will* (*t*), *Hole* v. *Davies* (*u*), *Re Davids' Trusts* (*x*), and *Reid* v. *Carleton* (*y*), seem to rest on the same principle.

Effect of gift over to executors and administrators.

There is the highest authority for the proposition that a gift to A for life, with remainder as he shall by deed or will appoint, with remainder to his executors or administrators, vests in equity the entire corpus in A. A can be a married woman with the gift to her separate use. This is asserted in *London Chartered Bank of Australia* v. *Lempriere* (*z*) in the following words : " In the present case it is to be noted that the gift is to the married woman for her separate use for life, with remainder as she should, notwithstanding her coverture, by deed or will appoint, with remainder to her executors or administrators. Their Lordships are satisfied that on the weight of authority and on principle they ought to treat this as what in common sense and to common apprehension it would be, an absolute gift to the sole and separate use of the lady. The words are an expansion and expression of what would be implied in the word ' sole and separate use,' and they conceive themselves at liberty to hold that such a form of gift to a married woman, without any restraint on anticipation, vests, in equity, the entire corpus in her for all purposes as fully as a similar gift to a man would vest it in him." From these words it looks as if in the case of a bequest to A for life, with remainder as he shall by deed or will (or by will only) appoint, and in default of appointment to A's executors and administrators, the fund could (subject to any question of duty (*a*)) be safely handed over by the executors or trustees to A, and that

(*r*) 4 De G. & S. 584.
(*s*) 6 Sim. 568.
(*t*) 24 Bea. 246.
(*u*) 34 Bea. 345.
(*x*) Johns. 495. The reasoning in this case, however, is not quite satisfactory.
(*y*) [1905] 1 Ir. R. 147.
(*z*) L. R. 4 P. C. at p. 595.
(*a*) See *Jackson* v. *Commissioners of Stamps*, [1903] A. C. 350.

A could give a valid receipt for it without there being any necessity for A to exercise or release his power (*b*). But this is not necessarily the case.

In the first place, it seems clear that if the power of appointment is by will only, a formal release of the power, or something equivalent, is required. Thus in *Re Davenport* (*c*) the testator directed that after the death of his wife the trustees should hold certain trust funds upon trust to pay the income thereof equally for the benefit and maintenance of his two daughters during their minorities, and when they should respectively attain the age of twenty-one years to pay the same income to them in equal moieties during their lives for their separate use; and as to the capital of such trust funds the testator declared that the same being divided into equal parts should as to each moiety thereof be subject to the appointment by will of his said daughters respectively, and be assigned and paid over by his trustees according to such appointment or appointments, and in default thereof to their executors, administrators or assigns respectively. The widow died in 1878, the daughters married in 1889 and 1890. Kekewich, J., held that by virtue of the Married Women's Property Act, 1882, the life interest and the interest in reversion were alike limited to the separate use of the married women, and that on releasing their powers they would be absolutely entitled to the fund, adding, "I have said that the married women must release their powers because I am now only making a declaration. If I went on at their request to order payment I should not require any release of the power, because the order for payment would operate as a release. But as the order is not in that form I think there must be releases of the powers" (*d*). The rule appears to be that since the order of the Court will bind equitable interests, the Court will not insist on the formality of a release or an appointment if the desire or intention of the donee of the power of appointment to take the whole fund is manifest. In *Irwin* v. *Farrer* (*e*) the testator directed a legacy to be laid out in stock, and the dividends as they came due to be paid to A for life, and after her decease to pay the principal according to her appointment by will or otherwise; A filed a bill praying for payment of the legacy, and the Court of Exchequer made a decree in her favour without a formal appointment being executed, holding that the demand by the Bill was a sufficient indication of her intention to take the whole for her own benefit. It does not appear from the

Re Davenport.

Irwin v. *Farrer.*

(*b*) As to the release of general and special powers, see *ante*, pp. 810 *seq.*
(*c*) [1895] 1 Ch. 361.
(*d*) [1895] 1 Ch., at p. 367.
(*e*) 19 Ves. 86.

report whether or not there was a gift over in default of appointment. Similarly in *Holloway* v. *Clarkson* (*f*) there were bequests to females, some married and some single, for their separate use for their respective lives and after their decease to such persons as they should respectively appoint, and in default of appointment to their respective executors, administrators and assigns; several of the legatees presented petitions for transfers of their shares in the fund; Sir J. Wigram, V.-C., said that it being clear the executors of the several female legatees could only take the fund as part of the estates of such legatees, that the legatees were authorised to make an immediate disposition of their legacies either by a revocable or an irrevocable act; and that their excutors could not dispute, or claim in opposition to the act of such legatees, he was of opinion that the petition was in such case equivalent to an appointment, and that therefore the order ought to be made as sought by the petitioners.

Holloway v. *Clarkson.*

Devall v. *Dickens.*

In *Devall* v. *Dickens* (*g*) the limitations were similar, except that the power was by will only. Sir J. Wigram said that he had in previous cases of a similar description to the present always held that the effect of such a limitation was substantially to give the entire interest in the property to the legatee, and he ordered a transfer of the fund.

Page v. *Soper.*

In *Page* v. *Soper* (*h*) the limitations (contained in a settlement) resembled those in *Devall* v. *Dickens*, but there was a restraint on anticipation attached to the life estate. The donee of the power, having become a widow, applied to the Court for a transfer of the funds offering to release her power; and an order was made accordingly.

In *Cambridge* v. *Rous* (*No.* 2) (*i*) there was no gift over, but the order was made without requiring the power of appointment to be exercised.

The result of these authorities would appear to be as follows:

Result of cases.

(1) A gift to A for life, with a power of appointment by deed or will, with a gift over away from A or his estate, or with no gift over, gives A entire dominion over the fund, and therefore if he applies to the Court for it the Court need not require a formal appointment of the fund, as his application to the Court is a sufficient intention to take the fund (*k*).

(2) If the power of appointment in the last case had been by will only, the Court would not decree payment because an

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(*f*) 2 Ha. 521; *Cambridge* v. *Rous*, 25 Bea. 574.
(*g*) 9 Jur. 550.
(*h*) 11 Ha. 321. See also *Re Onslow*, 39 Ch. D. 622, a case of a settlement.
(*i*) 25 Bea. 574.
(*k*) See *Irwin* v. *Farrer*, 19 Ves. 86, *ante*, p. 1159.

appointment by will must be executed in accordance with the Wills Act.

(3) If there is a gift over to A's executors and administrators, then, whether the power is by deed or will, or by will alone, there is substantially an absolute gift to A, and consequently the Court will make an order for transfer without requiring an appointment or a release of the power.

Whether trustees can dispense with appointment or release.

It now remains to be considered whether the executors or trustees can safely pay over the fund to A in any of the above cases. As regards (1) and (2) it is clear that they cannot. As regards (3) it is submitted that they cannot because although A is substantially absolute owner of the fund, and some of the cases treat him as if he were owner, yet a trustee would not be safe in handing over the fund until A had taken the requisite legal steps to have the entire beneficial interest vested in him, and so that no power of divesting that beneficial interest remains. A further question arises, namely, whether if in such a case A either appoints to himself or releases his power there may not be a liability to estate duty under section 11 of the Finance Act, 1900. This is not an easy question to answer. The section appears to refer to dealings with the life interest, and in the case supposed A would only deal with a power of disposition to take effect after the life interest, but executors and trustees would do well to make proper provision for the possibility of estate duty becoming payable before they hand over the fund.

What is an exercise of a general power.

An actual dealing with the fund by the tenant for life, for instance, by selling out Consols and investing in Long Annuities, is not an exercise of a power of appointment "by will or otherwise" (*l*).

III.—Where Words which create an Estate Tail in Real Estate before 1926 confer the Absolute Interest in Personalty.—In the case of wills coming into operation before 1926 there was a rule that words which would create an estate tail in realty created an absolute interest in personalty (which could not then be entailed). But in the case of wills coming into operation on and after January 1, 1926, the law has been completely altered. In the first place estates tail (or, as they are now called, entailed interests) can only be created by such formal words as are necessary to create them in a deed, and secondly, personalty can, equally with realty, be entailed (*m*). The result is that in course of time the old rule will become obsolete. The old rule was so well established that few cases on it have been reported

The new law.

(*l*) *Reith* v. *Seymour*, 4 Russ. 263.
(*m*) Law of Property Act, 1925, section 130.

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in recent years (*n*). Consequently in this edition it does not seem necessary to do more than to state the old rule, and the reader is referred to the sixth edition for a more detailed discussion of the cases. It is only necessary to point out here that it has been settled by *Re Hammond* (*o*) that in a gift of personalty to A and his issue the issue take as purchasers—that is, A and the issue take as joint tenants; and by virtue of section 130, subsection 2, of the Law of Property Act, 1925, the same will be the case in a devise of realty to A and his issue in a will which comes into operation after 1925.

Before 1926—words which create an estate tail in realty confer the absolute interest in personalty.

The old rule is stated by Mr. Jarman (*p*) as follows :—" It has been established by a long series of cases (*q*) that where personal estate (including of course terms of years of whatever duration (*r*)) is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail, and consequently devolves at his death to his personal representative (whether he leaves issue or not), and not to his heir in tail (*s*).

Rule applied to estates tail by implication.

" This rule is not confined, as has been sometimes affirmed (*t*), to cases in which the words, if used in reference to realty, would create an *express* estate tail; for it applies also to those in which an estate tail would arise *by implication*, except in the particular case in which words expressive of a failure of issue receive a different construction in reference to real and personal estate (*u*). Thus, where by a will which is regulated by the old law (*x*) personalty is bequeathed to A, or to A and his heirs, and if he

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(*n*) *Pole* v. *Pole*, [1908] 2 Ch. 648 is a case where the rule was applied.

(*o*) [1924] 2 Ch. 276.

(*p*) First edition, vol. II, p. 489. A few cases have been added to the footnotes.

(*q*) *Leventhorpe* v. *Ashbie*, Rolle's Abr. 831, pl. 1; *Bennet* v. *Lewknor*, Roll. Rep. 356; *Fereyes* v. *Robertson*, Bunb. 301, 8 Vin. Abr. 451, pl. 25, 26; *Richards* v. *Bergavenny*, 2 Vern. 324; *Seale* v. *Seale*, 1 P. Wms. 290; Stratton v. *Payne*, 3 Br. P. C. Toml. 99; *Pelham* v. *Gregory*, 3 Br. P. C. Toml. 204; *Montagu* v. *Beaulieu*, 3 Br. P. C. Toml. 277; *Donn* v. *Penny*, 1 Mer. 20; *Chatham* v. *Tothill*, 7 Br. P. C. Toml. 453, 1 Mad. 488 (*sub nom. Tothill* v. *Pitt*); *Butterfield* v. *Butterfield*, 1 Ves. sen. 133, 154; *Robinson* v. *Fitzherbert*, 2 B. C. C. 127; *Elton* v. *Eason*, 19 Ves. 73; *Britton* v. *Twining*, 3 Mer. 176; *Crawford* v. *Trotter*, 4 Mad. 361; *Simmons* v. *Simmons*, 8 Sim. 22; *Williams* v. *Lewis*, 6 H. L. C. 1013 (affirming 3 Drew. 668); *Re Walker*, [1908] 2 Ch. 705; *Re Cleary's Trusts*, 16 Ir. Ch. 438.

(*r*) But not including a personal annuity created by will *de novo* and given to A and the heirs of his body: this gives A a conditional fee, and unless he performs the condition (*i.e.* has issue) the annuity ceases on his death, *Turner* v. *Turner*, Amb. 776, 1 B. C. C. 316.

(*s*) It will of course be remembered that if personal property is bequeathed to A in tail, with remainder to B in tail, and A dies in the testator's lifetime without issue, the bequest to B takes effect: *Re Lowman*, [1895] 2 Ch. 348, and other cases cited, *ante*, p. 427.

(*t*) *Atkinson* v. *Hutchinson*, 3 P. W. 259; *Doe* v. *Lyde*, 1 T. R. 593.

(*u*) See Chap. LII, pp. 1917 *seq.*

(*x*) *I.e.*, the law before 1838.

shall die without issue to B (which would clearly make A tenant in tail of real estate), he will take the absolute interest (*y*).

Rule applied to cases falling within the rule in *Shelley's Case*.

"The rule also applies to those cases in which, by the operation of the rule in *Shelley's Case* (*z*), the terms of the bequest would, in reference to real estate, create an estate tail. Thus in *Garth* v. *Baldwin* (*a*), where a testator devised real and personal estate to A, in trust to pay the rents and profits to S. for life, and after her death to pay the same to E. *for life*, and afterwards to pay the same to *the heirs of his body*, and for want of such issue, over; Lord Hardwicke held that E. was tenant in tail of the real estate and entitled absolutely to the personalty.

Though the bequest be referential to the devise.

"And of course it is immaterial in such a case whether the bequest itself contain the words of limitation, or refer to a devise of realty creating an estate tail. As in *Brouncker* v. *Bagot* (*b*), where a testator devised his real estate to B for life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the *heirs of the body* of B; and by a codicil he bequeathed his personal estate unto the same persons, and in the same manner, as he had by his will devised his real estate. It was contended that although as to real estate this rule of law was too strong for the intention of the testator, yet that a different construction might be put upon the words as applied to personalty, to prevent the application of the rule where it went to defeat the obvious intention, as in this case; but Sir W. Grant, M.R., held that the testator having declared his intention respecting his personal estate only by referring to the terms of the devise of the real estate, and as the law had ascertained those terms to give an estate tail in the realty, they would give the absolute interest in personalty."

After discussing the cases where words of distribution are superadded, where the bequest is to a person and his issue simply, and where the bequest is to A for life and after his death to his

(*y*) *Love* v. *Windham*, 2 Ch. Rep. 14, 1 Lev. 290; *Chandless* v. *Price*, 3 Ves. 99; *Campbell* v. *Harding*, 2 R. & My. 390; *Dunk* v. *Fenner*, 2 R. & My. 557; *Simmons* v. *Simmons*, 8 Sim. 22; *Caulfield* v. *Maguire*, 2 J. & Lat. at p. 176; *Cole* v. *Goble*, 13 C. B. 445; *Webster* v. *Parr*, 26 Bea. 236.

(*z*) As to which, see Chap. XLVIII.

(*a*) 2 Ves. sen. 646; see also *Webb* v. *Webb*, 1 P. W. 132, 2 Vern. 668; *Butterfield* v. *Butterfield*, 1 Ves. sen. 133, 154; *Tothill* v. *Earl of Chatham*, 7 Br. P. C. Toml. 453, 1 Mad. 488, nom. *Tothill* v. *Pitt*; *Earl of Verulam* v. *Bathurst*, 13 Sim. 374; *Ousby* v. *Harvey*, 17 L. J. Ch. 160; *Williams* v. *Lewis*, 6 H. L. Ca. 1013. The fact of the income only, and not the property itself, being given to A for life, is no argument against his taking the absolute interest: *Butterfield* v. *Butterfield*, 1 Ves. sen. 133, 154; *Glover* v. *Strothoff*, 2 B. C. C. 33; *Re Andrew's Will*, 27 Bea. 608; and the other cases overruling *Smith* v. *Clever*, 2 Vern. 38; and (on this point) *Fonnereau* v. *Fonnereau*, 3 Atk. 315.

(*b*) 1 Mer. 271, 19 Ves. 574; see also *Douglas* v. *Congreve*, 1 Bea. 59; and the cases referred to *ante*, pp. 669 *seq.*, on gifts of chattels by reference to the limitations of real estate.

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Bequests over after gifts in question, when void.

issue, Mr. Jarman continues (*c*) : " A necessary consequence of the rule, that words which create an estate tail in realty confer the absolute interest in personalty, is, that all bequests ulterior to such a gift are void (*d*); but this principle does not apply to cases in which personal estate is limited in such terms to several persons not *in esse* successively; in which case the successive limitations, though having the form of remainders, operate simply as substitutional or *alternative* bequests, each gift in the series being dependent upon the event of the preceding gift or gifts not taking effect.

" Thus, where a term of years is limited to A for life, with remainder to his first and other sons successively in tail male with remainder to the first and other sons of B in tail. If A die without having had a son, it is clear that the bequest to the *first* son of B (for no son after the first could ever take) is good; but if A have a son, that son becomes entitled absolutely, to the exclusion of the ulterior legatees; so that the limitation is *in effect* a bequest for life, and after his death to his first son absolutely, and if he have no son, to the first son of B; and being necessarily to take effect within the period of a life in being, is free from objection on the ground of remoteness."

Brett v. *Sawbridge* overruled by *Pelham* v. *Gregory*.

Mr. Jarman then states *Brett* v. *Sawbridge* (*e*), and points out that it is completely overruled by *Pelham* v. *Gregory* (*f*), and continues :

Such gifts may be made defeasible on a collateral event.

" It is scarcely necessary to observe, that a bequest of a term for years or other personal property in the language of an estate tail, may be made defeasible on a collateral event in the same manner as any other bequest carrying the whole interest. Thus, a legacy to A and the heirs of his body, and if he die without issue, *living B*, to C, is clearly a good executory gift to C (*g*).

Effect of Wills Act, on this rule of construction.

" And here it occurs to remark, that the enactment (*h*) restricting words denoting a failure of issue to a failure at the death (which we have seen prevents them having the effect of creating an estate tail by implication) will, when applied to

(*c*) First edition, vol. II, p. 504. The remarks on the effect of a bequest of personalty to a man and his issue, in raising a substitutional gift in favour of the issue (which preceded this section in Mr. Jarman's text), have been transferred to Chap. XXXVI, on Substitutional Gifts.

(*d*) *Hoare* v. *Byng*, 10 Cl. & Fin. 508; *Re Percy*, 24 Ch. D. 616.

(*e*) 3 Br. P. C. Toml. 141 [1736]. This case seems to have escaped the research of Mr. Fearne. See also *Backhouse* v. *Bellingham*, Pollex. 33; *Burgis* v. *Burgis*, 1 Mod. 115.

(*f*) 3 Br. P. C. Toml. 204. See also *Higgins* v. *Dowler*, 1 P. W. 98; *Stanley* v. *Leigh*, 2 P. W. 686; *Sabbarton* v. *Sabbarton*, Cas. t. Talb. 55, 245; *Gower* v. *Grosvenor*, 3 Barn. 54; *S. C.* cit. in *Tothill* v. *Pitt*, stated 1 Mad. at p. 503; *Phipps* v. *Lord Mulgrave*, 3 Ves. 613; *Boydell* v. *Golightly*, 14 Sim. 327; *Lewis* v. *Hopkins*, 3 Drew. 668, 6 H. L. C. 1013 (*Williams* v. *Lewis*).

(*g*) *Lamb* v. *Archer*, 1 Salk. 225.

(*h*) Wills Act, s. 29.

personalty, operate to restrain such words from passing the absolute interest, and also to bring within the compass of the rule against perpetuities the ulterior bequest depending on such contingency. If, therefore, a testator by a will made or republished since 1837, bequeaths personal estate to A, and in case he shall die without issue then to B, A will not take the absolute interest (as formerly), from the ulterior gift being void; but A will take a vested interest in the personalty so bequeathed, defeasible in favour of B on his (A's) leaving no issue at his death.

"Where the bequest is to A expressly for life, and in case of his dying without issue to B, the construction seems also free from doubt. A will according to the newly-enacted doctrine take a life interest in *any* event, and B will take the ulterior interest, only in the event of A's leaving no issue; in the converse event of A leaving issue, the ulterior interest will be undisposed of."

But if after the express gift for life the limitation over be in case of A dying without "heirs of his body," the enactment will not apply, and A will, it should seem, be absolutely entitled as before (*k*).

In *Re Price* (*l*), a man was, immediately before January 1, 1926, tenant in tail special of an undivided share in land; by virtue of section 35 of the Law of Property Act, 1925, he obtained a corresponding equitable interest in the proceeds of sale of the land. Clauson, J., held that he became entitled to an absolute interest. But it is submitted that the principle of the new legislation as to undivided shares in land is that corresponding equitable interests should be obtained in the proceeds of sale, and that the rule under which, before 1926, words conferring an estate tail in realty give an absolute interest in personalty should not have been applied.

Re Price.

(*k*) As in *Bodens* v. *Watson* (or *Lord Galway*), Amb. 398, 478, 2 Ed. 297; *Re Sallery*, 11 Ir. Ch. 236 (bequest of leaseholds to illegitimate child A, and if A should die without "heirs or issue," over).

(*l*) [1928] 1 Ch. 579.

CHAPTER XXXIV.

LIFE ESTATES AND INTERESTS.

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Life interests created by implication.

I.—How created.—An intention to give a person an estate for life in real property, or a life interest in personal property, is sometimes inferred from the terms of a will, although it contains no direct gift to that person. The creation of estates or interests by implication in this manner has already been considered (*a*). In this chapter it is proposed to consider what words of direct gift will confer a life interest.

Life interest in personal property.

A gift of chattels or other personal property to A, without more, gives A an absolute interest in the subject-matter of the gift, and it is necessary to use the words "for life" (*b*), or similar words, in order to cut down his enjoyment to a life interest, unless that intention appears from other parts of the will, as in the cases mentioned in the next paragraph. The proper way of creating a life interest in chattels personal is through the medium of a trust, as they are in theory essentially the subject of absolute ownership. Courts of Equity, however,

(*a*) Chap. XIX.

(*b*) In *Cooney* v. *Nicholls*, 7 L. R. Ir. 107, the testator gave to his wife "my house during her life, also the interest of my money in the Government funds, also my furniture": it was held that the restriction of a life interest did not extend to the funds or the furniture. In *Mannox* v. *Greener*, L. R. 14 Eq. 456, a gift of furniture conferred only a life interest, as it was followed by words ("to revert back to the estate") which could only have that effect.

protect the rights of executory legatees in remainder (*c*). Terms of years can be the subject of executory bequests (*d*).

Express words not required.

Although a gift of personal property to A, without more, *prima facie* confers an absolute interest, it may appear from the subsequent provisions of the will that the testator intended A to take only a life interest, if the words cannot otherwise have effect given them (*e*). For although a gift to A, followed by a gift to B contingently on A's death, is, in the absence of any controlling context, construed as an absolute gift to A if he survives the testator, so that the gift to B only takes effect in the event of A's death in the lifetime of the testator (*f*), yet if the gift is to A, and "after" or "on" or "at" his death to B, the *prima facie* construction is that the testator intends to give a life interest to A, with remainder to B (*g*). In such a case, if the intention is clear that A is only to have a life interest in any event, his interest is not re-converted into an absolute one by the failure of the gift to B (*h*), while if the intention is that A's absolute interest is not to be cut down unless the gift to B takes effect, then the failure of the gift to B gives A an absolute interest (*i*).

Such an expression as "in the event of A's death" is frequently used by laymen to mean "when A dies," and the result is that the technical rule of construction above stated—namely, that a gift to A, and "in the event" of his death to some one else, is only intended to provide for the case of A dying in the lifetime of the testator—often defeats the testator's intention, especially where the objects of the gift over are A's children. Thus in *Re Bourke's Trusts* (*k*) the testator gave his brother J. B. the sum of £2,500, to be invested by the executors, and the interest to be paid from time to time to J. B., without power of anticipation, and "in the event of the death of J. B."

Re Bourke's Trusts.

(*c*) *Re Swan*, [1915] 1 Ch. 829, *post*, p. 1429.

(*d*) See *Manning's Case*, 8 Rep. 94b, and other cases cited *post*, p. 1427. This question is discussed in Gray on Perp. (2nd ed.), pp. 119 *seq.*, 564 *seq.*

(*e*) See *Mannox* v. *Greener*, L. R. 14 Eq. 456; *Shields* v. *Shields*, [1910] 1 Ir. R. 116.

(*f*) *Post*, p. 2080. The exceptional cases of *Billings* v. *Sandom*, 1 Br. C. C. 393; *Nowlan* v. *Nelligan*, 1 Br. C. C. 489; and *Lord Douglas* v. *Chalmer*, 2 Ves. jun. 501, in each of which a gift to A, and in case of his death to B, was held to give A only a life interest, are there discussed.

(*g*) *Re Adams' Trusts*, 14 W. R. 18; *Waters* v. *Waters*, 26 L. J. Ch. 624; *Sherratt* v. *Bentley*, 2 My. & K. 149; *Re Russell*, 52 L. T. 559; *Harris* v. *Newton*, 46 L. J. Ch. 268; *Re Houghton*, 53 L. J. Ch. 1018; *Re Ibbetson*, 88 L. T. 461; *In b. Lupton*, [1905] P. 321. Many of these cases are discussed in Chap. XVII. Compare *Re Percy*, 24 Ch. D. 616, where there was a gift to A "afterwards to go to" B, and it was held that A took absolutely: *sed quære*: the decision clearly defeated the intention of the testator.

(*h*) *Joslin* v. *Hammond*, 3 My. & K. 110, stated *ante*, p. 542.

(*i*) *Crozier* v. *Crozier*, L. R. 15 Eq. 282.

(*k*) 27 L. R. Ir. 573.

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the interest was directed to be paid for the support of his children until they attained twenty-five, when each was to receive an equal part of the £2,500; there was a gift over in the event of J. B. dying "without heirs" or of the children dying "without heirs" before the age of twenty-five. Nevertheless, it was held that J. B. took absolutely.

Gift so long as A remains unmarried.

A gift to a woman during widowhood is equivalent to a gift for life or until the woman marries again (*l*). A gift to a woman "so long as she remains unmarried" has been held on the authority of *Rishton* v. *Cobb* (*m*) to give her an absolute interest (*n*); but the principle of this decision is difficult to discover. It is clear that a gift to a woman until she shall marry, with a gift over on her marriage gives her an interest during life, or until she marries.

Gift to parent and children.

A gift for the benefit of A and his children may be so expressed as to give A an estate for life with a power of appointment among the children, and an implied gift to them in default of appointment (*p*).

Gift of "what remains," etc.

In several cases a gift to A, with a direction that at A's death "the residue" or "whatever remains" of the property shall go to B, has been held to give A a life interest only (*q*), while in other cases somewhat similar words have been held to give A an absolute interest (*r*), or a life interest with a power of appointment or disposition (*s*). In one case, where a testator gave his personal estate to his wife, and "the residue" of his personal estate in trust for his children, it was held upon a consideration of the whole will (under which the wife took an estate for life in real property) that the wife only took a life interest in the personalty (*t*). In *Re Russell* (*u*), there was a bequest of £1,000 to A, "the same to become the property (at

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(*l*) *Re Mason*, [1910] 1 Ch. 695. See *post*, p. 1514.

(*m*) 5 Myl. & Cr. 145. See *ante*, p. 1110.

(*n*) *Re Howard*, [1901] 1 Ch. 412. See *Re Barklie*, [1917] 1 Ir. R. 1.

(*p*) See *Bradshaw* v. *Bradshaw*, [1908] 1 Ir. R. 288.

(*q*) *Constable* v. *Bull*, 3 De G. & S. 411; *Re Brook's Will*, 2 Dr. & Sm. 362, 13 W. R. 573; *Re Adams' Trust*, 14 W. R. 18; *Bibbens* v. *Potter*, 10 Ch. D. 733; *Re Sheldon and Kemble*, 53 L. T. 527; *In b. Lupton*, [1905] P. 321. The cases in which a gift over of "what remains" has been held void for uncertainty are considered *ante*, pp. 437 *seq.*

(*r*) See *Perry* v. *Merritt*, L. R. 18 Eq. 152; *Parnell* v. *Boyd*, [1896] 2 Ir. R. 571; *Re Jones*, [1898] 1 Ch. 438, and the cases cited in Chaps. XIV and XVII. A direction that a legacy bequeathed to A shall be invested, and that he be paid only the dividends arising therefrom, does not prevent A from taking the legacy absolutely: *Richards* v. *Richards*, 9 Price, 219.

(*s*) See *Re Stringer's Estate*, 6 Ch. D. 1; *Re Sanford*, [1901] 1 Ch. 939; *Roberts* v. *Thorp*, 56 Sol. J. 13; and other cases considered *ante*, p. 765.

(*t*) *Re Bagshaw's Trusts*, 46 L. J. Ch. 567. Compare *Hare* v. *Westropp*, 9 W. R. 689.

(*u*) 52 L. T. 559. See also *Re Taylor*, [1914] 1 Ir. R. 111.

her death) of her heirs"; it was held that A took a life interest only. CHAP. XXXIV.

Life interest, where enlarged.

An express gift of personalty for life will not easily be enlarged by the context into an absolute interest (*x*), but instances of this sometimes occur (*y*). It is hardly necessary to say that as the rule in *Shelley's Case* (Chapter XLVIII) did not apply to personal estate, a bequest to A for life and after his death to his heirs does not give A the absolute interest, even if it is combined with a devise of realty, in which, before 1926, A took the fee (*z*).

Consumable things.

The rule that a gift of consumable things to A for life, with remainder to B, *prima facie* vests the absolute interest in A, is discussed in Chapter XXXVIII.

Effect of codicil.

Where an absolute interest (or an interest greater than a life estate) is given to a person by a will, it can, of course, be cut down to a life interest (or other interest) by a codicil, if the intention is clear (*a*).

Life estate in land.

Before the Wills Act, a devise of land to A gave A an estate for life, in the absence of any contrary indications in the will. Since the Wills Act the presumption is the other way, and *prima facie* a devise to A gives A an estate in fee simple, or other the whole estate or interest of the testator; but the effect of section 28 of the Act is only to raise a presumption, and the intention that A should take only a life estate may be shown in various ways (*b*). Thus a devise to A, followed by a direction that "at" or "on" or "after" A's death the property shall go to B, will as a general rule give A a life estate only (*c*). In *Quarm* v. *Quarm* (*d*), the testator devised a freehold estate to seven persons as joint tenants and not as tenants in common, and to the survivor of them, his or her heirs and assigns for ever: it was held that the devisees did not take a joint estate in fee simple, but that they were joint tenants for life with a contingent remainder in fee simple to the survivor, because the

(*x*) *Scawin* v. *Watson*, 10 Bea. 200; *Re Graham's Will*, 33 Bea. 479; *Re Holden*, 59 L. T. 358; *Re Dixon*, 56 Sol. J. 445. In *M'Culloch* v. *M'Culloch*, 3 Giff. 606, however, words which were apparently intended to give an interest less than a life interest, namely, an interest *durante viduitate*, were held to confer an absolute interest, subject to a gift over in the event of the legatee marrying again.

(*y*) *Nowlan* v. *Walsh*, 4 De G. & S. 584; and the cases cited *ante*, p. 1156.

(*z*) *Herrick* v. *Franklin*, L. R. 6 Eq. 593.

(*a*) See Chap. VII.

(*b*) As to the construction of an express "cutting down clause" in a will devising land in strict settlement, see *Villar* v. *Gilbey*, [1906] 1 Ch. 583, [1907] A. C. 139.

(*c*) *Sherratt* v. *Bentley*, 2 My. & K. 149; *Gravenor* v. *Watkins*, L. R. 6 C. P. 500. *Re Taylor*, [1914] 1 Ir. R. 111 (renewable leasehold).

(*d*) [1892] 1 Q. B. 184.

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former contention would render the words "to the survivor, &c.," useless.

Life estate, when enlarged.

The general principle that an express gift for life of personal property is not easily enlarged into an absolute interest, seems also to apply to real estate (*e*), but its operation is interfered with by some special rules applying to gifts of real estate. Thus the effect of the rule in *Shelley's Case* may be to enlarge an express gift for life into an estate of inheritance (*f*), and under the doctrine of *cy-près* an estate for life may be enlarged into an estate tail (*g*). So an express gift for life may be enlarged into an estate tail by subsequent words, if that construction appears best to effectuate the intention of the testator (*h*). But if the intention of the testator to give an estate for life only is clear and can be carried into effect, the estate will not be enlarged in order to carry out a supposed "general intention" of the testator (*i*).

In *Foster* v. *Lord Romney* (*k*), where the will was before the Wills Act, a testator devised land to A for life, and after the decease of A to all and every the son and sons of A severally and successively one after another in priority of birth, and for default of such issue over. It was held that the sons took life estates. This decision has been twice followed in Ireland (*l*), but no similar case appears to be reported where the will was made after the Wills Act came into operation.

A gift of the "use and occupation" of property has never been held to mean an unlimited gift (*m*).

Interests created *de novo*.

The rule that a devise without words of limitation (since the Wills Act) passes the fee, does not apply to interests created *de novo* (*n*).

Gift to several persons during their lives.

Whether the property is real or personal, a gift of income "for the life of A and B to be equally divided between them,"

(*e*) *See Moore* v. *Ffolliott*, 11 L. R. Ir. 206; 19 L. R. Ir. 499, where the testator devised land to three persons expressly for life and then referred to his having left it to them as his "co-heirs."

(*f*) Chap. XLVIII. The rule is now abolished.

(*g*) *Ante*, p. 258.

(*h*) *Roe* v. *Grew*, 2 Wils. 322, and other cases referred to *post*, pp. 1896 *seq.* The rule that a gift over in default of issue of A following a gift to A for life, had the effect of enlarging A's estate for life to an estate tail, does not apply to wills governed by the Wills Act.

(*i*) *Kershaw* v. *Kershaw*, 3 Ell. & B. 845; *Forsbrook* v. *Forsbrook*, L. R. 5 Ch. 93; *Hampton* v. *Holman*, 5 Ch. D. 183.

(*k*) 11 East, 594.

(*l*) *Bevan* v. *White*, 7 Ir. Eq. R. 473 (the date of the will is not given, but it seems to have been before the Wills Act); *Palmer* v. *Palmer*, 18 L. R. Ir. 192 (will before Wills Act). Compare *Re Buckton*, [1907] 2 Ch. 406.

(*m*) *Re Coward*, 60 L. T. 1. See *per* Lord Watson, at p. 3.

(*n*) See *ante*, p. 1116, and *post*, p. 1782.

continues only during their joint lives (*o*). But a gift to A and B during their natural lives is a gift to A and B, and the survivor of them during their lives, and if A dies in the testator's lifetime, the gift to B does not lapse (*p*).

If property is given to A, B, and C "during their respective lives, and subject thereto in trust for the respective children of the said A, B, and C as tenants in common," A, B, and C are tenants in common, and the children take *per stirpes* (*q*).

A gift to A and B during their joint lives, followed by a gift over on the death of both, may operate as a gift by implication to the survivor for his life (*r*).

Gift to A during life of B and C.

A limitation of real estate to A during the life of B and C gives A an estate during the lives of B and C and the survivor; but a limitation for 100 years if A and B shall so long live is determined by the death of either, because this is a collateral condition; probably these rules also apply to personal estate (*s*).

A devise to A for his life and the life of his heir gives A an estate during his life and that of the person who at his death shall be his heir (*t*).

As to gifts of annuities to several persons for their lives, see Chapter XXXI.

Estates *pur auter vie*.

II.—Estates pur auter (*u*) **Vie.**—An estate *pur auter vie* (that is for the life of another man) may be created by a devise of lands or tenements to A during the life of some other person or persons (*x*).

Re Ashforth.

In *Re Ashforth* (*y*) the testatrix devised real estate to trustees and their heirs upon trust to pay the rents to A, B, and C, and

(*o*) *Grant* v. *Winbolt*, 23 L. J. Ch. 282; and see *Re Drakeley's Estate*, 19 B. 395.

(*p*) *Alder* v. *Lawless*, 32 Bea. 72; and see *Neighbour* v. *Thurlow*, 28 Bea. 33. So a gift to A and B "during their joint and natural lives" means during their joint lives and the life of each of them: *Smith* v. *Oakes*, 14 Sim. 122. This is the construction even where A and B are husband and wife: *Moffatt* v. *Burnie*, 18 Bea. 211.

(*q*) *Sutcliffe* v. *Howard*, 38 L. J. Ch. 472.

(*r*) See *Townley* v. *Bolton*, 1 My. & K. 148; *Moffatt* v. *Burnie*, 18 Bea. 211; *Re Buller*, 74 L. T. 406, and the other cases cited *ante*, p. 618.

(*s*) *Day* v. *Day*, Kay, 703; *Brudnel's Case*, 5 Rep. 9.

(*t*) *Re Amos*, [1891] 3 Ch. 159.

(*u*) This is the spelling of Littleton, Coke and Blackstone, see *ante*, p. 67.

(*x*) Litt. sec. 56. The old doctrine was that if a rent-charge was limited to A during the life of B, and A died during B's lifetime, the rent-charge determined: *Smartle* v. *Penhallow*, 1 Salk. 188; *Holden* v. *Smallbrooke*, Vaughan, at p. 199. By a strained interpretation of the Statute of Frauds, it was held that the 15th section altered the law in this respect; such a rent-charge, therefore, does not determine by the death of the grantee, but passes to his personal representative under section 6 of the Wills Act. See *Bearpark* v. *Hutchinson*, 7 Bing. 178.

(*y*) [1905] 1 Ch. 535. The decision itself is correct, for the ultimate limitation was an executory devise, and therefore void for remoteness. But both the grounds given for the decision are, it is submitted, erroneous. See *supra*, p. 347.

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the survivors and survivor of them during their lives and the life of the survivor, and after the decease of such survivor to pay and divide the rents equally amongst all such of the children (born in her lifetime or within 21 years of her death) of A, B, and C as should be living at the date of the division, and after the death of all such children except one the testatrix devised the real estate to such surviving child in tail : Farwell, J., held that the trustees took an estate *pur auter vie*. But there does not seem to be any authority for this decision. It is assumed by all text writers of weight that in creating an estate *pur auter vie*, the lives during which the estate is to have continuance must be in existence when the limitation is made (*z*).

An estate *pur auter vie* is realty (*a*).

Deposition and devolution of estates *pur auter vie*

The provisions of the Wills Act with regard to the devisability of existing estates *pur auter vie*, and their devolution on intestacy, have been already referred to (*b*).

It seems that where a tenant *pur auter vie* dies intestate, a case of general occupancy may still occur, during the interval before administration is granted. But the view generally held is that no practical difficulty is likely to arise in such a case, because the title of the administrator relates back to the death, and the general occupant would therefore not profit by his intrusion (*c*).

Equitable estates *p. a. v.*

It has been held that the 6th section of the Wills Act applies to equitable estates *pur auter vie* (*d*); consequently if there is no special occupant in equity of such an estate, and the tenant dies intestate, it passes to his personal representatives (*e*); and there can be no general occupancy during the interval before administration is granted (*f*).

The same rules also apply to the case of a legal estate *pur*

(*z*) See an article in the Solicitors' Journal, vol. 49, p. 793, referred to in Gray on Perpetuities, addenda.

(*a*) *Ante*, p. 3.

(*b*) *Ante*, p. 67. Before the Wills Act it was held that if an estate *pur auter vie*, limited to the heirs of the tenant, was devised by him without words of limitation, the devisee took only a life-estate : *Doe* d. *Jeff* v. *Robinson*, 8 B. & Cr. 296. Mr. Hayes has commented on the "singular inaccuracy, as well as inconsistency," with which this decision "strained" the rule requiring words of inheritance, or their equivalent, in the case of a devise of the fee in lands (Conv. i. 352, ii. 83). The decision was, however, approved by Lord St. Leonards : *Allen* v. *Allen*, 2 Dr. & W. p. 327; *Crozier* v. *Crozier*, 3 Dr. & W. p. 382.

(*c*) See 1 Preston, Conv. 44; *Re Inman*, *infra*, note (*f*) : *per* Stirling, L.J., in *In b. Pryse*, [1904] P. at p. 305.

(*d*) Since 1925 all estates *pur auter vie* are equitable.

(*e*) *Re Michell*, [1892] 2 Ch. 87; *Mountcashell* v. *More-Smyth*, [1896] A. C. 158; *Re Sheppard*, [1897] 2 Ch. 67.

(*f*) *Re Inman*, [1903] 1 Ch. 241.

auter vie being devised to trustees upon trust for one or more persons (*g*).

In *Northern* v. *Carnegie* (*h*) incorporeal hereditaments were granted to C. his heirs and assigns, *pur auter vie*. C. conveyed them to trustees their executors administrators and assigns upon trusts which failed as to one third part. It was held that there was a resulting trust of the beneficial interest to the settlor's co-heiresses.

Special occupant.

It has been already mentioned that the question whether there is a special occupant, in the event of a tenant *pur auter vie* dying intestate, is regulated by the terms of the last instrument under which he claims, each tenant having the right of altering the mode in which the estate shall devolve (*i*). But a power of appointment over an estate *pur auter vie* may be so restricted as not to enable the donee to alter the devolution of the estate (*k*). If no special occupant is designated (*l*), and the tenant dies intestate, the estate passes to his personal representative under section 6 of the Wills Act; the same result follows if the estate is given to A and his heirs, and A dies intestate without an heir (*m*).

If an estate *pur auter vie* is given to A and his heirs, and A devises it to B without words of limitation, and A dies intestate, the estate passes to his personal representative (*n*).

Incorporeal hereditaments.

There may be a special occupant of an incorporeal hereditament (*o*).

Copyholds.

There could also be a special occupant of copyholds (*p*).

(*g*) *Reynolds* v. *Wright*, 2 D. F. & J. 590; *Croker* v. *Brady*, 4 L. R. Ir. 653.

(*h*) 4 Dr. 587. The decision is criticised by Mr. Theobald (Wills, 8th ed., p. 591). See *Re Murray*, [1916] 1 Ir. R. 302, and *Mountcashell* v. *More-Smyth*, [1896] A. C. 158 at p. 165.

(*i*) *Ante*, p. 67, and the cases cited *supra*, n. (*e*).

(*k*) *Whitehead* v. *Morton*, 19 L. R. Ir. 435.

(*l*) It seems that the heir can be made a special occupant by untechnical words in a devise; see *Philpotts* v. *James*, 3 Doug. 425, as explained in *Re Sheppard*, [1897] 2 Ch. at p. 70, and *Re Inman*, [1903] 1 Ch. at p. 247: *sed quære*; and see *per* Lord Davey, [1896] A. C. at p. 165. If land is devised to A, his heirs, executors, administrators and assigns during the life of B, and A dies intestate, his heir is entitled as special occupant: *Carpenter* v. *Dunsmure*, 3 E. & B. 918.

(*m*) *Ante*, p. 67, n. (*q*); *Plunket* v. *Reilly*, 2 Ir. Ch. 585.

(*n*) *Re Michell*, [1892] 2 Ch. 87, where the earlier authorities are referred to; *Mountcashell* v. *More-Smyth*, [1896] A. C. 158; *Re Inman*, [1903] 1 Ch. 241, following *Doe* v. *Lewis*, 9 M. & W. 662, and dissenting from *Blake* v. *Jones*, 1 Hud. & Br. 227, n.; *Wall* v. *Byrne*, 2 J. & L. 118, and *Re King*, [1899] 1 Ir. R. 30.

(*o*) *Northern* v. *Carnegie*, 4 Dr. 587. See *Plunket* v. *Reilly*, 2 Ir. Ch. 585. There cannot be a general occupant of an incorporeal hereditament. See *Hassell* v. *Gowthwaite*, Willes, 500, and the authorities cited in *Bearpark* v. *Hutchinson*, 7 Bing. 178.

(*p*) *Doe* v. *Martin*, 2 W. Bl. 1148. There cannot be a general occupancy of copyholds (*Zouch* d. *Forse* v. *Forse*, 7 East, 186) without a custom to that effect (*Doe* v. *Goddard*, 1 B. & Cr. 522; Scriven, 24).

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Quasi-entail.

A testator entitled to an estate *pur auter vie* can devise it in quasi-entail, by any words which would create an estate tail in lands belonging to him in fee simple (*q*). A quasi-entail can be barred by the quasi tenant in tail in possession by act *inter vivos* (*r*), but, according to the opinion of Mr. Jarman (*s*) and Mr. Hayes (*t*), not by testamentary disposition.

Remainders and executory interests.

An existing estate *pur auter vie* can also be devised to A for life, with remainder to B, or it can be devised to A absolutely, subject to an executory gift over. Such a remainder or executory interest is a mere expectancy, and not an estate, but it cannot be destroyed by A (*u*). So a contingent remainder in an estate *pur auter vie* was not liable to be destroyed by the determination of the particular estate (*x*).

III.—Tenant for Life and Remainder-man.—The general law of tenant for life and remainder-man is outside the scope of this treatise, and the reader is referred to recognised text books for the discussion of the law relating to waste, timber (*y*), mines (*z*), emblements, fixtures, improvements, and the incidence of estate duty. In the following pages, however, the law is stated in relation to certain matters which not infrequently arise where life estates or interests are given by will.

Tenant for life must pay outgoings.

(1) CHARGES AND OUTGOINGS.—In the absence of specific directions by the testator, the tenant for life must pay the usual outgoings, such as land tax, tithe rent-charge or any other rent-charges, and the ground rent (if the property is leasehold) and must (to the extent of the rents and profits but not further) pay the interest on mortgages or incumbrances subject to which the

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(*q*) *Re M'Neale*, 7 Ir. Ch. 388. As to quasi-entails, see Hargrave's note to Co. Litt. 20 a; Hayes, Conv. i, 197. See *Re Mahon's Estate*, 1 Ir. C. L. 567; *Re Whitsett's Estate*, *ib.* 632; *Allen* v. *Allen*, 2 Dr. & W. 307; *Betty* v. *Humphreys*, Ir. R., 9 Eq. 332.

(*r*) See authorities cited in notes (*q*) and (*u*). A quasi tenant in tail in remainder cannot bar the entail without the concurrence of the tenant for life: *ante*, p. 68, n. (*s*).

(*s*) *Ante*, p. 68. But see Theobald on Wills (8th ed.), p. 589. The analogy between an estate tail and a quasi-entail seems to support the view held by Mr. Jarman and Mr. Hayes.

(*t*) Conv. i, 198.

(*u*) The principal authorities are cited in *Pickersgill* v. *Grey*, 30 Bea. 352; *Re Barber's Settled Estates*, 18 Ch. D. 624.

(*x*) *Ferguson* v. *Ferguson*, 17 L. R. Ir. 552.

(*y*) See *Dashwood* v. *Magniac*, [1891] 3 Ch. 306. *Re Trevor-Batye's Settlement*, [1912] 2 Ch. 339. As to abnormal cuttings see *Re Terry*, 119 L. T. 596, and *Re Harrison's Trusts*, 28 Ch. D. 220 (larch trees blown down). As to trees felled for military purposes, see *Gage* v. *Pigott*, [1919] 1 Ir. R. 23.

(*z*) Some of the rules of law with regard to the profits of mines are referred to, *post*, p. 1209.

estate has been devised to him (*a*). The cost of surveys and notices requiring tenants to repair have been held not to be "outgoings," and directed to be raised by mortgage upon which the tenant for life would keep down the interest (*b*). Deductions under the provisions of the Licensing Act, 1904, are borne by the tenant for life (*c*).

Notices.

The question how annuities are apportionable as between tenant for life and remainder-man is discussed in sub-section 9, *post*, p. 1194.

Annuities.

A tenant for life cannot charge the expenses of improvements upon the property (*d*), except under the Settled Land Acts (*e*), but the Court has jurisdiction to permit him to charge moneys expended for salvage (*f*), or in some cases for the benefit of the trust estate (*g*).

Cost of improvements.

Salvage.

As to fire insurance, see sections 19 and 20 of the Trustee Act, 1925, and *Re McEacharn* (*h*).

Fire insurance.

Expenses which by statute are made a charge upon the property, such as road-making expenses under the Public Health Act, 1875, are, in the absence of special directions in the will, borne by capital (*i*).

Statutory charges.

But where the property, consisting of houses or other buildings, is given to A and his assigns for life, he or they committing no manner of waste, and keeping the property in good and tenantable repair, it seems that the tenant for life must rebuild the houses if they are accidentally destroyed by fire (*k*).

Miscellaneous liabilities.

(*a*) But this only extends to the interest on charges accrued due during his life estate: *Kirwan* v. *Kennedy*, Ir. R. Eq. 499; and if a tenant for life pays off charges, the amount so paid may be set off against arrears of interest or an incumbrance left unpaid by the tenant for life: *Howlin* v. *Sheppard*, Ir. R. 6 Eq. 497; but a tenant for life, buying up an incumbrance, can, it seems, only have credit against the estate for the amount he actually paid: *Hill* v. *Browne*, Dru. t. Sug. 426.

(*b*) *Re McClure*, 95 L. T. 704. *Re Tubbs*, [1915] 2 Ch. 137.

(*c*) *Re Smith*, [1906] 1 Ch. 799.

(*d*) *Nairn* v. *Marjoribanks*, 3 Russ. 582; *Re Leigh's Estate*, L. R. 6 Ch. 887; *Bostock* v. *Blakeney*, 2 B. C. C. 653.

(*e*) For instances where this can and cannot be done, see *Clarke* v. *Thornton*, 35 Ch. D. 307; *Re Lord Stamford's S. E.* 43 Ch. D. 84; *Re Thomas*, [1900] 1 Ch. 319; *Re Partington*, [1902] 1 Ch. 711. The Settled Land Act, 1925, extends the improvements allowed. See also *Re Hanbury's S. E.* (*No.* 1), [1913] 1 Ch. 50; *Re Lord Sherborne's S. E.*, [1929] 1 Ch. 345.

(*f*) *Hibbert* v. *Cooke*, 1 S. & St. 552; *Dent* v. *Dent*, 30 Bea. 363; *Dixon* v. *Peacock*, 3 Dr. 288; *Ferguson* v. *Ferguson*, 17 L. R. Ir. 552; or to pay them out of capital moneys, *Re Hawker's Settled Estate*, 76 L. T. 286.

(*g*) *Conway* v. *Fenton*, 40 Ch. D. 512 (settlement). In *Lord De Tabley*, 75 L. T. 328, North, J., said that this case did not establish any rule. See *Gilliland* v. *Crawford*, Ir. R. 4 Eq. 35.

(*h*) 103 L. T. 900.

(*i*) *Re Smith's S. E.*, [1901] 1 Ch. 689; *Re Pizzi*, [1907] 1 Ch. 67 (Private Street Works Act, 1891); *Re Barney*, [1894] 3 Ch. 562 (Drainage: Public Health Act, 1848); *Re Farnham's Settlement*, [1904] 2 Ch. 561 (Public Health (London) Act, 1891).

(*k*) *Re Skingley*, 3 Mac. & G. 221.

The tenant for life has to pay any moneys due to an outgoing tenant by the terms of the tenant's lease (*l*).

Where a testator gives successive interests, and adds to them a direction that the person who takes shall do a particular thing, such as repairing buildings, discharging debts, or paying an annuity, and the devisee accepts the estate, there is a personal liability, capable of being enforced in equity, to perform the directions imposed by the testator (*m*).

Repairs.

By virtue of section 28 of the Law of Property Act, 1925, trustees for sale have a power of repair, and these repairs may be paid out of income (*n*). As a condition to keep in good repair "reasonable wear and tear excepted," see *Haskell* v. *Marlow* (*o*).

Income applied as capital.

In *Re Marquess of Bute* (*p*), the testator devised his estates to trustees for 1500 years upon trust, "by mortgaging or otherwise disposing of the term . . . or by with and out of the rents, issues and profits," or by one or all of those ways, to raise moneys sufficient for the purposes mentioned in the will, which involved capital expenditure. The trustees expended large sums, chiefly out of income. It was held that this was a charge on the corpus of the estates comprised in the term, and that the tenant for life was only liable for the interest. Bacon, V.-C., followed the general principle laid down in *Playters* v. *Abbott* (*q*), *Jones* v. *Jones* (*r*) and *Marker* v. *Kekewich* (*s*).

Moneys raisable out of leaseholds.

On the same principle, if settled freeholds and leaseholds are vested in trustees upon trust to raise moneys in such way as the trustees think fit, and they postpone the raising for a considerable period, so that the value of the leaseholds is diminished, the Court has power to adjust the burden of the charge between the tenant for life and the remainder-man (*t*).

Charges directed to be paid out of income.

A testator may, of course, direct the income of property to be employed in paying off incumbrances, so that, until they are discharged, the tenant for life does not receive the income. But such a scheme is necessarily subservient to the right of the incumbrancers to get paid in a different way, and if they are paid in a different way (*e.g.*, out of the proceeds of the sale of

(*l*) *Mansel* v. *Norton*, 22 Ch. D. 769.

(*m*) *Re Williams*, 54 L. T. 105; *Re Bradbrook*, 56 L. T. 106 ("good and tenantable repair"); *Re Field*, [1925] 1 Ch. 636; *Jay* v. *Jay*, [1924] 1 K. B. 827.

(*n*) *Re Gray*, [1927] 1 Ch. 242, distinguished in *Re Robins*, [1928] 1 Ch. 721; *Re Whitaker*, [1929] 1 Ch. 663; *Re Smith*, [1929] W. N. 173; *Re Conquest*, [1929] 2 Ch. 353.

(*o*) [1928] 2 K. B. 45.

(*p*) 27 Ch. D. 196.

(*q*) 2 My. & K. 97, cited *post*, p. 1963.

(*r*) 5 Ha. 440, cited *post*, 1178, n. (*i*).

(*s*) 8 Ha. 291.

(*t*) *Blake* v. *O'Reilly*, [1895] 1 Ir. R. 479.

part of the property), there is then nothing to prevent the tenant for life from receiving the income; the remainder-man has no equity to have the expenditure recouped out of the future income (*u*).

Leaseholds.

(2) LEASEHOLDS.—Where leaseholds are bequeathed, questions may arise between the specific legatees of the leaseholds and the testator's general estate; these are discussed in Chapter LIV; if leaseholds are bequeathed in succession a different set of questions arise between the tenant for life and the persons entitled in remainder. These questions will now be briefly considered.

Where leaseholds are bequeathed in succession, the question arises who is to pay for the rent due at the testator's death, and for any existing dilapidations or repairs which must be done under the covenants in the lease. These are debts of the testator's estate (*x*), and should therefore be paid by the executors and paid for out of corpus, and under special circumstances rent accrued due after the testator's death may be payable out of corpus (*y*).

Where leaseholds are vested in trustees for a tenant for life and remainder-man, it is their duty to perform the covenants of the lease, and they are entitled to have the rents applied in keeping the houses in a proper state of repair (*z*).

On the other hand, an equitable tenant for life of leaseholds is bound during the continuance of his interest as between himself and his testator's estate, to perform the continuing obligations under the lease, on the principle that a tenant for life, whether legal or equitable, is within the maxim "*qui sentit commodum sentire debit et onus*" (*a*). Where expenses are

(*u*) *Tewart* v. *Lawson*, L. R. 18 Eq. 490; *Norton* v. *Johnstone*, 30 Ch. D. 649; *Re Green*, 40 Ch. D. 610; where the debts were paid out of corpus by the executrix, who was also the tenant for life. See *Biggar* v. *Eastwood*, 19 L. R. Ir. 49, where the terms of the will were special, and the income was held to be applicable for purposes of recoupment. And see *Re Webster*, 54 Sol. J. 602, where the authorities are discussed.

(*x*) *Re Betty*, [1899] 1 Ch. 821; *Re Courtier*, 34 Ch. D. 136; *Pinfold* v. *Shillingford*, 46 L. J. Ch. 491; *Brereton* v. *Day*, [1895] 1 Ir. R. 518; *Re Smith*, 84 L. T. 835. See *Re Hanbury*, 101 L. T. 32; *Re Sutton*, 56 Sol. J. 650.

(*y*) As in *Allen* v. *Embleton*, 4 Dr. 226, where the testator was not at the time of his death the owner of the leasehold; *Re Owen*, [1912] 1 Ch. 519 (leasehold sub-let at a loss).

(*z*) *Re Fowler*, 16 Ch. D. 723.

(*a*) *Re Betty*, *supra*; *Re Baring*, [1893] 1 Ch. 61; *Kingham* v. *Kingham*, [1897] 1 Ir. R. 170; *Re Redding*, [1897] 1 Ch. 876; *Re Gjers*, [1899] 2 Ch. 54; *Re Waldron and Bogue's Contract*, [1904] 1 Ir. R. 240. See also *Marsh* v. *Wells*, 2 S. & St. 87. *Re Tomlinson*, [1898] 1 Ch. 232, was based on a mistaken view of the decision of the Court of Appeal in *Re Courtier*, 34 Ch. D. 136.

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incurred to meet the requirements of a local authority, it is necessary to consider the terms of the statute and the terms of the lease (*b*).

Sale of leaseholds under statutory power, etc.

If leaseholds, specifically bequeathed, are sold compulsorily, or under the Settled Land Acts, or by order of the Court, the proceeds ought, as a general principle, to be invested and applied in such a manner as to give the tenant for life and remainder-man the same benefit as they would have derived from the lease, or as near thereto as may be (*c*). This means that the tenant for life is entitled to have his income made up out of corpus (*d*). In *Askew* v. *Woodhead* (*e*), the purchase-money was sufficient to provide an annuity for the unexpired term of the lease of much larger amount than the rent, and it was held by the Court of Appeal that the tenant for life was entitled to receive this annuity.

If wasting property (as leaseholds) bequeathed in specie is converted into a permanent fund, with the consent of the tenant for life, and he survives the period when the leaseholds would have expired, the capital of the permanent fund will become the absolute property of the tenant for life (*f*). But a lease in which the tenant for life is *cestui que vie*, would practically not become his absolute property immediately, at least not so as to enable him to assign or surrender it; for the chance of renewal for the benefit of the remainder-man would be thereby lost, and it seems that on this account a sale or surrender by him would be set aside (*g*).

Renewal of leaseholds.

(3) COPYHOLDS AND RENEWABLE LEASEHOLDS (*h*).—Where copyholds or renewable leaseholds were settled, the costs of fines were apportioned between the tenant for life and remainder-man, on the principle of *Nightingale* v. *Lawson* (*i*), that is, in propor-

(*b*) *Re Lever*, [1897] 1 Ch. 32; *Re Crawley*, 28 Ch. D. 431. See also *Re Copland's Settlement*, [1900] 1 Ch. 326 (cost of complying with sanitary notice and dangerous structure notice).

(*c*) Lands Clauses Act, 1845, s. 74; Settled Land Act, 1925, s. 79.

(*d*) *Jeffreys* v. *Conner*, 28 Bea. 328; *Re Phillips' Trusts*, L. R. 6 Eq. 250; *Re Pfleger*, *ib.* 426, and cases there cited.

(*e*) 14 Ch. D. 27; followed in *Re Lingard*, [1908] W. N. 107; *Re Simpson*, [1913] 1 Ch. 277.

(*f*) *Phillips* v. *Sarjent*, 7 Hare, 33; *Re Beaufoy's Estate*, 1 Sm. & Gif. 20.

(*g*) *Harvey* v. *Harvey*, 5 Bea. 134, where, however, under the peculiar circumstances, the sale was not held bad.

(*h*) Copyholds and renewable leaseholds were abolished on January 1, 1926. Law of Property Act, 1925, s. 128 and s. 145.

(*i*) 1 B. C. C. 440. See *Re Bullock's Estate*, 91 L. T. 650; *Carter* v. *Sebright*, 26 Bea. 374; *Buckeridge* v. *Ingram*, 2 Ves. jun. 652; *Playters* v. *Abbott*, 2 My. & K. 97; *Jones* v. *Jones*, 5 Ha. 440; *Giddings* v. *Giddings*, 3 Russ. 241; *Bradford* v. *Brownjohn*, L. R., 3 Ch. 711; *Isaac* v. *Wall*, 6 Ch. D. 706; *Reeves* v. *Creswick*, 3 Y. & C. Ex. 715. See generally as to the rights of tenant for life and remainder-man with respect to renewable leaseholds, Vaizey on Settlements, 1313 *seq.*

tion to their actual enjoyment. In the case of leaseholds, a tenant for life is not bound to renew, unless from the terms of the will or the nature and formation of the gift to him, an intention that he should be bound to renew can be implied (*k*); if he does renew he renews for the benefit of the estate (*l*), and this doctrine applies also to the purchase of the reversion by the tenant for life (*m*), if the lease is renewable by contract or custom (*n*). The testator may, of course, throw the cost of renewal on the tenant for life or the estate (*o*).

A direction to raise and pay the fines out of the rents and profits is not enough to make the fines payable by the tenant for life (*p*); but where the first trust is to pay the fines out of the rents and profits this appears to be a sufficient direction to make the fines payable solely by the tenant for life (*q*).

Sale of renewable leaseholds.

Where leaseholds are renewable by usage, but not by law (as sometimes happens in the case of church lands) a testator may, in specifically bequeathing them upon trust for persons in succession, make provision for creating a renewal fund out of the rents, and thus show an intention to treat the property as permanent; in such a case, if the property is compulsorily sold under the provisions of the Lands Clauses Acts, the general rule above stated (*r*) does not apply, and the tenant for life is not entitled to have his income made up out of capital (*s*). So if renewal is refused by the lessor, the unexpired leasehold ought to be converted into a permanent fund; this, together with the renewal fund, if any, is corpus, to the income of which the tenant for life is entitled (*t*).

(*k*) *White* v. *White*, 9 Ves. 554; *Capel* v. *Wood*, 4 Russ. 500; *Jones* v. *Jones*, 5 Hare, 440; *O'Ferrall* v. *O'Ferrall*, Ll. & G. t. P. 79. In *Pinfold* v. *Shillingford*, 25 W. R. 425, renewal was impossible by the act of the testator.

(*l*) *Bowles* v. *Stewart*, 1 Sch. & L. 209; *Owen* v. *Williams*, Ambler, 734.

(*m*) *Phillips* v. *Phillips*, 29 Ch. D. 673.

(*n*) *Longton* v. *Wilsby*, 76 L. T. 770. See the note to *Keech* v. *Sandford* in White and Tudor, L. C. (9th ed.), vol. II, p. 648.

(*o*) *Stone* v. *Theed*, 2 B. C. C. 243; *Trench* v. *St. George*, 1 Dr. & Wal. 417.

(*p*) *Allan* v. *Backhouse*, 2 V. & B. 65; and see *Greenwood* v. *Evans*, 4 Bea. 44 (or by mortgage); *Ainslie* v. *Harcourt*, 28 Bea. 313.

(*q*) *Shaftesbury* v. *Marlborough*, 2 M. & K. 111. See also *Blake* v. *Peters*, 1 D. J. & S. 345; *Solley* v. *Wood*, 29 Bea. 482 (settlement); *Montford* v. *Cadogan*, 17 Ves. 485, 19 Ves. 635 (settlement).

(*r*) *Ante*, p. 1178.

(*s*) *Re Wood's Estate*, L. R. 10 Eq. 572.

(*t*) *Hollier* v. *Burne*, L. R. 16 Eq. 163; *Maddy* v. *Hale*, 3 Ch. D. 327: distinguishing *Tardiff* v. *Robinson*, 27 Bea. 629, n.; *Morres* v. *Hodges*, *ib.* 625; and *Hayward* v. *Pile*, L. R. 5 Ch. 214. See also *Re Barber's S. E.* 18 Ch. D. 624 (leases for lives). In *Hillier* v. *Burne*, Lord Selborne's statement of "the general law of the Court" appears to have been made *per incuriam*, as the rule in question does not apply to specific bequests. See also *Re Lord Ranelagh's Will*, 26 Ch. D. 590 (where a beneficiary purchased the reversion, and the property was afterwards taken compulsorily), and *Gould* v. *Tripp*, [1883] W. N. 72 (settlement).

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(4) Reversions and Remainders.—Where land subject to a beneficial lease is sold under the Lands Clauses Acts or the Settled Land Acts, the tenant for life is, during the unexpired term of the lease, entitled to so much only of the income of the invested purchase-moneys as is equal to the rent under the lease: the rest of the income is accumulated and added to corpus (*u*).

Apportionment Act, 1870.

(5) Income—Apportionment—Accumulations.—By section 2 of the Apportionment Act, 1870 (*x*), rents, annuities, dividends, and other periodical payments in the nature of income (*y*) shall be considered as accruing from day to day, and shall be apportionable in respect of time accordingly, and by section 5 dividends include all payments made by the name of dividend, bonus, or otherwise out of revenue of trading or other public companies (*z*) divisible between all or any of the members of such respective companies, whether such payment shall be usually made or declared at any fixed time or otherwise, but dividend does not include payment in the nature of a return or reimbursement of capital. The Act applies to specific legacies and devises (*a*), but not to all kinds of property yielding income (*b*), and the testator may indicate that the Apportionment Act is not to apply (*c*). Thus, in *Re Lysaght* (*d*), a declaration that "every share in the said company of L. Ltd., hereby bequeathed, shall carry the dividend accruing thereon at my death," was held to exclude the Act, but not to capitalise these dividends, which were payable to the tenants for life as income. But the Act is not excluded by a direction (after a power to

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(*u*) Settled Land Act, 1925, s. 79. *Cottrell* v. *Cottrell*, 28 Ch. D. 628, following *Re Mette's Estate*, L. R. 7 Eq. 72; *Re Wootton's Estate*, L. R. 1 Eq. 589; *Re Wilkes' Estate*, 16 Ch. D. 597. As to the right of a tenant for life, unimpeachable for waste, to the purchase moneys paid for leased minerals taken compulsorily, see *Re Barrington*, 33 Ch. D. 523.

(*x*) 33 & 34 Vict. c. 35. The Act applies to instruments coming into operation before the passing of the Act: *Re Cline's Estate*, L. R. 18 Eq. 213; *Roseingrave* v. *Burke*, Ir. R. 7 Eq. 186; *Patching* v. *Barnett*, 28 W. R. 886; *Lawrence* v. *Lawrence*, 26 Ch. D. 795 (see *ante*, p. 1069.

(*y*) As to business profits, see *Re Cox's Trusts*, 9 Ch. D. 159; *Jones* v. *Ogle*, 8 Ch. 192. An insurance company not incorporated has been held to be a public company within the Act: *Re Griffith*, 12 Ch. D. 655.

(*z*) Any company registered under the Companies Act is a public company within the meaning of the term as used in the Act: *Re Lysaght*, [1898] 1 Ch. 115; *Re White*, [1913] 1 Ch. 231.

(*a*) *Hasluck* v. *Pedley*, L. R. 19 Eq. 271; *Pollock* v. *Pollock*, 18 Eq. 329; *Capron* v. *Capron*, 17 Eq. 288; *Att.-Gen* v. *Daly*, L. R. 8 Eq. 595. *Whitehead* v. *Whitehead*, 16 Eq. 528, is erroneous.

(*b*) See *ante*, p. 1069.

(*c*) See section 7; *Roseingrave* v. *Burke*, Ir. R. 7 Eq. 187.

(*d*) [1898] 1 Ch. 115; *Macpherson's Trustees* v. *Macpherson*, [1907] Sess. Cas. 1067 (direction to pay dividends "as received"). It seems that the stipulation referred to in section 7 should be in the will: *Re Oppenheimer*, [1907] 1 Ch. 399.

postpone a trust for sale) that the whole of the income of property actually producing income shall be applied as from the testator's death as income (*e*).

In *Re Clarke* (*f*), the testator bequeathed £15,000 to trustees, such sum to carry interest at 4½ per cent. until the same should be paid or appropriated upon trust to invest the same and to pay the annual income of the legacy and the investment thereof, including in such income the interest payable in respect of such legacy to his wife for life, with remainder over. Interest was paid to the widow till the legacy was invested in stocks, in some of which five months' dividend had accrued : Sir J. Bacon, V.-C., held that the Apportionment Act did not apply, and that the widow was entitled to the whole of the dividends. It is hardly necessary to say that the Act does not apply to any sum duly and properly paid or accrued due before the happening of the incident which is said to necessitate or require the apportionment (*g*).

Arrears of preference dividend.

In *Re Wakley* (*h*), the testator specifically bequeathed cumulative preference shares in a company to his son R. and settled his residuary estate upon trust. At his death in 1905, the dividends on the shares were in arrear. In 1907 an interim dividend was declared, sufficient to satisfy all the arrears upon the preference shares. It was held that this dividend must be treated as being in respect of 1907 only, that the Apportionment Act, 1870, did not apply, so that the whole dividend belonged to R.

Although it is unnecessary that a payment made by a company out of revenue to its shareholders, in order to come within section 5 of the Act, should be periodical in the sense that it must be a payment which is usually made at recurring intervals (*i*), yet the payment, in order to be apportionable under the Act, must be a payment which is declared or expressed to be made for or in respect of some definite period (*k*).

If the dividend is declared after the death of a tenant for

(*e*) *Re Edwards*, [1918] 1 Ch. 142, distinguishing *Re Meredith*, 67 L. J. Ch. 409.

(*f*) 18 Ch. D. 160.

(*g*) *Ellis* v. *Rowbotham*, [1900] 1 Q. B. 740 (rent payable in advance).

(*h*) [1920] 2 Ch. 205. See also *Re Marjoribanks*, [1923] 2 Ch. 307 (annual produce of an estate). *Re Sale*, [1913] 2 Ch. 697; *Re Grundy* 117 L. T. 470 (arrears of preference shares). See an article in XXXVIII L. Q. R. p. 87. As to meaning of "current dividend" see *Re Raven*, 111 L. T. 938.

(*i*) *Re Griffith*, 12 Ch. D. 655.

(*k*) *Re Jowitt*, [1922] 2 Ch. 442.

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life in respect of a period before his death, he is entitled to the whole dividend (*l*).

The question of apportionment is discussed elsewhere in connection with the rights of devisees (*m*) and legatees (*n*) as against the testator's estate. *Clive* v. *Clive* (*o*) is an instance of apportionment as between tenant for life and remainder-man.

Accumulations of income given for maintenance.

If a vested legacy is given to an infant for life, the accumulations of income during minority belong to the legatee (*p*), but if the life interest is contingent, they belong to capital, and the legatee, on attaining majority, is only entitled to the income of the investments representing them (*q*).

In *Re Woolf* (*r*), the testatrix gave her residuary estate upon trust to pay or apply all or any part of the revenue thereof towards the maintenance and education or otherwise for the benefit of her granddaughter until she attained twenty-one or married. F. married after the death of the testatrix before attaining twenty-one. Held that the accumulations of unapplied income existing at the date of the marriage formed part of the capital of the residuary estate.

Wasting and hazardous property.

If personal property of a wasting or hazardous character is specifically bequeathed upon trust for A for life, with remainder over, A is *prima facie* entitled to the whole income, although a different rule prevails if the property forms part of a residuary bequest (*s*). Some of the rules relating to mining properties, etc., are referred to *post*, p. 1207.

Casual profits in the case of realty.

(6) CASUAL PROFITS.—With regard to casual profits, the question as between tenant for life and remainder-man of real estate may to some extent depend upon whether or not the tenant for life is impeachable for waste. In *Re Medows* (*t*), by the custom of a manor, copyholds were granted on leases for lives at small quit rents and subject to heriots, on payment of arbitrary fines to the lord. There was no obligation on the lord to renew the leases. A tenant for life of the manor, unimpeachable for waste, and having only an ordinary power of leasing for twenty-one years, granted leases for lives and received fines. Kekewich, J., held that the fines were income, and belonged to the tenant for life.

(*l*) *Re Muirhead*, [1916] 2 Ch. 181; *Re Oppenheimer*, [1907] 1 Ch. 399.
(*m*) *Ante*, p. 919. As to a bequest of arrears of rent, see *Re Ford*, [1911] 1 Ch. 455.
(*n*) *Ante*, pp. 1067 *seq.*
(*o*) L. R. 7 Ch. 433.
(*p*) *Re Wells*, 43 Ch. D. 281.
(*q*) *Re Bowlby*, [1904] 2 Ch. 685 (overruling *Re Scott*, [1902] 1 Ch. 918); *Re Mellor*, [1922] 1 Ch. 312. Trustee Act, 1925, s. 31, sub-s. 2.
(*r*) [1920] 1 Ch. 184.
(*s*) *Post*, p. 1207.
(*t*) [1898] 1 Ch. 300.

In an earlier case (*u*), where it is not stated whether the tenant for life was or was not impeachable for waste, Jessel, M.R., said that the tenant for life of a settled estate takes all casual profits which accrue during the time of his tenancy for life. Thus, the tenant for life of a manor took the fines arising from copyholds because they became payable under an obligation arising from the custom (*x*).

And in the absence of *mala fides*, money paid to a legal life tenant as the consideration for accepting the surrender of a lease granted without recourse to the power of the Settled Lands Acts, belongs to him as a casual profit (*y*).

In *Re Williams' Settlement* (*z*), it was held that where a legal tenant for life without impeachment of waste recovered compensation under the Indemnity Act, 1920, for damage done by military authorities, this was a casual profit which he might retain.

S. 80 of the Settled Land Act, 1925.

Under section 80 of the Settled Land Act, 1925, damages or compensation recovered after 1925 for breach of any covenant contained in a lease, are deemed to be capital money unless the Court otherwise decides, and unless a contrary intention is expressed in the settlement. Words negativing impeachment for waste are deemed not to express such a contrary intention. Since the draftsmen of Settlements could not foresee this Act it is unlikely that such a contrary intention will be expressed, and the rights of the tenant for life will in some cases be seriously affected. Under section 61 of the Act, money received on the exercise by the tenant for life of the powers of sections 58, 59, and 60 of the Act is capital money unless the Court otherwise directs. Damages for breach of covenant recovered by trustees for sale are capital (*a*).

S. 61 of the Settled Land Act, 1925.

Accretions to personalty caused by investing between dividend days.

With regard to personalty settled by will, extraordinary profits, or accretions in the case of trading companies or business partnerships, are dealt with later, but in the case of ordinary securities, unless they are bought or sold upon the days when dividends are payable, or unless the proceeds of sale of one investment are employed in the purchase of another investment, the income of which is payable on the same days, it is evident

(*u*) *Brigstocke* v. *Brigstocke*, 8 Ch. D. 357. See also *Noble* v. *Cass*, 2 Sim. 343 (damages for breach of covenant in a lease granted by the testatrix).

(*x*) And see *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 656, 35 Bea. 635.

(*y*) *Re Hunloke's S. E.*, [1902] 1 Ch. 941.

(*z*) [1922] 2 Ch. 750; applying *Re Lacon's Settlement*, [1911] 2 Ch. 17; *Re Barrington*, 33 Ch. D. 523; distinguishing *Re Bladon*, [1922] 1 Ch. 45.

(*a*) *Re Pyke*, [1912] 1 Ch. 770.

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that on every change of investment either some dividend is purchased out of capital or some dividend is sold and invested as capital. Thus, the trustees of a will who had power to vary investments by always selling the securities cum dividend just before the dividends were declared, and investing in other securities in which dividends had just been declared, could succeed, in effect, in capitalising the whole of the dividends for as long a period as they should so act, or, by reversing the process, could in effect succeed in paying income out of capital. But apart from special circumstances, and, of course, in the absence of any *mala fides* on the part of the trustees, it has been settled that the tenant for life takes the dividends even though in this way purchased out of capital, or loses the income invested in capital. The matter was put very clearly by Kindersley, V.-C., in *Scholefield* v. *Redfern*, as follows (*b*):

Scholefield v. Redfern.

"There is another question of a peculiar kind, and one which is novel to me. The point will be best explained by putting an example. Suppose part of the testator's property to consist of a certain American stock bearing interest or dividends payable at half-yearly periods, say January and July, and the trustees sell it in order to invest the proceeds in Consols: if they sell it at any other time than precisely the period at which a dividend has just accrued, the money realised by the sale is so much more in proportion to the time which has elapsed since the last dividend day. Therefore, the amount realised by the sale is compounded, partly of the value of the stock itself, and partly of the value of that proportionate part of the current half-year's dividend which may be considered to have accrued since the last dividend day. It is contended that the tenant for life ought to have this latter portion as income. Now it is certain that in the multitude of cases of administration of estates in modern times, where similar directions have been given by testators, the Court has never been in the habit of administering any such equity. When we consider a little further, it is obvious that if the tenant for life is to have something out of the sale money as representing income, then when the trustees invest the money, unless they invest it on the very day on which the dividend has just accrued due, the same equity ought to be administered the other way, and we ought to take from the tenant for life something of his next dividend on the Consols and add that to the capital, in order to make things equal as between him and the remainder-man. It is clear that if there is an equity one way there is an equity the other way. It is obvious that

(*b*) 2 Dr. & Sm. 173, quoted with approval by Stirling, J., [1896] 2 Ch., at p. 246.

the reason why such equity on either side has never been administered habitually by this Court is that by attempting it a grievous burden would be imposed upon the estates of testators by reason of the complex investigation it would lead to. The gain to either party would be far more than compensated by the expense which might be incurred in a complicated case, and for that reason, no doubt, the thing has never been done. I will not be the first to introduce the practice." The same learned Judge discussed the matter very fully in *Freman* v. *Whitbread* (*c*). But in exceptional cases the general rule has been departed from (*d*). And it has been held not to apply where the investment is made after the dividend has been earned and declared, but before it is payable (*e*).

Shares in trading companies.

(7) PROFITS OF TRADING COMPANIES.—Where a trust estate includes shares in a trading company which the trustees are authorised to hold, they are, of course, bound by the constitution and regulations of the company in the same way as the other shareholders, and consequently in the case of dividends paid out of current profits in the ordinary way there can rarely be any question as to the rights of the tenant for life and remainder-man, because it may generally be assumed that the dividends are properly declared, although it is conceivable that if a company paid dividends out of capital, or otherwise misapplied its funds, and the trustees had notice of this, it might be their duty to raise the question before paying over the dividend (or the whole of it) to the tenant for life, or (if he die after the dividend is declared, and before it is paid) to his personal representative (*f*). The question how the profits of a trading company ought to be ascertained is one of considerable difficulty, and has given rise to a large number of judicial decisions. But the question is still completely unsettled, and the tendency of the Courts is in the direction of giving a large measure of discretion to the business men who are actually conducting the business, and in *Dovey* v. *Cory* (*g*), Lord Davey disapproved of some of the propositions which had been laid down by the Court of Appeal, and Lord Halsbury, C., said: "But what are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve. When the time comes that these questions come before us in a concrete

(*c*) L. R. 1 Eq. 266.
(*d*) For example, *Lord Londesborough* v. *Somerville*, 19 Bea. 295; *Bulkeley* v. *Stephens*, 3 N. R. 105; *Bulkeley* v. *Stephens*, [1896] 2 Ch. 241.
(*e*) *Re Sir R. Peel's Settled Estate*, 54 Sol. J. 214.
(*f*) *Price* v. *Anderson*, 15 Sim. 473; *Re Hopkins' Trusts*, L. R. 18 Eq. 696; *Wright* v. *Tuckett*, 1 J. & H. 266 (settlement).
(*g*) [1901] A. C. 477.

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case we must deal with them, but until they do I, for one, decline to express an opinion not called for by the particular facts before us, and I am the more averse to doing so because I foresee that many matters will have to be considered by men of business which are not altogether familiar to a court of law."

Rules deduced from the authorities.

In the absence, however, of any improper payment of dividends on the part of the company, the following propositions appear to be established :

Rule (A).

(A) The decision of the company as to what is capital and what is income is binding on the tenant for life and remainderman.

Bouch v. *Sproule.*

"When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern enures to the benefit of all who are interested in the capital" (*h*).

But it is not always easy to determine what the company's decision has been, and the following rules offer guidance on this point :

Rule (B).

(B) If a company has power to increase its capital, it cannot be considered as having converted its profits into capital when it has not taken the proper steps to increase its capital, and consequently any bonus or dividend distributed is not capital (*i*).

"Where a company has power to increase its capital and to appropriate its profits to such increase, it cannot be considered as having intended to convert or having converted any part of its profits into capital when it has made no such increase" (*j*). Thus, in *Re Hopkins' Trusts* (*k*), an extraordinary or special dividend paid out of accumulated profits was held to be income.

(*h*) *Per* the C. A. in *Re Bouch*, 29 Ch. D. at p. 653, and approved by Lord Herschell in *Bouch* v. *Sproule*, 12 A. C. at p. 397. *Re Evans*, [1913] 1 Ch. 23; *Re Thomas*, [1916] 2 Ch. 331; *Re Taylor*, [1926] Ch. 923; *Re Ogilvie*, 120 L. T. 436; *Inland Revenue Commissioners* v. *Blott*, [1921] 2 A. C. 171; *Pool* v. *Guardian Investment Trust*, [1922] 1 K. B. 347; *Inland Revenue Commissioners* v. *Wright*, [1926] 2 K. B. 246; *Re Palmer*, 56 Sol. J. 363; *Inland Revenue Commissioners* v. *Fisher's Executives*, [1926] A. C. 395. See *Hollis* v. *Allan*, 14 W. R. 980 (settlement). See *Re Speir*, [1924] 1 Ch. 359, as to a bequest of dividends, bonuses and income.

(*i*) *Re Bates*, [1928] Ch. 682, 688.

(*j*) *Per* Lord Herschell, *Bouch* v. *Sproule*, 12 A. C. at p. 398. See *Blyth's Trustees* v. *Milne*, 7 F. 799.

(*k*) L. R. 18 Eq. 696. *Re Alsbury*, 45 Ch. D. 237, is another instance. See also *Re Bates*, *supra*.

(c) But, conversely, if a company applies part of its earnings in increasing its capital, and issues new shares to represent the money so applied, the new shares are capital. *Re Barton's Trust* (*l*) is a case of this kind.

Rule (c).

(d) If a company has no power to increase its capital, it may be that a bonus out of accumulated profits is capital if the company has, in fact, used them for capital purposes.

Rule (d).

This remarkable rule has arisen out of a series of cases dealing with the stock of the Bank of England (*m*), the Bank of Scotland (*n*), and the Bank of Ireland (*o*), where payments by way of bonus arising from accumulated profits had been made to the shareholders : it was held that they were in the nature of capital and did not go to the tenant for life; and in *Bouch* v. *Sproule*, Lord Herschell considered that the inability of the Banks of England and Scotland to increase their capital was the reason why the payments to the shareholders by way of bonus were in these cases treated as payments in respect of capital. He said : " I think, therefore, that *Irving* v. *Houstoun* must still be regarded as good law, unaffected by any counter current of authority. But it is, in my opinion, an authority governing only a case similar in its facts : that is to say, a case where the company has no power to increase its capital, but has accumulated profits, and used them in fact for capital purposes, and afterwards distributes these profits amongst the proprietors " (*p*). As a matter of fact, the inability of the Bank of England to increase its capital was put forward in *Brander* v. *Brander* and *Paris* v. *Paris* as an argument on behalf of the tenant for life, and the real reason why the House of Lords decided in favour of the remainder-man in *Irving* v. *Houstoun* was (as Lord Eldon remarked) that the bank's practice of setting aside reserve funds was well known to the stockholders, and that if a testator gave the dividends of bank stock to a tenant for life he did not mean him " to run away with a bonus that may have been accumulating on the capital for half a century." In the later case of *Paris* v. *Paris*, Lord Eldon added that the House of Lords, in deciding *Irving* v. *Houstoun*, did not like to disturb previous decisions on the point which had gone

(*l*) L. R. 5 Eq. 238 (settlement) *Carson* v. *Carson*, [1915] 1 Ir. R. 321.

(*m*) *Brander* v. *Brander*, 4 Ves. 800; *Paris* v. *Paris*, 10 Ves. 185; *Clayton* v. *Gresham*, 10 Ves. 288; *Witts* v. *Steere*, 13 Ves. 363. See also *Plumbe* v. *Neild*, 29 L. J. Ch. 618 (which is commented on in *Dale* v. *Hayes*, 19 W. R. 299); *Barclay* v. *Wainewright*, 14 Ves. 66; and compare *Ward* v. *Combe*, 7 Sim. 634 (settlement).

(*n*) *Irving* v. *Houstoun*, 4 Paton Sc. App. 521.

(*o*) *Ex p. Hodgens*, 11 Ir. Eq. 99.

(*p*) 12 A. C. at p. 397.

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to great length, and in *Barclay* v. *Wainewright* (*q*) he gave yet a third reason, namely, that it was impracticable to ascertain at what time the profits had been earned, and that "the Court cut short the difficulty by saying it (the bonus) should be considered as a gift of capital to those having capital according to the charter."

The distinction, however, must be considered as established, with the curious result stated above.

Rule (E).

(E) Where a company is wound up, and there is a surplus after payment of debts and repaying to the shareholders the capital paid upon their shares, such surplus is capital (*r*), but whether a reserve fund of undivided profits is to be treated as income seems to depend upon the regulations of the company (*s*). The question in this form does not appear to have arisen between tenant for life and remainder-man, but it seems clear that the same principle would be applicable in that case, as in the case where the dispute is between preference and ordinary shareholders.

Not infrequently the company gives the individual shareholders the option whether they will receive a bonus dividend in cash or will capitalise it. In such a case the rule is :

Rule (F).

(F) If a company declares a dividend, and at the same time gives the shareholders an option to take up new shares with the amount of the dividend, the value of the dividend is income and the value of the option is capital.

Re Northage (*t*) is a good illustration of this. There the directors of a company allotted to the trustees, as holders of 150 fully paid shares, 75 new shares of £10 each, being their proportion of the new issue. At the same time they enclosed a bonus dividend warrant for £750, the amount due in respect of the new shares. The trustees applied this bonus dividend in taking up the 75 shares, and then sold the shares for £1363. North, J., held that £750, the amount of the bonus dividend, belonged to the tenant for life, and that the residue of the £1363 was capital (*u*).

(*q*) 14 Ves. at p. 78; but in *Preston* v. *Melville*, 16 Sim. 163, a bonus of 1 per cent. was given to the tenant for life.

(*r*) *Birch* v. *Cropper*, 14 A. C. 525; *Re Weymouth Steam Packet Co.*, [1891] 1 Ch. 66; *Re Armitage*, [1893] 3 Ch. 337; *Davidson* v. *King* (*Re Gihon*), [1928] 1 N. Ir. 1.

(*s*) *Re Bridgewater Navigation Co.*, [1891] 2 Ch. 317; *Bishop* v. *Smyrna and Cassaba Ry.*, [1895] 2 Ch. 596, where it was also held that earnings made by a company after it has gone into liquidation are capital and not income; *Re Crichton's Oil Co.*, [1902] 2 Ch. 86; subject to the rights of the preference shareholders : *Re W. J. Hall & Co., Ltd.*, [1909] 1 Ch. 521; and compare *Nicholson* v. *Nicholson*, 30 L. J. Ch. 617, which turned upon the provisions of the deed of settlement of an insurance company.

(*t*) 64 L. T. 625.

(*u*) Other cases are, *Re Bromley*, 55 L. T. 145; *Re Malam*, [1894] 3 Ch. 578; and see *Rowley* v. *Unwin*, 2 K. & J. 138 (a case of a marriage settlement).

Bouch v. *Sproule* (*x*) differs from *Re Northage* in the fact that there was in substance no option, the effect of the whole operation being that the company capitalised the profits.

Windfall to a company.

Lastly, the distributed fund may not arise from accumulated profits in the strict sense of the word, but from the payment of some outstanding claim, or in some other way. In such a case the fund cannot be properly distributed (except in a winding up) unless it can either properly be considered as income or unless it represents a surplus or profit on capital account, and this raises many of the difficult questions about the manner in which the accounts of trading companies should be kept, which are at present unsolved by authority (*y*). But if money arising from a windfall or a profit on capital account is properly distributable among the shareholders, it would no doubt be treated as income for all purposes. Thus, in *Maclaren* v. *Stainton* (*z*), a company had claims against its manager in respect of moneys not accounted for by him; many years afterwards these claims were compromised, and a large sum was paid to the company and divided among the shareholders by way of bonus; one of the shareholders died before the compromise, having bequeathed his shares by way of settlement: it was held that the bonus was income and belonged to the tenant for life under the will, although the company's claim had accrued during the life of the testator (*a*).

Return of capital under Companies Act, 1880.

Where a company has accumulated undivided profits and decides to "return" them to the shareholders in reduction of the paid-up capital, under the Companies Act, 1880 (*b*), the amount received by each shareholder is capital and not income, provided, of course, the requirements of the Act are complied with: if not, the amount is income (*c*).

Bonus and call on shares.

Where a company makes a call and declares a bonus of the same amount, both payable on the same date, the bonus is to be treated as capital (*d*). In *Re Carson* (*e*) a company which had obtained power to increase its capital, paid a bonus of 50 per cent. out of accumulated profits—40 per cent. was paid

(*x*) *Ante*, p. 1186.

(*y*) See *Lubbock* v. *British Bank of South America*, [1892] 2 Ch. 198; *Verner* v. *General, &c., Trust*, [1894] 2 Ch. 239; *Foster* v. *New Trinidad Lake Asphalt Co., Ltd.*, [1901] 1 Ch. 208; *Re Armitage*, [1893] 3 Ch. 337; *Re Tedlie*, 126 L. T. 644.

(*z*) 3 D. F. & J. 202; *Re Bates*, [1928] Ch. 682.

(*a*) See *The Carron Co.* v. *Hunter*, L. R. 1 Sc. & D. 362, a case arising in the same company between specific and residuary legatees. *Edmondson* v. *Crosthwaite*, 34 Bea. 30, is another case on the Carron Co.

(*b*) Now replaced by the Companies (Consolidation) Act, 1908.

(*c*) *Re Piercy*, [1907] 1 Ch. 289.

(*d*) *Re Hatton*, [1917] 1 Ch. 357.

(*e*) [1915] 1 Ir. R. 321.

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in stock and the remaining 10 per cent. in cash. Held that the stock was capital and the cash income.

Treasury Scheme B.

Where trustees deposited securities with the Treasury by way of loan under a scheme known as Scheme B, under which, in addition to the dividends, ½ per cent. per annum was paid and at the end of the loan the deposit value plus 5 per cent of that was repaid, it was held that the ½ per cent. per annum was to be treated as income and the 5 per cent. as capital (*f*).

Profits of a private partnership.

(8) PROFITS OF PRIVATE PARTNERSHIPS.—Questions as to the difference between capital and profits do not often arise in the case of an ordinary partnership, because the partners can settle the matter by agreement between themselves. But where trustees are authorised to carry on a private trade or business, either alone or in conjunction with other persons, as part of a trust estate, the rights of the beneficiaries have to be considered. In such a case the mode of ascertaining the profits depends partly on the general principle that the tenant for life is not entitled to have the corpus of the trust estate diminished at the expense of the remainder-man, and partly on the intention of the settlor. This intention may be expressed, or it may be implied from the stipulations of the deed of partnership (if the settlor had partners), or from the system of ascertaining profits previously adopted by the settlor. Thus, in *Straker* v. *Wilson* (*g*), a testator bequeathed to trustees his share of a colliery in which he was a partner upon trust for his wife for life with remainders over; by the deed of partnership the majority in value of the partners had power to dispose of the profits by adding them to the capital or dividing them between the partners; the trustees (of whom the wife herself was one) continued to be partners in the colliery, but the profits were not divided for many years, the amount being carried to the credit of the profit and loss account and employed in improving and developing the property and in paying off debts: it was held that the profits so applied had been capitalised, and that the share of them belonging to the testator's estate did not go to the tenant for life as income, but formed part of the corpus. Again, in *Gow* v. *Forster* (*h*), the testator bequeathed his residuary property (including his share in a business) to trustees upon trust to pay one-half of the income (including the net profits of the business) to his daughter for life; it had been the practice of the firm in prosperous years to divide the whole

(*f*) *Re Oppenheim*, [1917] 1 Ch. 274.
(*g*) L. R. 6 Ch. 503.
(*h*) 26 Ch. D. 672.

profit among the partners, in bad years to write off each partner's proportion of the profit from his share of the capital : after the death of the testator his trustees carried on the business in conjunction with the other partners : in one year there was a loss, which was written off in the books of the firm from the shares of the capital of each partner, including the testator's estate : in the next year there was a profit, and it was held that the daughter was entitled to one-half of so much of that profit as belonged to the testator's estate, without any deduction for the purpose of making good the loss of the previous year. Where there is no stipulation or practice in this respect, the general rule is that losses must be made good out of the profits of subsequent years, and not out of capital. Thus in *Upton* v. *Brown* (*i*) a settled business was carried on at a loss during the life of the first tenant for life, and at a profit during the life of the second tenant for life : it was held that the losses must be made good out of the profits and not out of capital. If, however, the will contains any provisions for ascertaining profits, they must, of course, be observed, even if they are inconsistent with the ordinary practice of persons engaged in similar trades. Thus in *Re Millechamp* (*k*) the testator in effect directed that the income arising from his business should be applicable as income under the trusts of his will, and that no part should be retained as corpus or capital, and that any losses should be defrayed out of his estate : it was held that the tenant for life was entitled to the profits made in any year, and that if there was a loss it must be paid out of the capital employed in the business. Where the business belongs entirely to the trust estate, no deduction is made in calculating the profits for interest, or the capital employed in the business (*l*); but if freehold land belonging to the trust estate is occupied for the purposes of a business a question may arise as to rent being allowed in respect of it (*m*).

Upton v. *Brown.*

A tenant for life in specie of a share in a partnership has been held not entitled to the increase of capital made during his life (*n*).

The expenses incurred by a trustee (to whom the testator's capital left in a business by him on retiring had been bequeathed in trust for persons in succession) in employing accountants and auditors to examine the books of the partnership periodically, in order to see whether the business is in a sound condition, are

Costs of audit.

(*i*) 26 Ch. D. 588.
(*k*) 52 L. T. 758.
(*l*) *Gee* v. *Liddell*, 35 Bea. 631.
(*m*) See *Re Millechamp*, 52 L. T. 758.
(*n*) *Mousley* v. *Carr*, 4 Bea. 49.

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not outgoings to be borne by the tenant for life, but expenses incurred for the benefit of the whole, and therefore are payable out of capital (*o*). It is submitted that the expense of auditing the accounts to ascertain the amount of profits in any year would be an outgoing payable out of income.

Depreciation.

In ascertaining the profits of a business, sums may properly be set aside for depreciation of machinery in addition to the cost of repairs (*p*).

Where the trustees are not authorised to carry on the business.

The above rules only apply in the case where the testator has authorised his executor or trustees to carry on the business. Without such authorisation they may not carry on the business or employ trust moneys in carrying it on, except so far as is necessary for winding up or disposing of the business (*r*). In any case where a business is carried on without authority, the tenant for life is only entitled to the income of the business up to 4 per cent. per annum on the capital employed, the surplus profits being treated as accretions to capital (*s*).

In *Stroud* v. *Gwyer* (*t*), the testator authorised his executors to enter into partnership with his brother and sons on such terms as they should think fit, and to leave his capital therein for a certain period. The executors accordingly entered into partnership with the brothers and sons on the terms that interest at 5 per cent. per annum should be allowed on the testator's capital, and that the executors should only draw out 2 per cent. on that capital for their share of profits, and that the remainder of their share of profits should remain in the partnership as additional capital; after the specified period had elapsed a new partnership was formed, and the executors, in breach of trust, allowed the capital to remain in the business at interest at 5 per cent. per annum : it was held that the tenant for life was entitled to the whole of the interest at 5 per cent. per annum payable under the first partnership : that the rest of the executors' share of the profits was capital and not income : and that the tenant for life was entitled to the whole of the interest at 5 per cent. per annum payable under the second partnership. The decision on the third point may not be good law (*u*).

(*o*) *Re Bennett*, [1896] 1 Ch. 778.

(*p*) *Re Crabtree*, 106 L. T. 49. As to a company see *American Soda Co.* v. *Chamberlain*, [1918] 1 Ch. 266.

(*r*) *Kirkman* v. *Booth*, 11 Bea. 273; *Collinson* v. *Lister*, 20 Bea. 356; *Re Chancellor*, 26 Ch. D. 42. As to what capital may be employed, see *M'Neillie* v. *Acton*, 4 D. M. & G. 744. In carrying on a business trustees may not make any personal profit unless authorised to do so : *Re Sykes*, [1909] 2 Ch. 241, doubting *Smith* v. *Langford*, 2 Bea. 362.

(*s*) *Re Hill*, 50 L. J. Ch. 551 (settlement).

(*t*) 28 Bea. 130.

(*u*) *Re Hill*, 50 L. J. Ch. 551.

A power to postpone the conversion of a business authorises the trustees to carry on the business. In *Re Crowther* (*x*), the trustees carried on the business for twenty-two years, not with a view to a sale, but for the benefit of the tenant for life : it was held that the whole of the profits of the business had been properly paid to the tenant for life.

Effect of a trust for conversion.

(9) RESIDUE GIVEN TO PERSONS IN SUCCESSION, SUBJECT TO A TRUST FOR CONVERSION.—The rights of a legatee for life and remainder-man, in property subject to a trust for conversion, remain to be considered. It will be remembered that the non-execution of a trust for conversion does not operate to affect the rights of the beneficiaries (*y*).

"But though," says Mr. Jarman (*z*), "the general principle is well settled, yet many questions have arisen in the course of its application, especially respecting the precise point of time at which the enjoyment of the legatee for life commences; the effect of an express direction to accumulate the income until conversion; and, above all, as to whether the legatee for life of the proceeds is, until the conversion of the property, to take the actual income or the assumed income; in other words, whether he is entitled to the income accruing from the property in its actual condition, or the income which, if duly converted and invested, it would have yielded.

"Points of this nature have most commonly occurred under general residuary clauses containing trusts for sale and conversion, in which the principle has to be applied to the various species of property of which a residue is composed."

The following will be found to embody the chief doctrines to be deduced from the authorities :—

As to income of property duly invested.

(i) The ordinary case is that of residuary personal estate being directed to be sold or otherwise converted into money, and the produce (either with or without a prior express trust for payment of debts and legacies) laid out in Government or real securities, or other specified investments, for the benefit of a person for life, at whose decease the capital is given over, without any express appropriation of the income accruing before conversion : here the income arising from such part of the residue as, at the testator's decease, was actually invested in Government or real securities, or other securities of the nature

(*x*) [1895] 2 Ch. 56. *Re Slater*, 113 L. T. 691 (profits of farming business).
(*y*) *Waddington* v. *Yates*, 15 L. J. Ch. 223. See *ante*, pp. 726 *seq.*
(*z*) First edition, p. 540.

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contemplated by the investment trust, belongs to the residuary legatee for life from the period of the testator's decease (*a*).

Rule in *Allhusen* v. *Whittell*.

But income arising within the first year from so much of the testator's estate as is required for payment of debts and legacies, is not income arising from residue (*b*). In other words, there is no residue till these payments have been made, and the tenant for life must keep down the interest on debts as well during the first as during subsequent years (*c*). A power to postpone the sale and a direction that the income from the testator's estate, however invested, should after his death be treated as income does not displace the rule (*d*).

Fund set aside for legacies.

Where a fund is set aside to answer contingent legacies, the income arising from the fund, until the legacies become payable, forms part of the income of the residue (*e*); but the income of a fund set aside to answer legacies vested but not yet payable, is to be treated as capital and invested, and the income of the investment will be paid to the tenant for life of the residue (*f*); but the surplus dividends of a fund set aside to answer a conditional annuity after paying the annuity are income (*g*).

Annuities.

Where a testator who has charged his estate with or covenanted to pay an annuity, gives his residue to A for life, with remainder over, there has been a difference of judicial opinion as to the correct course to pursue. Probably the correct rule is to deal with each payment as it occurs, and to ascertain what sum set aside at the death of the testator and accumulated at 3 per cent. simple interest would have met the particular payment, and attribute that part of the payment to capital, and the remaining part to income (*h*).

(*a*) *Hewitt* v. *Morris*, T. & R. 241; *Angerstein* v. *Martin*, *ib.* 232; *Taylor* v. *Clark*, 1 Hare, 161; *Macpherson* v. *Macpherson*, 16 Jur. 847; 1 Macq. H. L. 243; *Hume* v. *Richardson*, 4 D. F. & J. 29; *Brown* v. *Gellatly*, L. R. 2 Ch. 751.

(*b*) *Holgate* v. *Jennings*, 24 Bea. 623; *Re M'Euen*, [1913] 2 Ch. 704. The income of the estate is calculated on the net amount after deduction of tax: *Re Oldham*, 71 Sol. J. 491.

(*c*) *Allhusen* v. *Whittell*, L. R. 4 Eq. 295; *Marshall* v. *Crowther*, 2 Ch. D. 199 (real estate, where *Greisley* v. *Earl of Chesterfield*, 13 Bea. 288, was not followed); *Lambert* v. *Lambert*, 16 Eq. 320; *Aikin* v. *Butler*, Seton on Decrees, p. 1680. The rule in *Allhusen* v. *Whittell* does not apply where a person is entitled to the residue absolutely, subject to an executory gift over: *Re Hanbury*, 101 L. T. 32. The methods of applying the rule are discussed in XXX L. Q. R. p. 481, and XXXII L. Q. R. p. 208.

(*d*) *Re Wills*, [1915] 1 Ch. 769.

(*e*) *Allhusen* v. *Whittell*, 4 Eq. 295; *Crawley* v. *Crawley*, 7 Sim. 427; *Fullerton* v. *Martin*, 1 Dr. & Sm. 31.

(*f*) *Re Whitehead*, [1894] 1 Ch. 678; *Crawley* v. *Crawley*, 7 Sim. 427.

(*g*) *Re Whitehead*, *supra*; *Cranley* v. *Dixon*, 23 Bea. 512. But see *Tucker* v. *Boswell*, 5 Bea. 607, which does not seem to be consistent with the later cases.

(*h*) *Re Perkins*, [1907] 2 Ch. 596 (where Swinfen Eady, J., declined to follow *Re Bacon*, 62 L. J. Ch. 445, and *Re Henry*, [1907] 1 Ch. 30, and followed *Allhusen* v. *Whittell*, 4 Eq. 295, and *Re Harrison*, 43 Ch. D. 55); *Re Thompson*, [1908] W. N. 195; *Re Poyser*, [1910] 2 Ch. 444 (interest at

In *Re Dawson* (*i*), it was held by Swinfen Eady, J., that the successive instalments of the annuities should be borne by income and capital in proportion to the actuarial values of the life estate and reversion at the testator's death. This method seems less accurate, but is simpler, since the proportion is calculated once for all.

Rentcharge.

Where a testator devises or appoints land subject to a rentcharge (which he has not covenanted to pay) in trust for A for life, with remainder over, the rentcharge must be borne by the tenant for life (*j*).

As to income of property not duly invested.

(ii) In the case already described, namely, that of a residuary bequest containing a trust for sale and conversion, without any express appropriation of the annual income until conversion, the destination of such income arising within the first year from the unconverted property (comprising all which does not consist of such investments as the proceeds are directed to be converted into) was long doubtful. In *La Terriere* v. *Bulmer* (*k*), Sir A. Hart, V.-C., decided that the first year's income formed part of the capital. In *Dimes* v. *Scott* (*l*), Lord Lyndhurst held the legatee for life to be entitled during the year, in lieu of the actual income, to dividends on so much Three per Cent. stock as the proceeds of the property, if converted, would have purchased at the end of the year. In *Douglas* v. *Congreve* (*m*), Lord Langdale, M.R. (after noticing these conflicting opinions), gave the legatee for life the actual income arising from unconverted funds, from the testator's death until the end of the year, or until conversion, which should first happen (*n*); a rule which certainly seems to be more just than the first, and more convenient than the second, of the others which have been referred to, and was apparently adhered to by the same Judge in *Mehrtens* v. *Andrews* (*o*). However, the rule laid down in *Dimes* v. *Scott* has since been repeatedly followed, and must be

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3½ per cent.). The cases are discussed in an article in XXXI L. Q. R. p. 421, at p. 431. On principle it is difficult to see why compound interest is not calculated.

(*i*) [1906] 2 Ch. 211, following *Yates* v. *Yates*, 28 Bea. 637. But see *Re Perkins*, *supra*, where it seems that this rule would have worked unfairly. See also *Bulwer* v. *Astley*, 1 Ph. 422; *Yonge* v. *Furse*, 20 Bea. 380; *Re Muffett*, 39 Ch. D. 534.

(*j*) *Re Popham*, 111 L. T. 524.

(*k*) 2 Sim. 18.

(*l*) 4 Russ. 195.

(*m*) 1 Kee. 410.

(*n*) See *Angerstein* v. *Martin*, T. & R. 232, acc. But Lord St. Leonards has said (16 Jur. 847, 1 Macq. H. L. Ca. 213) that when Lord Eldon there decreed the dividends on Russian stock to the tenant for life his attention could not have been called to the point. See also *per* K. Bruce, V.-C., 1 Y. & C. C. C. at p. 318.

(*o*) 3 Bea. 72.

considered as now settled (*p*). The $2\frac{1}{2}$ per cent. Consols will take the place of the 3 per cent.

Effect of direction to accumulate until conversion.

(iii) The rule that conversion is to be deemed as having been made within a year from the testator's death, is applied in favour of, as well as against, the tenant for life. Thus, where trustees are directed to convert the property (whether it be land into money, or money into land), and until conversion the income is directed to be accumulated and added to the capital; and it happens that the conversion is deferred beyond the period of a year from the testator's decease, the process of accumulation ceases, and the title of the legatee for life to the income commences, at the end of such year; this being considered to afford a reasonable time for the conversion of the property (*q*); and it is immaterial, in such case, that the clause directing the accumulation of the income goes on to provide for its investment (*r*). And it is to be observed that where the purchase of land is to be made with a pecuniary legacy, which is to come out of the testator's general estate (and payment of which, therefore, may, under the general rule, be made at any time within a year), the twelve months at which the income becomes receivable by the tenant for life is computed from the time of the receipt of the legacy (*s*).

As to income of property converted within the year.

(iv) With respect to such portion of the property as is, in point of fact, converted before the end of the year following the testator's decease, the legatee for life takes the actual income of the fund constituted of the proceeds from the time of its actual investment; and that too, of course, without regard to the fact of there being an express direction to accumulate the profits until conversion or not (*t*).

As to income of property which can be but is not converted within the year.

(v) If the property can be, but is not, actually converted at the end of a year from the testator's decease, it must be computed what would have been the result if the conversion had taken place at such year's end, and the proceeds had been then

(*p*) *Taylor* v. *Clark*, 1 Hare, 161; *Morgan* v. *Morgan*, 14 Bea. 72; *Brown* v. *Gellatly*, L. R. 2 Ch. 751; *Allhusen* v. *Whittell*, L. R. 1 Eq. 295.

(*q*) *Sitwell* v. *Bernard*, 6 Ves. 520, and cases there cited; *Kilvington* v. *Gray*, 2 S. & St. 396; *Noel* v. *Henley*, 7 Pri. 241; *Stair* v. *Macgill*, 1 Bli. (N.S.) 662; *Vickers* v. *Scott*, 3 My. & K. 500; *Tucker* v. *Boswell*, 5 Bea. 607. See also *Vigor* v. *Harwood*, 12 Sim. 172, where an *implied* direction to accumulate was altogether disregarded, so that the tenant for life got the income from the testator's death. The decisions in *Taylor* v. *Hibbert*, 1 Jac. & W. 308, and *Stott* v. *Hollingworth*, 3 Madd. 161, appear to have been based on a misapprehension of *Sitwell* v. *Bernard*, and are erroneous.

(*r*) *Entwistle* v. *Markland*, 6 Ves. 528, n.

(*s*) *Parry* v. *Warrington*, 6 Madd. 155.

(*t*) *La Terriere* v. *Bulmer*, 2 Sim. 18. See also *Dimes* v. *Scott*, 4 Russ 195; *Gibson* v. *Bott*, 7 Ves. 89.

invested in the public stocks (*u*); the dividends of which stocks will form the income to which the legatee for life will be entitled either from the testator's decease or from the end of the year, according to the fact whether there is not, or is, an intermediate trust for accumulation. And this rule applies as well where the unconverted fund or property is of a permanent nature as where it is limited in its duration, as leaseholds, etc. (*x*).

Dimes v. *Scott*.

In *Dimes* v. *Scott* (*y*), a testator bequeathed the residue of his personal estate to trustees, upon trust, to convert the same into money, and thereout to pay debts, and invest the surplus in Government or real securities, for the benefit of A for life; at whose decease the capital was given to other persons absolutely. When the testator died, part of his property was invested in an East India security, yielding £10 per cent., on which the executors permitted it to remain for several years, and during this period paid over the whole interest to the legatee for life; Lord Lyndhurst decided that they could only be allowed, as a proper application of income, a sum equal to the dividend on so much 3 per cent. Consols as the proceeds of the security, if turned into money at the end of a year from the testator's decease, would have purchased; such dividends to be computed from the decease of the testator; and though it appeared that the fund had actually yielded more than it would have produced if sold at the end of a year, yet the trustees were held not to be entitled to the benefit of this gain, by way of set-off against the claim of the ulterior legatees for excess of income paid to the legatee for life; but were bound to account for both such excess, and also the entire sum actually received on the conversion of the security. In *Robinson* v. *Robinson* (*z*), where trustees had an option to invest in Government or real securities, and had neglected to convert improper investments and a loss had ensued, they were charged, not with so much Government stock (for they were not bound to choose that mode of investment), but with the money value of the fund at the year's end, and £4 per cent. interest on such value; and it was held to follow that the income of the tenant for life who had acquiesced in the default must also be £4 per cent. on the same value. But where the only question is what are the relative

(*u*) Formerly the investment was deemed to have been made in Three per Cent. Consols. It would seem that, for the purpose in question, the investment should now be deemed to have been made in Two and One Half per Cent. Consols.

(*x*) See *Dimes* v. *Scott*, 4 Russ. 195; *Mills* v. *Mills*, 7 Sim. 501; *Mehrtens* v. *Andrews*, 3 Bea. 72; *Hume* v. *Richardson*, 4 D. F. & J. 29; *Brown* v. *Gellatly*, L. R. 2 Ch. 751.

(*y*) 4 Russ. 195.

(*z*) 1 D. M. & G. 247.

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rights of tenant for life and remainderman in an improper investment forming part of the testator's estate, the rule in *Dimes* v. *Scott* and *Taylor* v. *Clark* (*a*) applies, and whether the will does or does not give an option to invest in Government or other securities, the tenant for life is entitled only to dividends on so much Consols (*b*).

Neither Order XXII, Rule 17, nor the Trustee Act, 1925, would appear to affect the rule in the case of improper securities left unconverted. But securities authorised by statute, or by the Rules of Court for the time being in force, are proper investments for a testator's estate, although not expressly authorised by the will, unless expressly forbidden thereby (*c*); and the tenant for life will be entitled as income to the annual proceeds of such investments, when actually found, or made, part of the testator's estate (*d*).

As to income of property which cannot be converted.

(vi) Where property ought to be, but from its nature cannot be, immediately converted, at least without great loss to the estate, the authorities are not quite uniform. Thus, in *Gibson* v. *Bott* (*e*), where leaseholds directed to be converted could not be sold for want of a good title, Lord Eldon gave the tenant for life 4 per cent. per annum from the testator's death on a sum to be ascertained as the value at the testator's death (*f*). Lord Langdale, in *Mehrtens* v. *Andrews* (*g*), after the leases had expired, directed a value to be put upon them having reference to the enjoyment had thereunder, and that the income of the tenant for life should be taken as the dividends of the sum of Consols which could have been purchased for that value. In *Meyer* v. *Simonsen* (*h*) there was no trust for conversion, but the trustees were bound to convert under the rule in *Howe* v. *Earl of Dartmouth* (referred to in the next Section), and the principles laid down in the judgment are generally treated as applicable to cases where conversion is expressly directed. In *Meyer* v. *Simonsen*, conversion could not, from the nature

Meyer v. *Simonsen.*

(*a*) 1 Hare, 161.

(*b*) *Brown* v. *Gellatly*, L. R. 2 Ch. 751. *Anderson* v. *Read*, 22 W. R. 527 (cor. Hall, V.-C.), where the trust for investment is stated to have been "comprehensive," appears to be to the same effect.

(*c*) For an example of an express prohibition, see *Ovey* v. *Ovey*, [1900] 2 Ch. 524 (it seems, however, that the decision in that case is wrong, since the attention of the Judge was not called to section 27 of the National Debt Conversion Act, 1888).

(*d*) *Hume* v. *Richardson*, 4 D. F. & J. 29. See *Re Hazeldine*, [1918] 1 Ch. 433 (retention of unauthorised investments during the war).

(*e*) 7 Ves. 89.

(*f*) 1 Y. & C. C. C. 320, n. (a).

(*g*) 3 Bea. 72.

(*h*) 5 De G. & S. 723; *Re Evans' Will Trusts*, [1921] 2 Ch. 309 (copyright). See *Caulfield* v. *Maguire*, 2 J. & Lat. at p. 162; *Re Eaton*, 70 L. T. 761.

of the property, be immediately made, and Sir J. Parker V.-C., decided that interest at 4 per cent. (*i*) on the value should be allowed. He said there were three distinct classes of cases: "First, where the subject-matter of the bequest is either invested in the funds or in some security of which the Court approves, there conversion is not necessary, and the tenant for life takes the interest of the fund as it is, and the corpus belongs to those in remainder. The second class is where part of the estate can be sold and converted so as not to sacrifice the interest of the tenant for life or of the remainderman, such a case is one of partial conversion, and the proceeds of the part converted must be laid out on the permanent securities approved of by the Court, of which the tenant for life will take the interest, and the remainderman the corpus. The third class where the property is so laid out as to be secure and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate, as in *Gibson* v. *Bott*, and *Caldecott* v. *Caldecott* (*k*). There the rule is not to convert the property, but to set a value upon it, and give to the tenant for life 4 per cent. on such value, and the residue of the income must then be invested, and the income of the investment paid to the tenant for life, but the corpus must be secured for the remainderman" (*l*).

Power to postpone conversion.

(vii) In carefully drawn wills, a trust for conversion is generally accompanied by a discretion given to the trustees to postpone conversion for a definite or indefinite period. Such a discretion, if exercised in good faith, exonerates them from liability for loss, even if some of the property consists of shares in an unlimited company (*m*).

Statutory power to postpone conversion of land.

By section 25 of the Law of Property Act, 1925, a power to postpone shall in the case of every trust for sale of land be implied unless a contrary intention appears (*n*); and by section 28, sub-section 2, subject to any direction to the contrary, the net rent and profits of the land until sale are to be paid or

(*i*) See *Re Beech*, [1920] 1 Ch. 40, where *Re Woods*, [1904] 2 Ch. 4, and *Re Chaytor*, [1905] 1 Ch. 233, in each of which 3 per cent. was allowed, are discussed.

(*k*) 1 Y. & C. C. C. 312.

(*l*) This rule was approved in *Wentworth* v. *Wentworth*, [1900] A. C. at p. 171; and see *Fearns* v. *Young*, 9 Ves. 549; *Walker* v. *Shore*, 19 *ib.* 387, 1 Y. & C. C. C. 321, n.; *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312, 737; *Arnold* v. *Ennis*, 2 Ir. Ch. Rep. 601; *Re Llewellyn's Trust*, 29 Bea. 171; *Brown* v. *Gellatly*, L. R. 2 Ch. 751 (as to the ships). But see *Crawley* v. *Crawley*, 7 Sim. 427, *contra*. See also *Arnold* v. *Ennis*, 2 Ir. Ch. Rep. 601 (racehorse).

(*m*) *Re Norrington*, 13 Ch. D. 654.

(*n*) The power to postpone does not apply to personalty (other than leaseholds). This is an instance where the new legislation does not assimilate the law of real and personal property.

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applied as the income of investments representing the purchase-money would be payable or applicable if a sale had been made. Consequently when leaseholds are settled on trust for sale the tenant for life is entitled to the net income (*o*). But this does not apply to unauthorised investments under a power to postpone conversion (*p*).

Unauthorised investment.

Where a trustee invests a settled fund in unauthorised investments and the tenant for life thereby receives a larger income, but the capital is intact, the remainderman cannot recover from the tenant for life the excess of income paid to him (*q*).

Mortgage foreclosed.

When trust funds are invested on mortgage and the properties are foreclosed, then pending the sale (see Conveyancing Act, 1911, s. 9, replaced by section 31 of the Law of Property Act, 1925) the tenant for life is entitled to the net rents, but if they amount to less than the interest on the mortgages he is not entitled to claim any part of the proceeds of sale to make up the deficiency (*r*).

Long annuities.

If the trustees have a power to retain investments in the public funds or Government securities, they may retain long annuities forming part of the estate (*s*).

Business.

Where the property directed to be converted includes a business, it is not clear whether a power to postpone conversion, without more, authorises the trustees to carry on the business for an indefinite time: they may certainly carry it on for any reasonable period (for example, two years), in order to enable them to dispose of it to advantage as a going concern (*t*). In *Re Crowther* (*u*), where the trustees carried on the testator's business for twenty-two years, not with a view to a sale, but for the benefit of the tenant for life, Chitty, J., held that they were justified in so doing. If, however, the will directs the business to be sold with all convenient speed, a general power to postpone conversion does not authorise the trustees to carry on the business for an indefinite period (*x*). In the case in which

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(*o*) *Re Brooker*, 70 Sol. J. 526.

(*p*) *Re Trollope's Will Trusts*, [1917] 1 Ch. 596.

(*q*) *Re Hoyles*, [1912] 1 Ch. 67.

(*r*) *Re Horn's Estate*, [1924] 2 Ch. 222. Where there has been no foreclosure and the trustees have gone into possession, see *Re Coaks*, [1911] 1 Ch. 171. Where the mortgaged property is sold for an insufficient price, see *Re Southwell*, 113 L. T. 311.

(*s*) *Howard* v. *Kay*, 27 L. J. Ch. 448; *Wilday* v. *Sandys*, L. R. 7 Eq. 455. In *Tickner* v. *Old*, L. R. 18 Eq. 422, Malins, V.-C., seems to have forgotten his own decision in *Wilday* v. *Sandys*. See *post*, p. 1213, n. (*m*). Compare *Preston* v. *Melville*, 15 Sim. 35, where there was a power to renew investments on "undoubted real or personal security."

(*t*) *Re Chancellor*, 26 Ch. D. 42.

(*u*) [1895] 2 Ch. 56. In *Kirkman* v. *Booth*, 11 Bea. 273, there was no trust for conversion: *ante*, p. 1192.

(*x*) *Re Smith*, [1896] 1 Ch. 171.

this was decided, North, J., seemed to think that *Re Crowther* went too far. The learned Judge was no doubt influenced by the rule that trustees must not carry on a business unless they are expressly authorised to do so (*y*).

If the testator is a partner in a business, and the articles of partnership require that his capital shall remain in the business for a fixed time, the effect of a power to postpone conversion may be to entitle the tenant for life to interest on the testator's capital at the rate fixed by the articles (*z*).

Income of retained investments.

There is a conflict of judicial opinion on the question whether rules (ii), (iii), (iv), (v), and (vi), stated above, apply where the will gives the trustees a discretionary power to postpone conversion, but says nothing as to the destination of the income pending conversion. It is obvious that if the will expressly directs that, pending conversion, the income of the retained investments is to be treated as if it were income arising from investments authorised by the will, the tenant for life is entitled to the whole income (*a*), and the same result follows if the will contains some implied direction to that effect; as where the testator directs the income of his residuary estate, or of the securities for the time being "constituting" his residuary personal estate, to be paid to the tenant for life, for this clearly includes the income of the retained investments (*b*). In *Re Sheldon* (*c*), North, J., expressed the opinion that this principle, though it applies to hazardous, does not apply to wasting, investments, and that in the case of wasting investments the tenant for life is only entitled to receive interest on the capital value. But it is not easy to see why there should be any distinction of this kind, for the effect of an implied direction to pay the whole income to the tenant for life ought to be the same as that of an express direction to that effect (*d*).

Where there is a trust for sale, power to postpone the sale, and a trust to invest the proceeds, in each case with the consent of the tenant for life, the tenant for life is entitled to the income in specie (*e*).

(*y*) See *Kirkman* v. *Booth*, 11 Bea. at p. 280.

(*z*) *Johnston* v. *Moore*, 27 L. J. Ch. 453.

(*a*) *Re Chancellor*, 26 Ch. D. 42; *Re Crowther*, [1895] 2 Ch. 56; *Re Elford*, [1910] 1 Ch. 814; *Morley* v. *Mendham*, 2 Jur. (N.S.) 998; *Lean* v. *Lean*, 32 L. T. 305 (ships). See also *Sparling* v. *Parker*, 9 Bea. 524; *Wrey* v. *Smith*, 14 Sim. 202; *Waters* v. *Waters*, 32 L. T. 306, n.

(*b*) *Re Thomas*, [1891] 3 Ch. 482; *Green* v. *Britten*, 1 D. J. & S. 649; *Re Aste*, 118 L. T. 433 (income of my residuary estate)—cf. this with *Re Chaytor*, *infra*, n. (*f*).

(*c*) 39 Ch. D. 50. In *Furley* v. *Hyder*, 42 L. J. Ch. 626, the tenant for life was not allowed the dividends on some water stock retained by the Court.

(*d*) Compare the principle applicable where there is no express trust for conversion, *post*, p. 1210.

(*e*) *Re Rogers*, [1915] 2 Ch. 437. This case has nothing to do with the rule in *Howe* v. *Lord Dartmouth*, as there was an *express* trust to convert.

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If, however, the testator directs his residue to be converted and invested, and the income of his "residuary trust moneys and the investments representing the same" to be paid to A for life, a mere power to postpone conversion does not, it seems, entitle A to the whole income of unauthorised investments retained by the trustees (*f*). But it is a question of construction whether the testator intended that the power to postpone should be exercised for the benefit of the tenant for life or merely for the more convenient realisation of the estate (*g*).

In *Re Sherry* (*h*) part of the testator's estate consisted of an estate *pur auter vie* and two policies on the life of the *cestui que vie*. There was a trust for conversion with a power to postpone. It was held that the trustees might postpone the sale of the life interest and the policies and pay the premium on the policies out of capital. So in *Glengall* v. *Barnard* (*i*) annuities and policies on the life of the annuitants were permitted to be retained.

Implied power to postpone conversion.

In *Brown* v. *Gellatly* (*k*) the testator empowered his trustees to realise his property and to sail his ships for the benefit of his estate until they could be satisfactorily sold; this gave them a discretion to postpone conversion, and Lord Cairns held that the case fell within the third division pointed out by Sir James Parker in his judgment, already quoted, in *Meyer* v. *Simonsen*.

Re Owen.

In *Re Owen* (*l*) the testator gave his residuary estate upon trust for sale and conversion with a discretionary power to postpone conversion and directed the net proceeds of sale to be invested in trust securities, and held in trust for his wife for life with remainder to his son. The will contained no direction as to the income of his estate pending conversion. Held that the tenant for life was entitled as from the death of the testator to interest at 4 per cent. on the capital value of the unauthorised securities to be calculated not on each of the unauthorised securities separately, but on the aggregate value of all the unauthorised securities; and that if in any year the tenant for life on that basis received more than the actual income of the unauthorised securities the overpayment must be adjusted out of her subsequent income.

(*f*) *Re Chaytor*, [1905] 1 Ch. 233 (disapproving the decision in *Bulkeley* v. *Stephens*, 3 N. R. 105); *Re Lynch Blosse*, [1899] W. N. 27; *Re Woods*, [1904] 2 Ch. 4; *Re Carter*, 41 W. R. 140 (leaseholds). In *Re Bates*, [1907] 1 Ch. 22, there was no trust for conversion.

(*g*) *Re Inman*, [1915] 1 Ch. 187.

(*h*) [1913] 2 Ch. 508; *Re Bennett*, [1896] 1 Ch. 778.

(*i*) 5 Bea. 245.

(*k*) L. R. 2 Ch. 751; distinguished in *M'Leod's Trustees* v. *M'Leod*, [1916] S. C. 64, where the "free income" was given to the widow.

(*l*) [1912] 1 Ch. 519.

Reversionary and other interests not producing income.

(viii) The rules already stated are primarily applicable to property producing income, but a residue subject to a trust or power to convert often includes property which, from its nature, or from other causes, does not produce income. A reversionary interest, or a policy of life insurance, is not income bearing, and the interest on a mortgage debt may be in arrear and unpaid for a considerable period of time. If the trust for sale is absolute, and there is no discretionary power to postpone conversion, the tenant for life can compel the trustees to convert the property (unless it is absolutely unsaleable) and invest the proceeds in authorised securities, the income of which is paid to the tenant for life (*m*); and this is so even in the case of a reversionary interest expectant on the death of the tenant for life (*n*). The tenant for life does not lose his right to claim interest on the value of the property while unconverted, merely by acquiescing in its retention by the trustees (*o*), but if he requests the trustees to delay conversion it would seem that he impliedly waives this right (*p*).

No power to postpone.

Power to postpone.

In most cases, however, the testator gives the trustees a discretionary power of sale, or power to postpone conversion, and then the tenant for life cannot compel a realisation of the property so long as the trustees, in the proper exercise of their discretion, think fit to keep it unconverted; in such a case the tenant for life gets nothing until the property falls into possession or is sold; but he may have a right to an apportioned part of the fund when it falls into possession (*q*).

Rowlls v. *Bebb*.

In *Rowlls* v. *Bebb* (*r*) the testator bequeathed his personal estate to trustees upon trust for conversion and investment and to pay the income to his sister during her life and after her death on certain trusts. He gave to the trustees a discretionary power to postpone for such period as to them should seem expedient the conversion of any part of his personal estate, but the outstanding personal estate was to be subject to the trusts thereinbefore declared and the yearly produce thereof was to be deemed annual income for the purpose of the trust. He was entitled to a reversionary interest in a sum of Consols subject to the life interest therein of his sister. The trustees did not sell the reversionary interest during the sister's life. The Court of Appeal held upon the evidence that the trustees had never

(*m*) *Re Hobson*, 55 L. J. Ch. 422.

(*n*) *Johnson* v. *Routh*, 27 L. J. Ch. 305; *Countess of Harrington* v. *Atherton*, 2 D. J. & S. 352. But the testator, of course, may indicate that a reversionary interest shall not be considered to form part of his estate until it falls into possession : *Re Flower*, 63 L. T. 201 (reversing 62 L. T. 216).

(*o*) *Re Hobson*, 55 L. J. Ch. 422.

(*p*) *Walker* v. *Shore*, 19 Ves. 387.

(*q*) See *post*, p. 1204.

(*r*) [1900] 2 Ch. 107; *Mackie* v. *Mackie*, 5 Hare, 70.

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exercised their discretion and that the reversionary interest ought to have been sold and the proceeds invested to produce income for the tenant for life, and accordingly that the fund must be apportioned between the representatives of the tenant for life and the remaindermen on the principle of *Re Earl of Chesterfield's Trusts* (*s*). The will does not seem to have contained the usual direction that reversionary property shall not be sold until it falls into possession.

In such a case as that above referred to, where conversion ought to have taken place, either because there was no power to postpone, or because the power was not exercised or improperly exercised, it becomes necessary to determine what portion of the property belongs to the tenant for life or his representatives.

Apportionment of a reversion when it falls into possession.

The method by which the fund is apportioned has varied from time to time. In *Wilkinson* v. *Duncan* (*t*), the value which the reversion would have had at the expiration of one year from the testator's death, if the actual time of its falling into possession had then been known, was calculated, and the difference between the fund and this value was paid to the tenant for life; the residue of the fund was invested, and the dividends paid to the tenant for life. The report of this case does not state how the value was calculated, but from *Beavan* v. *Beavan* (*u*) it appears that the sum which, with simple interest at 4 per cent., calculated from one year from the testator's death till the date when the fund fell in, was to be the value required. This method was also adopted in *Wright* v. *Lambert* (*x*), a case in which the tenant for life died before the fund fell into possession, and the estate of the tenant for life was given simple interest at 4 per cent. on the sum so ascertained. In *Beavan* v. *Beavan* (*y*), Lord Romilly adopted a more rational plan, namely, to ascertain the sum which, if put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulated at compound interest with yearly rests (deducting income tax) would have produced the amount actually recovered on the day when the property was realised; this sum is then treated as capital, and the residue as income. The same method was adopted in *Re Chesterfield's Trusts* (*z*), where there was a power to postpone.

Beavan v. *Beavan.*

(*s*) 24 Ch. D. 643.
(*t*) 23 Bea. 469; *Re Hollebone*, [1919] 2 Ch. 93.
(*u*) 24 Ch. D. 649, n.
(*x*) 6 Ch. D. 649.
(*y*) 24 Ch. D. 649, n.
(*z*) 24 Ch. D. 643. Compare also *Cox* v. *Cox*, L. R. 8 Eq. 343 (settlement, part of bond debt recovered); *Re Donough O'Brien*, [1912] 1 Ir. R. 503 (annuity charged on land); *Turner* v. *Newport*, 2 Ph. 14, and *Re Bird*, [1901] 1 Ch. 916, which are cases of unauthorised investments. See *Re Atkinson*, [1904] 2 Ch., at p. 167.

In the course of time the fall in the rate of interest made the calculation on a 4 per cent. basis unduly favourable to the tenant for life, and Kekewich, J., in *Re Goodenough* (*a*), took the step of reducing the rate to 3 per cent., and his decision has been followed in other cases (*b*). But the rate is now 4 per cent. (*c*), except in special circumstances (*d*).

This method has also been applied to the case of a business carried on at a loss (*e*), and to a policy of life insurance (*f*), but with the rate at 4 per cent. (*g*). The same method is also applied in the case of a contingent reversion (*h*). In *Re Godden* (*i*), the same method was applied to sums received from some mortgaged property under peculiar circumstances; the property was a colliery, of which the testator was in possession as mortgagee, and interest was in arrear at his death; the trustees commenced a foreclosure action, in which a receiver was appointed, and he received various sums from the working of the colliery: an order for foreclosure absolute was made, and the mortgage debt ceased to exist, and the colliery became part of the testator's estate: the question therefore arose, what was to be done with the sums previously received from the working of the colliery. It was held that they ought to be divided between capital and income on the principle laid down in *Re Chesterfield's Trusts*. But where an investment is made by the trustees of a will on mortgage, under the powers contained in the will, and the sum realised by the security is insufficient to pay principal and arrears of interest, the amount is divided in proportion to the amount due for principal and the amount due for interest (*k*).

Re Godden.

If the reversion is sold before it falls into possession, the same method of apportionment is applicable to the proceeds of sale. If the tenant for life has died before the reversion falls into possession, his estate would, on principle, be entitled to 3 per cent. compound interest during his life, from the date of the testator's death, on the value of the reversion ascertained on that date by the method of *Re Goodenough*.

(*a*) [1895] 2 Ch. 537.
(*b*) *Re Duke of Cleveland's Estate*, [1895] 2 Ch. 542; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.
(*c*) *Re Baker*, [1924] 2 Ch. 271.
(*d*) *Re Pennington*, [1914] 1 Ch. 203 (3 per cent. paid under a scheme of arrangement).
(*e*) *Re Hengler*, [1893] 1 Ch. 586.
(*f*) *Re Morley*, [1895] 2 Ch. 738.
(*g*) *Ib.*, at p. 743.
(*h*) *Re Hobson*, 55 L. J. Ch. 422.
(*i*) [1893] 1 Ch. 292.
(*k*) *Re Atkinson*, [1904] 2 Ch. 160 (following *Re Moore*, 54 L. J. Ch. 432, and *Re Alston*, [1901] 2 Ch. 584, and overruling *Re Foster*, 45 Ch. D. 629, and *Re Phillimore*, [1903] 1 Ch. 942); *Stewart* v. *Kingsale*, [1902] 1 Ir. R. 496 (settlement); *Re Ancketill's Estate*; 27 L. R. Ir. 331. See also *Re Broadwood's Settlements*, [1908] 1 Ch. 115, and *Ackroyd* v. *Ackroyd*, 18 Eq. 313 (part of personalty recovered after a time from absconding executor).

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Property not actually producing income.

Where a will gives the trustees a discretionary power to postpone conversion, it generally goes on to direct that the income of property retained unconverted shall be paid to the tenant for life, but that no property not actually producing income shall be treated as producing income, the object, of course, being to exclude the two rules (v) and (viii) above stated. But the Courts seem inclined to put a narrow construction on the clause. Thus in *Re Godden* (*l*), it was held by North, J., that money received since the death of a testator from the working of a colliery of which he was in possession as mortgagee at his death, was not "income" within the meaning of the clause. And in *Re Hubbuck* (*m*), the Court of Appeal decided that the latter part of the clause above referred to did not have the operation which conveyancers had hitherto attributed to it. In that case the residue included a mortgage on which no interest was paid, and which produced, when realised, less than the principal. The Court of Appeal (reversing Stirling, J.) held in effect that the mortgage had actually produced income, and that the tenant for life was entitled to a proportionate part of the amount realised. It is difficult to understand the principle of this decision. When the testator referred to actual income he meant actual income, and not imaginary or notional income.

In *Re Lewis* (*n*), the will contained a similar clause; in that case the question arose with reference to a mortgage under which the interest, although it went on accruing, was not payable until the death of the mortgagor, which took place five years after that of the testator: it was held that the tenant for life was entitled to the income that accrued during that period.

Real estate.

(ix) The questions above discussed arise chiefly in relation to personalty, but it frequently happens that a testator gives his real and personal estate together upon trust for conversion and investment, and for payment of the resulting income to persons in succession. As ordinary land is not *prima facie* a wasting or hazardous form of property, it would seem clear that the general principle stated above under rule (i) applies to it, and that so long as the trustees, without impropriety, postpone the sale of it, the tenant for life is entitled to the rents and profits. And this may now be considered established (*o*).

(*l*) [1893] 1 Ch. 292.

(*m*) [1896] 1 Ch. 754.

(*n*) [1907] 2 Ch. 296. See *Re Taylor's Trusts*, [1905] 1 Ch. 734 (settlement of 6 per cent. bonds; the interest fell into arrear and the bonds were sold; no part of the purchase money was paid to the estate of the tenant for life); *Re Sale*, [1913] 2 Ch. 697 (arrears of preference dividends).

(*o*) *Casamajor* v. *Strode*, 19 Ves. 391, n.; *Vigor* v. *Harwood*, 12 Sim. 172; *Vickers* v. *Scott*, 3 My. & K. 500; *Fitzgerald* v. *Jervoise*, 5 Mad. 25; *Hope* v. *D'Hédouville*, [1893] 2 Ch. 361; *Re Searle*, [1900] 2 Ch. 829; *Re Oliver*,

But if the land is of such a nature that it is readily saleable and yet only produces a small rental, incommensurate to its real value, the tenant for life is entitled to insist either that it shall be sold, or that he shall be put in the same position as if it had been sold at its true value: if he allows it to remain unsold without protest he has no claim (*p*).

Conversely, if the land is let on such terms that it is in effect a wasting investment—as in the case of mines, brickfields, etc.—the tenant for life is only entitled to such an income as would have been produced if the property had been sold (*q*). This rule, however, does not seem to apply if the mines or brickfields were being worked at the testator's death, and if conversion has been postponed without impropriety (*r*).

The rule in *Howe* v. *Lord Dartmouth*.

(10) (i) THE RULE IN HOWE *v.* LORD DARTMOUTH.—It remains to be considered how far the preceding rules apply to cases in which the residuary clause contains no trust for conversion, express or implied, as where a testator simply bequeaths all the residue of his personal estate in trust for A for life, and after his decease to B absolutely (*s*). In such a case, if the residuary estate consisted of hazardous or wasting property (as, for instance, speculative investments, or leaseholds with a few years to run), the result of a specific enjoyment of the property might be that B would obtain nothing. Acting on the assumption that the testator's intention was that B should not suffer hardship, the Court, in order to give effect to this supposed intention of the testator, requires the wasting property to be converted and invested in trust investments. If the property had been not wasting, but reversionary, the converse result —that A might get nothing—might occur, so that the rule for conversion is also applied, in the case of reversionary and other

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[1908] 2 Ch. 74. The general principle is also stated in the chapter on Conversion, *ante*, p. 725.

(*p*) *Walker* v. *Shore*, 19 Ves. 387; *Yates* v. *Yates*, 28 Bea. 637. See now sections 25 and 28 of the Law of Property Act, 1925, *ante*, p. 1199.

(*q*) *Wentworth* v. *Wentworth*, [1900] A. C. 163 (following *Meyer* v. *Simonsen* and *Brown* v. *Gellatly*, *ante*, pp. 1198 and 1202); *Re Woods*, [1904] 2 Ch. 4. The general principles are stated by Lindley, L.J., in *Re Ridge*, 31 Ch. D. 504, where it is pointed out that in the case supposed the tenant for life cannot be said to be either impeachable or unimpeachable for waste: consequently the provisions of the Settled Land Acts are inapplicable.

(*r*) The decisions in *Miller* v. *Miller*, L. R. 13 Eq. 263, and *Re Darnley*, [1907] 1 Ch. 159, can probably be supported on this ground. In *Re North*, [1909] 1 Ch. 625, there was no trust for sale until after the death of the tenants for life.

(*s*) In *Tickner* v. *Old* (L. R. 18 Eq. 422), where there was an express trust to convert, followed by a power to retain certain kinds of investments, Malins, V.-C., considered that the rule in *Howe* v. *Earl of Dartmouth* applied, but the remarks of the learned V.-C. on this point must have been made *per incuriam*.

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interests not producing income, in favour of the tenant for life (*t*).

This rule is called the rule in *Howe* v. *The Earl of Dartmouth* (*u*), from the case in which it was applied by Lord Eldon to a residuary bequest including Bank stock (not then considered a proper investment for trust funds) and terminable annuities. The rule applies to short leaseholds (*x*), foreign bonds (*y*), shares in trading companies (*z*), a business carried on by the testator (*a*), and generally to all investments not authorised by law. It also applies in favour of a person having a life annuity charged on a wasting fund or residue (*b*).

Where rule does not apply.

The reason of the rule is not generally applicable to an absolute gift subject to an executory limitation (*c*). Nor does it apply to a settled legacy (*d*).

Real estate.

The rule as formulated by Lord Eldon only applies to residuary gifts of personal estate, and it is generally assumed not to apply to real estate (*e*). Lord Eldon seems to have thought that the reason for the exclusion of the rule in the case of real estate was that a residuary devise of real estate was specific (*f*), but it is submitted that the rule is really based on the presumed intention on the part of the testator that wasting property, whatever its nature, unless given by a specific description, ought to be converted for the benefit of the remainderman Real estate, as a rule, is not hazardous, but it may be wasting,

(*t*) *Hinves* v. *Hinves*, 3 Hare, at p. 611.

(*u*) 7 Ves. 137.

(*x*) *Morgan* v. *Morgan*, 14 Bea. 72; *Chambers* v. *Chambers*, 15 Sim. 183; *Lyons* v. *Harris*, [1907] 1 Ir. R. 32, but the law is now altered, see *post*, p. 1209.

(*y*) *Blann* v. *Bell*, 2 De G. M. & G. 775 (Dutch bonds); *Re Shaw's Trusts*, L. R. 12 Eq. 124 (Colonial bonds).

(*z*) *Thornton* v. *Ellis*, 15 Bea. 193 (railway shares); *Re Shaw's Trusts*, *supra* (railway stock).

(*a*) *Kirkman* v. *Booth*, 11 Bea. 273; *Meyer* v. *Simonsen*, 5 De G. & S. 723, *ante*, p. 1198. For an instance where the rule was held to be excluded, see *Stanier* v. *Hodgkinson*, 73 L. J. Ch. 179, *post*, p. 1212.

(*b*) *Fryer* v. *Buttar*, 8 Sim. 442; *Wightwick* v. *Lord*, 6 H. L. C. 217.

(*c*) *Re Bland*, [1899] 2 Ch. 336.

(*d*) If, therefore, trustees in exercise of a power given them for that purpose retain existing investments and appropriate them in satisfaction of a settled legacy, the tenant for life is entitled to the whole income, provided the investments are of a permanent character: *Re Wilson*, [1907] 1 Ch. 394.

(*e*) In the case of *Yates* v. *Yates*, 28 Bea. 637, which is often cited as a decision on the point, the trustees had a discretionary power of sale, as to the effect of which see next section. The question does not seem to be affected by the fact that real and personal estate are included in the same residuary gift: *Re Oliver*, [1908] 2 Ch. 74.

(*f*) For the purposes of the rule as to payment of a testator's debts a residuary devise is still specific, notwithstanding the provisions of the Wills Act: *Hensman* v. *Fryer*, L. R. 3 Ch. 420. Stuart, V.-C., refused to follow this in *Collins* v. *Lewis*, L. R. 8 Eq. 708, and Malins, V.-C., refused to follow it in *Dugdale* v. *Dugdale*, L. R. 14 Eq. 234, saying that the Court is not bound to follow a decision of the Court of Appeal if clearly erroneous. But *Hensman* v. *Fryer* is generally accepted as good law. See *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136.

Mines, brickfields, etc.

as in the case of mines, brickfields, etc. Special rules, however, apply to devises of such properties, whether the devise is residuary or specific. For if the mines are leased (or agreed to be leased) at the death of the testator, the presumption is that the testator intended the tenant for life to have the whole income, and if they are leased after his death by the tenant for life under the powers of the Settled Land Acts, the rules laid down by those Acts as to the capitalisation of part of the rent are applicable (*g*). It does not seem to have been decided whether the tenant for life under a residuary devise has any equity to have the property converted, if it would be to his interest to do so, as in the case of building land let as agricultural land, but as the principle of *Howe* v. *Earl of Dartmouth* does not apply to mining properties and the like, it seems impossible to apply it to the converse case, although this may produce an unjust result, for if a testator devises and bequeaths all his residuary estate to A for life, with remainder to B, and the residue consists of short leaseholds and freehold ground rents with a near reversion, the leaseholds will (if the testator died before 1926) be converted for the benefit of B, but the freeholds will not be converted for the benefit of A. Where the will contains a discretionary trust for conversion, the question may arise whether it is the duty of the trustees to sell (*h*).

Leaseholds.

The rule does not apply to leaseholds situate abroad (*i*), and now, since 1925, does not apply to leaseholds in England (*k*).

Income of wasting property.

If wasting property is not actually converted, the fair course in such cases seems to be to carry to account, as capital, the income accruing from the time of the testator's decease; and, in lieu of such income, to pay to the legatee for life from that period, a sum equal to the dividends which the produce of the sale would have yielded, if invested in $2\frac{1}{2}$ per cent. Consols; such investment, however, not being supposed to be made until the period of the actual sale (if within the year), though it regulates the income retrospectively from the testator's death. But if the sale does not take place within a year after the testator's decease, the amount must, it should seem, be regulated by the presumed

(*g*) *Re Ridge*, 31 Ch. D. 504; *Campbell* v. *Wardlaw*, 8 A. C. 641; *Re Kemeys-Tynte*, [1892] 2 Ch. 211; *Re Chaytor*, [1900] 2 Ch. 804; *Re Hanbury's S. E.* (*No.* 2), [1913] 2 Ch. 357. As to what is a new mine, see *Re Maynard's S. E.*, [1899] 2 Ch. 347; *Chaytor* v. *Trotter*, 87 L. T. 33; *Re Morgan*, [1914] 1 Ch. 910. As to wayleaves, see *Re Clavering*, [1915] W. N. 195. As to applying the rule in *Meyer* v. *Simonsen*, *ante*, p. 1198, to a residuary devise of a mining property where there is a trust for conversion, see *Wentworth* v. *Wentworth*, [1900] A. C. 163; *Re Woods*, [1904] 2 Ch. 4, *ante*, p. 1207.

(*h*) See *Yates* v. *Yates*, 28 Bea. 637; *Miller* v. *Miller*, L. R. 13 Eq. 263. In *Re North*, [1909] 1 Ch. 625, there was a future trust for sale.

(*i*) *Re Moses*, [1908] 2 Ch. 235.

(*k*) *Re Brooker*, 70 Sol. Jo. 526.

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proceeds, *i.e.*, the value at the end of such year, together, in either case, with dividends on the interim income of the terminable unconverted property (*l*).

Wasting securities.

In *Warrock's Trustees* v. *Warrock* (*m*) it was held that shares in steamships which ultimately were realised for more than their value at the testator's death were wasting securities.

As to income of a fund precarious, but not wasting.

What would be the destination of income arising from a fund which, though not wasting or fluctuating, is precariously secured, is more doubtful. It would clearly be the duty of any executor or trustee to call in the money as soon as possible (*n*); but in the meantime, if the fund should happen to yield a larger amount of income than a proper investment (as in the case of a loan on personal security at 10 per cent.), the trustee or executor could not, it is conceived, with safety pay the legatee for life the actual income, though no loss of principal were eventually sustained, having regard to the severe lesson taught to trustees by the case of *Dimes* v. *Scott* (*o*), in which, however, it is to be remembered, there was an express trust for conversion.

Contrary intention.

(ii) *What Expressions exclude the Rule.*—The rule in *Howe* v. *The Earl of Dartmouth* "is purely an artificial rule, and is often calculated to defeat what the testator would have wished in order to give effect to his intentions, and slight circumstances will be sufficient to show that the rule is not to be put in force" (*p*). Nevertheless, it is difficult, if not impossible, to lay down any general principle to assist us in answering the question: What amounts to an indication of intention that the legatee for life shall, in exclusion of the general doctrine, enjoy

Intention to give enjoyment in specie.

(*l*) *Fearns* v. *Young*, 9 Ves. 549; *Howe* v. *Earl of Dartmouth*, 7 Ves. 137; *Mills* v. *Mills*, 7 Sim. 501; *Morgan* v. *Morgan*, 14 Bea. 72; *Fryer* v. *Buttar*, 8 Sim. 442; *Benn* v. *Dixon*, 10 Sim. 636; *Chambers* v. *Chambers*, 15 Sim. 183; *Smith* v. *Pugh*, 6 Jur. 701; *Lichfield* v. *Baker*, 2 Bea. 481, 13 *ib.* 447. But see *Sutherland* v. *Cooke*, 1 Coll. 498, and *Crawley* v. *Crawley*, 7 Sim. 427, where £4 per cent. was allowed, and a remark on the last case, Hayes and Jarm. Con. Wills (3rd. ed.), p. 227 (4th ed.), p. 191. The rule that the tenant for life is only entitled to so much for income as the property would have produced if sold and invested in Consols, does not apply where the testator dies, and his property, and the persons entitled under his will, are out of the jurisdiction of the Court of Chancery, but it attaches as soon as the persons entitled arrive in this country: *Holland* v. *Hughes*, 16 Ves. 111.

(*m*) [1919] S. C. 522.

(*n*) *Thornton* v. *Ellis*, 15 Bea. 193. But see *Johnson* v. *Johnson*, 2 Coll. 441.

(*o*) See *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 737: but *contra*, *Douglas* v. *Congreve*, 1 Kee. 410; and *Mehrtens* v. *Andrews*, 3 Bea. 72, where the fund was both wasting and precarious. See also *Macdonald* v. *Irvine*, 8 Ch. D. 101, 112, 121.

(*p*) *Per* Kindersley, V.-C., in *Simpson* v. *Lester*, 4 Jur. (N.S.) 1269; and see the remarks of Baggallay, L.J., in *Macdonald* v. *Irvine*, 8 Ch. D., p. 113. Not only is the rule an artificial one, but it is based on a mistaken notion that enjoyment in specie depends on the bequest being specific, as may be seen from Lord Eldon's judgment, and that of Shadwell, V.-C., in *Mills* v. *Mills*, 7 Sim. 501. The two questions are quite distinct. See *per* Lord Cottenham in *Pickering* v. *Pickering*, 4 Myl. & Cr. 289.

in specie the property which is the subject of disposition? This is a question of construction, and some of the cases on it will be found to turn upon rather nice distinctions.

Where part of residue is specified.

The rule only applies to residues, and not to specific bequests; sometimes a testator combines with the general words of a residuary clause, an enumeration of certain species of property, thus raising the question whether the enumeration is to be considered as taking the specified property out of the rule. Whether in such a case the bequest of the particulars is specific is discussed in Chapters XXIX and XXX.

If, however, the bequest of the particulars enumerated is not specific, then it seems that the mere enumeration of some particulars, without any other indication, is not sufficient to exclude the rule (*q*).

Vaughan v. *Buck.*

But Lord Lyndhurst, C., in *Vaughan* v. *Buck* (*r*), on a will of doubtful construction, which the L.C. said might for the purpose now in question be read thus: "I give the whole of my property, *viz.*, my house, 21, North Street, £1,000 New £4 per cents., £1,500 in the £3 per cent. Consols, £645 in the £3 per cent. Reduced, and £20 per annum long annuities, with the residue and interest, if there should be any, to my wife for life, and after to be divided equally between my surviving children": held that the widow was entitled to enjoy the house, which was leasehold, and the long annuities, in specie. "With respect to the house," Lord Lyndhurst said, "the bequest is clearly specific, and as to the long annuities they constitute one of the items in the testator's property existing at the date of the will, and which by this description he bequeathed to his wife. . . . *Bethune* v. *Kennedy* (*s*) is similar in principle, and corresponds nearly in its circumstances with the present."

But, in fact, the M.R., in *Bethune* v. *Kennedy*, held that there was a specific gift of the funds; and *Vaughan* v. *Buck* was followed with some reluctance in *Oakes* v. *Strachey* (*t*) by the V.-C., whose decision had been overruled in the former case by Lord Lyndhurst (*u*).

What will exclude rule.

It has been said that the effect of the later cases is to allow small indications of intention to prevent the application of the

(*q*) *Stirling* v. *Lydiard*, 3 Atk. 199; *Mills* v. *Mills*, 7 Sim. 501; *House* v. *Way*, 18 L. J. Ch. 22, 12 Jur. 959; *Cotton* v. *Cotton*, 14 Jur. 950; *James* v. *Gammon*, 15 L. J. Ch. 217; *Simpson* v. *Earles*, 11 Jur. 921; *Pickup* v. *Atkinson*, 4 Hare, 624; and see *Sutherland* v. *Cooke*, 1 Coll. 498; *Morgan* v. *Morgan*, 14 Bea. 72; *Craig* v. *Wheeler*, 29 L. J. Ch. 374; *Re Tootal's Estate*, 2 Ch. D. 628.

(*r*) 1 Phill. 75. See also *Hubbard* v. *Young*, 10 Bea. 203; *Mills* v. *Brown*, 21 Bea. 1.

(*s*) 1 My. & Cr. 114.

(*t*) 13 Sim. 414.

(*u*) In *Milne* v. *Parker*, 12 Jur. 171, the intention to give the residuary legatee the income in specie of part of the residue was clear.

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rule (*x*); but it must be done by a fair construction of the will, the burden being always on those who would exclude the rule (*y*). In *Stanier* v. *Hodgkinson* (*z*) the testator gave his wife all his real and personal estate during widowhood, and at her death to be divided among his children; "also my shares and interest" in two colliery businesses: it was held that the wife was entitled to the income of the businesses in specie, partly because they were specifically mentioned, and partly by reason of the direction that the residue was to be divided at her death.

Expressions which imply enjoyment in specie.

A direction to renew or keep in repair (*a*), or to demise (*b*) or discharge incumbrances on (*c*) leaseholds, points to enjoyment in specie. And where after a bequest of a residue for life there is an express trust for conversion at a specified period, it will be inferred that no conversion is to take place previously to that period, and the tenant for life, therefore, takes the income in specie (*d*); so where there is a power to convert generally (*e*), and *a fortiori* where there is a direction not to convert without consent (*f*), or for a definite term of seven years (*g*), or a discretion is given either to convert or not (*h*). But a mere trust to divide is not sufficient (*i*).

In *Re Bentham* (*k*), a testator, who was entitled to freeholds, and also to leasehold houses held for an unexpired term of thirty-nine years, and let to weekly tenants, after bequeathing legacies gave to his widow a life rent of all his property, with power to sell and reinvest the proceeds on good security. Kekewich, J., held that the power of sale was sufficient to exclude the rule in *Howe* v. *Lord Dartmouth*. And an express trust to convert all "except Government stock" entitles the tenant for life to specific enjoyment of long annuities (*l*). And

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(*x*) *Morgan* v. *Morgan*, 14 Bea. 72; and see 3 Hare, pp. 612, 613.
(*y*) *Macdonald* v. *Irvine*, 8 Ch. D. 101.
(*z*) 73 L. J. Ch. 179.
(*a*) *Crowe* v. *Crisford*, 17 Bea. 507.
(*b*) *Hind* v. *Selby*, 22 Bea. 373; *Thursby* v. *Thursby*, L. R. 19 Eq. 395.
(*c*) *Re Sewell's Estate*, L. R. 11 Eq. 80.
(*d*) *Alcock* v. *Sloper*, 2 My. & K. 699; *Hunt* v. *Scott*, 1 De G. & S. 219; *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; *Harvey* v. *Harvey*, 5 Bea. 134; *Rowe* v. *Rowe*, 29 Bea. 276; *Re Holden*, [1888] W. N., p. 33; *Stanier* v. *Hodgkinson*, 73 L. J. Ch. 179. In *Mills* v. *Mills*, 7 Sim. 501, the direction to convert had reference to a conversion into actual money for the purpose of making loans, and did not therefore exclude by implication a previous conversion into other investments.
(*e*) *Bowden* v. *Bowden*, 17 Sim. 65; *Re Leonard*, 29 W. R. 234; *Skirving* v. *Williams*, 24 Bea. 275. But see *Jebb* v. *Tugwell*, 20 Bea. 84, and the cases referred to, *post*, p. 1214.
(*f*) *Hinves* v. *Hinves*, 3 Hare, 609; *Ellis* v. *Eden*, 23 Bea. 543.
(*g*) *Green* v. *Britten*, 1 D. J. & S. 649.
(*h*) *Simpson* v. *Lester*, 4 Jur. (N.S.) 1269.
(*i*) *Re Evans' Will Trusts*, [1921] 2 Ch. 309.
(*k*) 94 L. T. 307; *Re Pitcairn*, [1896] 2 Ch. 199.
(*l*) *Howard* v. *Kay*, 27 L. J. Ch. 448; *Wilday* v. *Sandys*, L. R. 7 Eq. 455. See also *Grant* v. *Mussett*, 8 W. R. 330.

this was so held, even though in the same will the trustees were directed to invest the proceeds of conversion in "Government stock," a direction which admittedly did not authorise them to invest in long annuities: the reason why it did not do so being not that long annuities did not come within the words of the direction as well as within the words of the exception, but because the Court would not permit the trustees to select perishable securities (*m*).

A power to retain investments of a specified nature entitles the tenant for life to the whole income of those investments, but not, of course, to the income of other unauthorised investments (*n*).

Distinction between hazardous and wasting investments.

In considering whether the rule in *Howe* v. *Earl of Dartmouth* applies in a particular case, there is, on principle, no distinction between investments which are wasting, and those which are merely speculative or hazardous, for if the testator shows an intention that the tenant for life should have the enjoyment of the residue in specie, he excludes the rule in *Howe* v. *Earl of Dartmouth* altogether, and not merely in respect of hazardous investments. But this principle has not been adhered to, and it was formerly regarded as settled that if a testator bequeathed his residue upon trust for A for life, and gave the trustees a discretionary power to retain any of his investments, A was entitled to the whole of the income arising from unauthorised investments of a permanent nature, so long as they were retained unconverted (*o*), but not to that arising from wasting investments: it was considered that these latter ought to be converted, or treated as having been converted (*p*). Wasting investments, it was held, could only be excluded from the rule if a clear intention appeared. Thus, in *Simpson* v. *Lester* (*q*), a testator gave all his residue, "including my mining property," in trust for his wife for life, and gave his trustees a discretionary power of conversion: it was held that the tenant for life was entitled to the enjoyment in specie of the testator's mining property. So in *Burton* v. *Mount* (*r*), where a testator

(*m*) *Per* Lord Romilly, L. R. 7 Eq. at p. 457. As to the decision in *Tickner* v. *Old*, L. R. 18 Eq. 422, which is sometimes cited as bearing on this matter, see *ante*, p. 1200, n. (*s*).

(*n*) *Brown* v. *Gellatly*, L. R. 2 Ch. 751.

(*o*) *Re Sheldon*, 39 Ch. D. 50; *Re Bates*, [1907] 1 Ch. 22; *Re Wilson*, [1907] 1 Ch. 394.

(*p*) *Porter* v. *Baddeley*, 5 Ch. D. 542. *Gray* v. *Siggers*, 15 Ch. D. 74, was, at the time it was decided, contrary to the current of authority.

(*q*) 4 Jur. (N.S.) 1269.

(*r*) 2 De G. & S. 383. The V.-C. (Knight Bruce) intimated that he would probably have decided otherwise as to the Long Annuities but for the decisions in *Alcock* v. *Sloper* (2 M. & K. 699), *Collins* v. *Collins* (2 M. & K. 703), *Bethune* v. *Kennedy* (1 My. & Cr. 114), and *Pickering* v. *Pickering* (4 My. & Cr. 289); and see *Waters* v. *Waters*, 32 L. T. (N.S.) 306, n.

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gave all his real and personal estate upon trust to pay the rents, profits, dividends and interest to A for life, and empowered his trustees, notwithstanding the devise and bequest of his freehold and leasehold estates, to sell the same, it was held that A was entitled to the enjoyment in specie of leaseholds and long annuities forming part of the residue. However, the leaning of the Courts is now in favour of the true principle, and where a testator gives his trustees a power to retain existing investments, this entitles the tenant for life to the income of wasting as well as of permanent investments (*s*).

Reversionary interest.

Conversely, if the trustees have a discretionary power of conversion, and in the exercise of their discretion retain a reversionary interest unsold until after the death of the tenant for life, his representatives are not entitled to any part of the proceeds of sale (*t*).

Expressions insufficient to confer enjoyment in specie.

But a discretionary power of sale does not always entitle the tenant for life to enjoyment in specie. Thus, a power to sail the testator's ships for the benefit of his estate till they can be satisfactorily sold (*u*), or a direction to sell a horse if a stated sum should be offered, if not, to let him, and if a sale should be made, to invest the money (*x*)—a sale upon the first good opportunity being in each case evidently contemplated—shows no intention to alter equities between successive takers, but only to regulate the discretion of the trustees in conducting the sale, and does not give the tenant for life the actual profits made before sale (*y*). So a direction to convert certain specific parts of the personal estate does not imply that the residuary estate is not to be converted (*z*); neither does a direction to sell the residuary personal estate for payment of debts and legacies imply that it is to be sold for no other purpose; since a sale for the purpose of making those payments is no more than the law itself would order in the common course of administration without an express direction (*a*). A power to vary securities, though an insufficient ground for conversion in the case of a specific gift (*b*),

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(*s*) *Re Nicholson*, [1909] 2 Ch. 111.

(*t*) *Re Pitcairn*, [1896] 2 Ch. 199.

(*u*) *Brown* v. *Gellatly*, L. R. 2 Ch. 751. Cf. *Thursby* v. *Thursby*, L. R. 19 Eq. 395.

(*x*) *Arnold* v. *Ennis*, 2 Ir. Ch. Rep. 601. See *Gibson* v. *Bott*, 7 Ves. 89, *ante*, p. 1198.

(*y*) Unless there is an express direction that interim profits shall go as income, see *Re Chancellor*, 26 Ch. D. 42.

(*z*) *Cafe* v. *Bent*, 5 Hare, 24; *Hood* v. *Clapham*, 19 Bea. 90, which is not consistent with *Morgan* v. *Morgan*, 14 Bea. 85, 86. *Secus* where all is directed to be sold except specific parts, see cases cited *ante*, p. 1212.

(*a*) *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312; *Johnson* v. *Johnson*, 2 Coll. 441.

(*b*) *Lord* v. *Godfrey*, 4 Mad. 455.

yet affords a strong argument in favour of a sale when it has reference to a residuary bequest (*c*).

Where various items of property are dealt with together, the fact that some of them are clearly to be enjoyed in specie (and more especially if these be of a kind which, according to the general rule ought to be converted) affords an argument in favour of the remaining items having been also intended to be so enjoyed (*d*); an argument, however, which requires other corroborative circumstances to render it conclusive (*e*).

Where of several items in one gift some are clearly not subject to sale.

An intention that the tenant for life shall enjoy the property in specie is sometimes collected from the circumstance that the terms of the gift in remainder point to the very property as it existed at the testator's death. Thus, in *Collins* v. *Collins* (*f*), where the words of the bequest were "I give to my wife, all and every part of my property, in every shape, and without any reserve, and in whatever manner it is situated, for her natural life; and at her death the property so left to be divided in the following manner." Part of the testator's property consisted of a leasehold messuage, held for a term of twenty-eight years; and Sir J. Leach, M.R., considered that the ulterior legatees were not entitled to have the lease sold, but that it was the intention of the testator that his widow should enjoy the leasehold property for her life.

Where the gift in remainder points to the very property. *Collins* v. *Collins*.

Again, in *Pickering* v. *Pickering* (*g*), where a testator gave to his wife, subject to the payment of his debts and legacies, and such annuities and assurances as he was liable to pay, all the interests, rents, dividends, annual produce and profits, use and enjoyment, of his real and personal estate, for life; and at her decease the testator gave all the rest and residue of his estate, real and personal, to his son-in-law; but, in case of his dying before the testator's wife, then he directed the residue to be divided in manner therein mentioned. Part of the testator's property consisted of a leasehold house and a life annuity; and the charges thereon also comprised annual payments. Lord Langdale, M.R., decided that in this case the testator had indicated an intention that the property should

Pickering v. *Pickering*.

(*c*) *Morgan* v. *Morgan*, 14 Bea. 72. Compare *Lyons* v. *Harris*, [1907] 1 Ir. R. 32.

(*d*) *Bethune* v. *Kennedy*, 1 My. & Cr. 114; *Burton* v. *Mount*, 2 De G. & S. 383; *Simpson* v. *Earles*, 11 Jur. 921, Wigram V.-C.; *House* v. *Way*, 12 Jur. 958, 18 L. J. Ch. 22, Wigram, V.-C.; *Howe* v. *Howe*, 14 Jur. 359 (K. Bruce, V.-C.); *Cotton* v. *Cotton*, *ib.* 950; *Booth* v. *Coulton*, 7 Jur. (N.S.) 207 (freehold distillery with utensils, etc., let together at one rent); *Holgate* v. *Jennings*, 24 Bea. 623, where it was said that though investments were to be enjoyed in specie, debts, as turnpike bonds, must be got in.

(*e*) *Howe* v. *Earl of Dartmouth*, 7 Ves. 137; *Blann* v. *Bell*, 5 De G. & S. 658; 2 D. M. & G. 775.

(*f*) 2 My. & K. 703; *Re Barratt*, [1925] Ch. 550.

(*g*) 2 Bea. 31.

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be specifically enjoyed by his wife during her life; and Lord Cottenham, on appeal (*h*), was of the same opinion, grounding his judgment especially on *Collins* v. *Collins*, to which he thought the direction to divide the property on a certain event precisely assimilated the case before him. He remarked that in *Collins* v. *Collins* there were expressions only applicable to the actual condition of the property.

Harris v. *Poyner.*

In *Harris* v. *Poyner* (*i*), the testator devised and bequeathed all the residue of his real and personal estate, " and all his estate, term and interest therein," to trustees in trust for his wife for life, and after her death, he devised " the same, and all his estate, term and interest therein " to his son : Sir R. Kindersley, V.-C., thought that the testator intended the son to take the identical property, and, therefore, that there was to be no conversion during the life of the widow.

Effect of gift of rents to tenant for life.

In *Pickup* v. *Atkinson* (*k*), the ground on which the conversion was opposed was, that there was a gift to the tenant for life of the rents, profits, dividends and interest of all the residue, etc., and that if leaseholds comprised in the residue were to be converted, the word " rents " would, in effect, be struck out of the will. In support of this, *Goodenough* v. *Tremamondo* (*l*) was cited, where Lord Langdale, M.R., relying on the use of that word in the gift for life, and gift over, held that there was to be no conversion; but Sir J. Wigram, V.-C., in deciding that there must be a conversion in the case before him, said that, according to that argument, the use of the words " dividends " (*m*), or " interest," would prevent the conversion of any property yielding income denominated by those words. However, in *Cafe* v. *Bent* (*n*), where a testator directed a percentage on the receipt of the " rents " of the residue, after satisfying " all ground rents and other outgoings," to be paid to his son, and none of the property included in the residue except leaseholds produced " rents," the same Judge held that the leaseholds were to be enjoyed in specie. This conclusion was probably fortified by a different percentage being given on the " dividends " arising from the residue.

(*h*) 4 My. & Cr. 289

(*i*) 1 Drew. 174, approved in *Re Wareham*, [1912] 2 Ch. 312; but see *Lichfield* v. *Baker*, 2 Bea. 481, 13 *ib.* 447; *Thornton* v. *Ellis*, 15 Bea. 193; *Bowden* v. *Bowden*, 17 Sim. 65.

(*k*) 4 Hare, 624.

(*l*) 2 Bea. 512; and see *Marshall* v. *Bremner*, 2 Sm. & Gif. 237; *Crowe* v. *Crisford*, 17 Bea. 507; *Skirving* v. *Williams*, 24 Bea. 275.

(*m*) Some stress was laid upon this word by Sir J. Leach in *Alcock* v. *Sloper*; and see *Blann* v. *Bell*, 5 De G. & S. 658; *Bowden* v. *Bowden*, 17 Sim. 65; but see *Sutherland* v. *Cooke*, 1 Coll. 498.

(*n*) 5 Hare, 24; see *Neville* v. *Fortescue*, 16 Sim. 333.

In *Re Game* (*o*), a testator directed that the rents and profits of his residuary real and personal estate should be paid to his wife for life; and after her death he gave his residuary estate to others in succession, subject to certain annuities, and conferred on the annuitants a power of distress. Stirling, J., held that neither the direction to pay rents nor the power of distress was sufficient to exclude the operation of the rule in *Howe* v. *Lord Dartmouth*.

Gift of "income" of residue.

In *Boys* v. *Boys* (*p*), a testator gave to his wife for life the interest, dividends, or income of all moneys or stock, "and of all other property whatsoever yielding income at my decease": it was held by Romilly, M.R., that this showed an intention to give the widow the income of the funds as they stood at the death of the testator. No doubt this was so, but that is so in all the cases to which the rule in *Howe* v. *Lord Dartmouth* applies. It is clear from the modern decisions that a gift of the income of "my estate" to a person for life, does not entitle him to the enjoyment of it in specie (*q*).

(*o*) [1897] 1 Ch. 881, following *Craig* v. *Wheeler*, 29 L. J. Ch. 374; and *Harris* v. *Poyner*, 1 Dr. 174. *Crowe* v. *Crisford*, 17 Bea. 507; *Wearing* v. *Wearing*, 23 Bea. 99; *Vachell* v. *Roberts*, 32 Bea. 140, and *Re Elmore's Will*, 9 W. R. 66, are overruled: *Re Wareham*, [1912] 2 Ch. 312. *Hood* v. *Clapham*, 19 Bea. 90, was not cited in *Re Game*.

(*p*) 28 Bea. 436.

(*q*) *Macdonald* v. *Irvine*, 8 Ch. D. 101; *Lyons* v. *Harris*, [1907] 1 Ir. R. 32.

CHAPTER XXXV.

DESCRIPTION OF PERSONS AND THINGS.

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Object or subject of gift not identified.

I.—General Principles.—If a testator makes a disposition in such terms that the subject or object of gift cannot be identified, the gift necessarily fails: as where he devises his land in the parish of A and has at the time of his death no land in the parish of A (*a*), or makes a gift of property, and leaves the name of the devisee or legatee blank (*b*). But if the testator uses a description which, though inaccurate, affords some means of identifying the subject or object of the gift, the error may be explained by parol evidence: as where he devises his "Quendon Hall Estates in the county of Essex," having no estate so named, but having a house called Quendon Hall and lands in Essex (*c*); or where he gives his "shares in the X Company," and it appears that although he has no shares he has stock in that company (*d*); or gives property to Charles Smith, and it appears that at the date of the will the testator knew no one of that name, but knew a person called Richard Smith (*e*).

Parol evidence.

If the description of the person to whom the testator gives property is unambiguous and can only apply to one person it is not necessary to prove that the testator was aware of his existence, but if there is a latent ambiguity or if the description does not accurately apply to any person then, as a general rule, the claimant must prove that the testator knew of his existence (*f*).

(*a*) *Miller* v. *Travers*, 8 Bing. 244; *Barber* v. *Wood*, 4 Ch. D. 885, and other cases cited *ante*, Chap. XV.
(*b*) *Ante*, p. 490.
(*c*) *Webb* v. *Byng*, 1 K. & J. 580.
(*d*) *Morrice* v. *Aylmer*, L. R. 7 H. L. 717, *post*, p. 1276.
(*e*) *Pitcairne* v. *Brase*, Finch, 403, and other cases cited *post*, p. 1226.
(*f*) *Doe* d. *Thomas* v. *Beynon*, 12 A. & E. 431; *Grant* v. *Grant*, L. R. 5 C. P. 380, 727; *Re Taylor*, 34 Ch. D. 255. See *ante*, pp. 479.

When evidence is admissible.

It should be added that the manner in which a will is framed sometimes affords ground for deciding whether the testator had in mind existing persons or whether he intended to make a general scheme for the distribution of his property, to take effect according to the state of facts at his death; in the former case evidence of the state of facts at the date of the will is generally of importance in arriving at the testator's intentions (*g*), while in the latter it is not. In *Daubeny* v. *Coghan* (*h*) the testator gave a legacy to the children of his niece Catherine A. and of his nephew, the late James C.; he had had two nephews named James C., both of whom had long been dead, leaving no issue; he had only one nephew of the name of C. who had died leaving issue, namely, Henry C. The children of Henry C. claimed the legacy. On the face of the will it would seem clear that the testator had in mind existing persons, in which case the principle of *Camoys* v. *Blundell* (*i*) would have applied and the children of Henry C. would have been entitled, but the evidence was unsatisfactory and the case sent back for further inquiry.

Right of selection or purchase.

It will also be remembered that if a testator gives one of his chattels, or part of his land, without defining or identifying it, this may give the legatee or devisee a right of selection (*k*). Or if he bequeaths a chattel or sum of stock, etc., in a general way, the legatee may be entitled to require the executors to purchase it (*l*).

All particulars in description of subject-matter of disposition need not be correct.

The general rule is thus laid down by Mr. Jarman (*m*): "It is clearly not essential to the validity of a devise that all the particulars which the testator has included in his description of the subject or object of gift should be accurate. There need only be enough of correspondence to afford the means of identifying both (*n*). Thus, the devise of a house or field, described by name, is not rendered uncertain by its being mentioned to be in the occupation of a person who is not the occupier; for as the property was adequately described in the first instance, this erroneous and unnecessary addition does not vitiate the devise (*o*). And even if it should turn out that part only of the house or field so named was in the occupation of the person

(*g*) *Ante*, p. 479.
(*h*) 12 Sim. 507.
(*i*) 1 H. L. C. 778; *post*, p. 1230.
(*k*) See *ante*, p. 435.
(*l*) See *ante*, p. 1026.
(*m*) First ed., p. 329, where these remarks form part of the chapter on "Gifts void for Uncertainty."
(*n*) See *Purchase* v. *Shallis*, 19 L. J. Ch. 518; *Howard* v. *Conway*, 1 Coll. 87; *Stephens* v. *Powys*, 1 De G. & J. 24.
(*o*) *Blague* v. *Gold*, Cro. Car. 447, 473; *Tomson* v. *Thornton*, And. 188, 2 Leon. 120.

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designated by the testator as the occupant, the whole nevertheless would pass (*p*).

Mistake in locality of lands.

" A reference to occupancy often comes in aid of a defect or error in the locality, and *vice versa*. Thus, a devise of ' my lands at Bramstead, in the county of *Surrey*, in the occupation of John Ashley,' has been held to pass lands in the occupation of John Ashley, at Bramstead, in the county of *Hants* (*q*). Even without the reference to the occupancy, however, in this instance the description would have been sufficient, for the misnomer of the county in which a parish is situate produces no uncertainty unless the testator should happen to have property answering to the description in a parish of that name in more than one county (*r*).

" It has even been held that a devise of houses and lands lying in the *parish* of Billing, and in a street called Brook Street, is a good devise of lands in Billing *Street*, the testator having no lands in the parish of Billing (*s*).

Leasehold will pass as " freehold."

" So it is clear that a leasehold estate will pass under the description of freehold, where the reference to its name or local situation, and the fact of the testator having no freehold estate answering thereto, leave no doubt of the identity (*t*); and *vice versa* (*u*).

" It has been adjudged, too, that under a devise of buildings in a specified street, houses situate in a lane contiguous to, and opening into, that street pass, for want of a subject more nearly answering to the description " (*x*).

Misdescription in case of personalty

The same principle applies to gifts of personal property; thus a gift of debenture stock of a certain company may pass debentures of that company if the testator had no debenture stock (*y*); a gift of " shares " may pass common stock (*z*), or even debenture stock (*a*); and a bequest of Danish bonds for £3,520 may pass Danish bonds for £5,600 if the error is clear (*b*). A bequest of £700 East India stock has even been held to pass £700 Bank stock (*c*).

(*p*) *Chamberlaine* v. *Turner*, Cro. Car. 129.
(*q*) *Hastead* v. *Searle*, 1 Ld. Raym. 728.
(*r*) See *Owens* v. *Bean*, Finch, 395; *Brown* v. *Longley*, 2 Eq. Ca. Ab. 416, pl. 14.
(*s*) Brownl. 131, 8 Vin. Ab. 277, pl. 7.
(*t*) *Denn* d. *Wilkins* v. *Kemeys*, 9 East, 336.
(*u*) *Day* v. *Trig*, 1 P. W. 286, *post*, p. 1232; *Doe* d. *Dunning* v. *Lord Cranstoun*, 7 M. & Wels. 1.
(*x*) *Doe* d. *Humphreys* v. *Roberts*, 5 B. & Ald. 407, *post*, p. 1247, where other cases relating to this point are cited.
(*y*) *Re Nottage* (*No.* 2), [1895] 2 Ch. 657.
(*z*) *Morrice* v. *Aylmer*, L. R. 7 H. L. 717, and other cases cited *post*, p 1276.
(*a*) *Re Weeding*, [1896] 2 Ch. 364, *post*, p. 1240; *Re Bodman*, *post*, p. 1275.
(*b*) *Goodlad* v. *Burnett*, 1 K. & J. 341; *Lindgren* v. *Lindgren*, 9 Bea. 358.
(*c*) *Door* v. *Geary*, 1 Ves. sen. 255.

Shares in a bank.

In *Re Jameson* (*d*) a testatrix bequeathed all her shares in "the Wensleydale and Swaledale Banking Company"; there was no such bank, either at the date of the will or at the testatrix's death, but she had formerly owned shares in the Swaledale and Wensleydale Banking Company, which before the date of the will had been converted into shares of Barclay & Company: it was held that these latter shares passed by the bequest. Numerous other examples of erroneous description may be cited (*e*).

Devise of certain land may pass share of proceeds of sale.

On the same principle, if a person is entitled, under a certain deed, to a moiety of the proceeds of sale of land at X which is subject to an absolute trust for sale, and by his will devises all the lands, tenements and hereditaments of which he is seised or possessed under that deed, this will pass his moiety of the proceeds of sale (*f*). So, if a person is in possession, as mortgagee, of leasehold property in X, having no other property there, and bequeaths his leasehold property in X to A, his beneficial interest in the property will pass to A, and not merely the legal estate, although the will contains an express gift of all estates vested in the testator as mortgagee (*g*).

Gift of land may pass mortgage debt.

Portrait.

In *Re Milner Gibson-Cullum* (*h*) the testator gave to the trustees of the National Portrait Gallery "My portrait of Charles Howard, Earl of Nottingham." The trustees accepted it but expressed considerable doubt whether it was correctly described as a portrait of the Earl. It was held that the uncertainty, or even the certainty, of the portrait not being of the Earl did not justify the Court in saying that the trustees were bound to return it.

Distinction between misdescription and ademption.

Where description of property is changed after date of will.

It is hardly necessary to warn the reader against confusing the principle now under discussion with the doctrine of ademption; if a testator devises his land at X to A, and afterwards sells it and invests part of the sale-money on mortgage of the same land, the devise to A is adeemed (*i*). So if a testator gives his shares in a certain company, and after the date of the will the shares are converted into the shares of another company, they do not, as a general rule, pass by the bequest (*k*). There

(*d*) [1908] 2 Ch. 111, *ante*, p. 1054. See also *Re Weeding*, [1896] 2 Ch. 364; *Trinder* v. *Trinder*, L. R. 1 Eq. 695; *Flood* v. *Flood*, [1902] 1 Ir. R. 538; *Townsend* v. *Townsend*, 1 L. R. Ir. 180, all cited *post*.

(*e*) *D'Aglie* v. *Fryer*, 12 Sim. 1; *Gallini* v. *Noble*, 3 Mer. 691, and other cases cited *post*.

(*f*) *Re Lowman*, [1895] 2 Ch. 348; *Re Glassington*, [1906] 2 Ch. 305.

(*g*) *Woodhouse* v. *Meredith*, 1 Mer. 450; *Re Carter*, [1900] 1 Ch. 801.

(*h*) [1924] 1 Ch. 457.

(*i*) *Re Clowes*, [1893], 1 Ch. 214; *Re Bick*, [1920] 1 Ch. 488 (devise of rent-charge, subsequent purchase of fee simple). Compare *Moor* v. *Raisbeck*, 12 Sim. 123, and other cases cited *ante*, p. 149.

(*k*) See the section on Ademption in Chap. XXX, *ante*, pp. 1053 *seq*.

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are many other instances in which it is necessary to distinguish between cases where a testator misdescribes property belonging to him at the date of his will, and those in which he disposes of property by an accurate description, which afterwards becomes inaccurate or ambiguous through a change in the property itself. The law governing cases of the second class is unsatisfactory by reason of section 24 of the Wills Act, the effect of which has been already considered (*l*).

Ademption by removal, etc.

The question whether a gift of chattels in a particular place is adeemed by their temporary or permanent removal is discussed elsewhere (*m*).

In description of objects all particulars need not be correct.

Mr. Jarman continues (*n*): "The same principles of construction of course apply to objects of gift. It is sufficient, therefore, that the devisee or legatee is so designated as to be distinguished from every other person, and the inaptitude of some of the particulars introduced into the testator's description is immaterial; and this whether the object of the gift be a corporation or an individual. Thus, a devise 'to the mayor, jurats, and town-council of the ancient town of Rye,' has been held to be good, though they were incorporated by the name of 'the mayor, jurats, and commonalty'" (*o*).

On the same principle, where money was bequeathed to the provost and fellows of Queen's College, Oxford, to purchase books to be added to the library, the proper name of the corporation being "the provost and scholars, etc.": the corporation was held to be entitled, because the evidence showed that in common parlance the name of "Provost and Fellows" was used instead of the proper corporate name of the College, and also on the ground that the library belonged to the body corporate, who were, therefore, the proper persons to make additions to it (*p*). And where a bequest to "the Westminster Hospital, Charing Cross," was claimed by the Westminster Hospital in Broad Sanctuary, and also by the Royal Opthalmic Hospital, and by the Charing Cross Hospital, Agar Street, Strand, the latter was held entitled, as being nearest to the locality mentioned, and as being a general hospital (*q*): the

(*l*) Chap. XII.

(*m*) *Ante*, p. 1064.

(*n*) First edition, p. 330.

(*o*) *Att.-Gen.* v. *Corporation of Rye*, 1 J. B. Moore, 267, 7 Taunt. 546. See also Fitz. Dev. 27, Dalison, 78, s. 8; 10 Rep. 57; *Foster* v. *Walter*, Cro. Eliz. 106, 2 Leon. 165. But as to gifts to corporations, *vide ante*, Chap. V, p. 78.

(*p*) *Queen's College* v. *Sutton*, 12 Sim. 521. In *Att.-Gen.* v. *Sibthorp* (2 Russ. & My. 107), a bequest "to the fellows and demies of Magdalen College, Oxford," was held void, not on the ground that the description of the college was inaccurate, but on the ground that the whole bequest was "so extraordinary and irrational" that it was impossible to support it.

(*q*) See *Re Alchin's Trusts*, L. R. 14 Eq. 230.

testator, when he intended to give to a hospital of a special character, having so named it (*r*). And where a testatrix made a bequest to "the Church Pastoral Aid Society in England," and another bequest to "the Church Pastoral Aid Society in Ireland," there being no such Society in Ireland, it was held that the Spiritual Aid Society in Ireland, a society similar to the Church Pastoral Aid Society in England, was entitled to the bequest (*s*).

Parol evidence to explain ambiguity.

Where the description is equally applicable to two different objects, either of which would have been sufficiently designated if the other had not existed, evidence is admissible to remove the ambiguity, by showing which of them was known to the testator (*t*), and (if a charitable institution) to which of them he subscribed (*u*). If this evidence fails to indicate which the testator meant, the bequest fails, unless, as already noticed, it is charitable and applicable *cy-près* (*x*). But when the society is accurately described there is no ambiguity (*y*).

General rule as to name.

As a general rule, *veritas nominis tollit errorem demonstrationis;* so that where there is a person to answer the name, it will be immaterial that any further description does not precisely apply. Thus a bequest to C. M. S. and C. E., legitimate son and daughter of C. S., was held to be a good bequest to persons of those names, though they turned out to be illegitimate, in consequence of an anterior marriage of their father being established (*z*). And the rule has prevailed, although besides a wrong or inaccurate description, one of the christian names of the legatee was omitted; a gift to "my niece Elizabeth" being held a sufficient description of Elizabeth Jane, a great grand-niece (*a*).

Gift to person described as "wife" or "husband," etc.

It is on this principle that a gift to A. B. by name, described as the wife or husband or widow of the testator or another person, is not in general affected by the fact of the devisee or legatee not answering the description. Thus in *Giles* v. *Giles* (*b*)

(*r*) *Bradshaw* v. *Thompson*, 2 Y. & C. C. C. 295; and see *Wilson* v. *Squire*, 1 Y. & C. C. C. 654; *Smith* v. *Ruger*, 5 Jur. (N.S.) 905; *Re Davies' Trusts*, 21 W. R. 154.

(*s*) *Re Maguire*, L. R. 9 Eq. 632; but see as to this case *ante*, p. 217. See *Coldwell* v. *Holme*, 2 Sm. & G. 31; *Re Magrath*, [1913] 2 Ch. 331.

(*t*) *King's College Hospital* v. *Wheildon*, 18 Bea. 30.

(*u*) *Re Kilvert's Trusts*, L. R. 7 Ch. 170; *Re Fearn's Will*, 27 W. R. 392; *Re Briscoe's Trust*, 20 W. R. 355, and the other cases cited *ante*, p. 217.

(*x*) *Re Clergy Society*, 2 K. & J. 615, *ante*, p. 233.

(*y*) *National Society for the Prevention of Cruelty to Children* v. *Scottish National Society for the Prevention of Cruelty to Children*, [1915] A. C. 207.

(*z*) *Standen* v. *Standen*, 2 Ves. jun. 589, 6 B. P. C. Toml. 193; and see *Doe* d. *Gains* v. *Rouse*, 5 C. B. 422; *Giles* v. *Giles*, 1 Kee. 685; *Re Blackman*, 16 Bea. 377; *Ford* v. *Batley*, 23 L. J. Ch. 225; *Pratt* v. *Mathew*, 22 Bea. 328; *Farrer* v. *St. Catherine's College*, L. R. 16 Eq. 19. As to bequests to illegitimate children, see *post*, Chap. XLIII.

(*a*) *Stringer* v. *Gardiner*, 27 Bea. 35, 4 De G. & J. 468.

(*b*) 1 Kee. 685; s. c. *sub nom. Penfold* v. *Giles*, 6 L. J. Ch. 4.

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a bequest by the testator to his wife Ann Giles was held good, although their supposed marriage was illegal, her first husband being alive at the time; it seems that she and the testator both supposed that he was dead. The case is still clearer if the testator knows at the time of the supposed marriage that it is illegal (*c*). Where the testator goes through the form of marriage with a woman who represents herself to be a widow, her first husband being in fact living, the validity of a gift by the testator to her as "my wife" depends on whether she made the representation fraudulently (*d*): if she did the Court of Probate will refuse to allow her to take advantage of it (*e*).

The same rule applies where a testatrix makes a gift to A. B., describing him as "my husband" (*f*).

Even if no form of marriage is gone through, a bequest to a woman described as "my wife A. B." is good, if she has been recognised by the testator as his wife: and the fact that he has a lawful wife living makes no difference (*g*).

Where the gift is not to a person by name, but simply to "my wife" or "my husband," different considerations prevail. The cases have been already considered (*h*).

Divorced wife.

In *Re Boddington* (*i*) a testator bequeathed a legacy of £200 "to my wife E. C.," and also bequeathed to "my said wife" an annuity "so long as she shall continue my widow and unmarried"; after the date of the will the marriage was annulled at the suit of the wife: it was held that she was entitled to the legacy, but not to the annuity, on the ground that she was not the testator's widow. If the annuity had been given to her so long as she continued unmarried the result would have been different. Thus in *Knox* v. *Wells* (*k*) the testator bequeathed an annuity to his son George Wells and Eliza his wife jointly, and directed that on the death of George, "leaving Eliza his wife surviving him," his trustees should pay to her an annuity "so long as she continues unmarried." After the testator's death George Wells obtained a divorce from his wife and died

Knox v. *Wells.*

(*c*) *Doe* d. *Gains* v. *Rouse*, 5 C. B. 422; *Dilley* v. *Matthews*, 2 N. R. 60; *Pratt* v. *Mathew*, 22 Bea. 328; *Re Wagstaff*, [1907] 2 Ch. 35; [1908] 1 Ch. 162.

(*d*) *Re Petts*, 27 Bea. 576, where the woman had heard nothing from her first husband for nineteen years.

(*e*) *Meluish* v. *Milton*, 3 Ch. D. 27. In the earlier cases of *Kennell* v. *Abbott*, 4 Ves. 802, *Wilkinson* v. *Joughin*, L. R. 2 Eq. 319, went on the theory that the Court of Chancery has jurisdiction in such cases, but the contrary is now settled: *ante*, pp. 44 *seq.*

(*f*) *Kennell* v. *Abbott*, *supra*. See *Re Smalley*, [1929] 2 Ch. 112.

(*g*) *Lepine* v. *Bean*, L. R. 10 Eq. 160.

(*h*) *Ante*, p. 376. *Re Hammond*, [1911] 1 Ch. 342 (bigamous marriage).

(*i*) 22 Ch. D. 597; 25 Ch. D. 685; *N.* v. *M.*, 1 T. L. R. 523.

(*k*) 48 L. T. 655.

in her lifetime; she was held to be entitled to the annuity so long as she remained unmarried.

Reputed wife of third person.

In *Turner* v. *Brittain* (*l*) a testator made a bequest to H., the present wife of his son J. B. There was a woman named C. H. living with J. B., and they had falsely represented to the testator that they were married. It was held that C. H. was entitled to the legacy. The same principle was followed in *Anderson* v. *Berkley* (*m*). In many cases the use of the word "wife" to describe the reputed wife of a person has an important bearing on the construction of the word "children" as meaning his illegitimate children by her (*n*). Conversely, a reference to a person by name as the "child" of A. B. (he being the illegitimate child of A. B.) may have a bearing on the construction of a gift to "the wife" of A. B. (*o*).

Gift to "widow" of third person.

In *Rishton* v. *Cobb* (*p*) the testator gave £2,000 to trustees upon trust to invest and allow "Lady C., widow of the late Sir N. C., to receive the dividends so long as she shall continue single and unmarried"; he also bequeathed "to the said Lady C. the sum of £500." About five years before the date of the will, Lady C. had married H. R., who, a few months after the marriage, went abroad and never returned. The testator was not aware of these facts, and the lady continued to call herself Lady C. It was held by Lord Cottenham that in concealing her second marriage she acted with no improper motive, and that the testator's bounty was not induced by it, and that she was entitled, not only to the legacy of £500, but also to the £2,000. The propriety of the decision was doubted by Fry, J., and Lord Selborne in *Re Boddington* (*q*), so far as regards the £2,000 : it is submitted that so far as regards the £500 the decision was clearly right.

Latent ambiguity.

The principles above stated do not, of course, apply where there is a latent ambiguity arising from the fact that the description given in the will applies to two persons ; these cases are considered in another chapter (*r*).

Misnomer of individuals.

Another maxim is, that *nihil facit error nominis cum de corpore constat* (*s*); and there are many cases in which the description is such as to lead to an irresistible inference that the

(*l*) 3 N. R. 21.
(*m*) [1902] 1 Ch. 936.
(*n*) See *Re Horner*, 37 Ch. D. 695; *Re Harrison*, [1894] 1 Ch. 561; and the other cases cited *post*, Chap. XLIII, pp. 1735 *seq.*
(*o*) See *Re Lowe*, 61 L. J. Ch. 415, *ante*, p. 377.
(*p*) 5 Myl. & Cr. 145. See *Re Mason*, [1910] 1 Ch. 695.
(*q*) *Ante*, p. 1224.
(*r*) Chap. XV.
(*s*) 11 Rep. 21a.

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person named was not the person in the testator's mind. Thus, where (*t*) the devise was to "William Pitcairne, eldest son of Charles Pitcairne," it was insisted that the eldest son had no title, because his name was not William, but Andrew; nevertheless the Court was of opinion that the words were sufficient to point him out with certainty.

"James" entitled under gift to "John."

So (*u*) under a bequest to "John and Benedict, sons of John Sweet," a son named James (there being no John) was held to be entitled. It was proved, too, that the testator used to call him "Jacky"; but Lord Hardwicke appears to have thought this evidence unnecessary to establish his title. And in *Re Hooper* (*x*), under a bequest to "Percy," described as a son of C. A. H., who had no son named Percy, a son of C. A. H. named Herbert, generally called "Bertie," was held to be entitled.

"Edward," written by mistake for "Samuel."

Again, where (*y*) a testator gave an annuity to his brother "Edward Parsons" for life, and, after his decease, the same to go equally among his (E. P.'s) children, "by his present wife," and at the date of the will, the testator had no brother except one named Samuel, who had a wife and children; but four or five years before, he had a brother named Edward, who as well as his wife, was then dead, which fact was known to the testator, who by the same will, gave legacies to his children. The testator had been in the habit of calling his brother Samuel, "Edward" and "Ned." Lord Loughborough, without argument, held the children of Samuel to be entitled.

"Charles," by mistake for "Richard."

In another case (*z*), a bequest to "the Rev. Charles Smith, of Stapleton Tawney, clerk," was held to apply to one who answered the other parts of the description, but whose name was Richard; though it was suggested that the person intended was Charles Smith of Romford, an officer in the army; it appeared, however, that he was dead at the date of the will, and that the testator had been informed of the fact. If the other part of the description, as well as the name, had corresponded with those of the deceased Charles Smith, and the testator could have been ignorant of his death, it would have been difficult to sustain the claim of Richard.

Other instances of mistake in christian name.

So where (*a*) a testator bequeathed to his six grandchildren (*b*)

(*t*) *Pitcairne* v. *Brase*, *Finch*, 403. See also *Gynes* v. *Kemsley*, 1 Freem. 293; *Rivers' Case*, 1 Atk. 410.

(*u*) *Dowset* v. *Sweet*, Amb. 175.

(*x*) 88 L. T. 160. See also *Re Radcliffe*, 51 W. R. 409. See *Beaumont* v. *Fell*, 2 P. W. 141, referred to *post*, p. 1231.

(*y*) *Parsons* v. *Parsons*, 1 Ves. jun. 266.

(*z*) *Smith* v. *Coney*, 6 Ves. 42; see *Re Blackman*, 16 Bea. 377.

(*a*) *Garth* v. *Meyrick*, 1 B. C. C. 30.

(*b*) As to gift to a specified number of children, *vide post*, p. 1682.

by their christian names, but the name of Ann, one of them, was repeated, and that of Elizabeth, another, omitted, it was held that Elizabeth should take the share mistakenly given to Ann by the repetition of her name. Under the present practice the name inserted by mistake in such a case may be omitted from the probate copy (*c*).

Again, where (*d*) a testator gave to " my namesake Thomas Stockdale, the second son of my brother John Stockdale," the second son, though not named Thomas, was held to be entitled, there being no son of that name. The error in the name here was remarkable, as the testator, in describing the legatee as his own namesake, had his attention particularly drawn to the name.

So, under a devise to " Mary Cook, wife of — Cook " (*e*), a married woman named Elizabeth Cook was held to be entitled, on evidence showing that the testator had no other relative of the name of Cook, and that she was the person intended. In this case the additional description was very slight, it merely showed the devisee to be a married woman. The principle has been recognised in several modern cases (*f*).

Other examples of principle.

The principle is not confined to cases of description by relationship. So far has it been carried that a gift to " my god-child " described as " the daughter of A," may take effect in favour of the testator's god-child who is the son of A (*g*).

In *Re Cawley* (*h*) a bequest to the testator's " sister Annie Neary " was held to be for his sister Annie Flynn (whose maiden name was Neary). The instructions for the will were admitted in evidence.

Distinction where there is more than one claimant.

Where the description of a legatee is inaccurate, it not unfrequently happens that part of the description applies to one person, and part to another. Here the maxims quoted above give but little help. The essence of the previous cases is that as to one term of the description it is applicable to no one : it is clearly erroneous. But in the cases now referred to each of the terms apply correctly, or with some degree of accuracy, to some one, and the question is, which is wrong? This can only be

(*c*) *In b. Boehm*, [1891] P. 247; *ante*, pp. 32, 470.
(*d*) *Stockdale* v. *Bushby*, G. Coop. 229, 19 Ves. 381.
(*e*) *Doe* d. *Cook* v. *Danvers*, 7 East, 299.
(*f*) *Patching* v. *Barnett*, 45 L. T. 292 (where the bequest failed for other reasons); *Re Waller*, 68 L. J. Ch. 526; *Baxter* v. *Morgan*, 7 L. R. Ir. 501 (wrong name as well as wrong description); *Re Ofner*, [1909] 1 Ch. 60; *Re Halston*, [1912] 1 Ch. 435. The decision in *Re Ely*, 65 L. T. 452, seems to be inconsistent with the principle.
(*g*) *Re Blayney's Trust*, Ir. R. 9 Eq. 413; *Re Blake's Trusts*, [1904] 1 Ir. R. 98; *Re Nunn's Trust*, L. R. 19 Eq. 331 (gift to " my housekeeper " by wrong name); *Re Fry*, 22 W. R. 813 (gift to " my servant " by wrong name).
(*h*) [1920] 1 Ir. R. 78.

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solved by considering the general context and the surrounding circumstances (*i*), and although it has been said that the description has generally prevailed over the name, yet numerous instances will be found on both sides.

Cases where the name prevailed.

Thus in *Garland* v. *Beverley* (*k*) where a testator devised land to his nephew for life, remainder to " William, the eldest son of my said nephew " for life, remainder to the issue of W. in tail; William was, in fact, the second son, but was nevertheless held to be entitled. Again, in *Gillett* v. *Gane* (*l*), where the testator devised to his son for life, remainder to " Robert the fourth son " of the son in fee, with an executory gift over if Robert should die under twenty-one " to —— the fifth son," and so on to those born after the fifth; Robert Henry, in fact, was the third son, but having attained twenty-one was held to be absolutely entitled.

Cases where the description prevailed.

On the other hand, in *Doe* v. *Huthwaite* (*m*), where, after previous limitations, the devise was to " Stokeham H., second son of A." for life, remainder to his issue in strict settlement, remainder " to John H., third son of A." and his issue in like manner; in fact, Stokeham was the third son of A. and John was his second, and it was held that the mistake was in the name, and that John and his issue were entitled before Stokeham and his issue.

So where there was a gift to " Clare Hannah, the wife of A.," whose wife was named " Hannah " only, but who had an infant daughter, named " Clare Hannah," it was held that the testator could not have had an infant in view when he gave a legacy to a wife, and that therefore the wife was entitled to the legacy (*n*). And where both the name and description are almost entirely inapplicable, the general purpose of the testator, collected from the circumstances, will sometimes point out the object : as where there was a gift for life to " Elizabeth A., a natural daughter of Elizabeth A., single woman, and who formerly lived in my

(*i*) See Chap. XV.

(*k*) 9 Ch. D. 213. So in *Newbolt* v. *Pryce*, 14 Sim. 354, though the name was not fully given; as to which see also *Bernasconi* v. *Atkinson*, *Gillett* v. *Gane*, *Charter* v. *Charter*, all cited *post*, notes (*l*) and (*r*).

(*l*) L. R. 10 Eq. 29. Other cases where the name has prevailed over the description are, *Bernasconi* v. *Atkinson*, 10 Hare, 345; *Garner* v. *Garner*, 29 Bea. 114; *Farrer* v. *St. Catharine's College*, L. R. 16 Eq. 19; *Re Lyon's Trusts*, 48 L. J. Ch. 245; *Re Taylor*, 34 Ch D. 255; *Dooley* v. *Mahon*, Ir. R. 11 Eq. 299.

(*m*) 2 Moore, 304. See also *Neeld* v. *Neeld*, [1878] W. N., p. 219. Other cases in which the description has prevailed over the name are, *Re Feltham's Trusts*, 1 K. & J. 528; *Hodgson* v. *Clarke*, 1 D. F. & J. 394; *Bradshaw* v. *Bradshaw*, 2 Y. & C. 72 (explained in *Doe* v. *Hiscocks*, 5 M. & W. 363, *ante*, p. 500); *Re Gregory's Settlement*, 34 Bea. 600. As to *Webber* v. *Corbett*, L. R. 16 Eq. 515, see *ante*, p. 498.

(*n*) *Adams* v. *Jones*, 9 Hare, 485; and see *Lee* v. *Pain*, 4 Hare, at p. 253; *Re Wolverton Estates*, 7 Ch. D. 197.

service," with remainder to her children. The servant Elizabeth was a married woman, who had an illegitimate son John, who had died leaving children, and a legitimate daughter Margaret, and it was held that the children of John were entitled, and not Margaret, the circumstances being such as to lead to the inference, that the children of the illegitimate child of the servant Elizabeth, without reference to name or sex, were the objects of the testator's bounty (*o*).

Where there is a person who substantially answers both name and description.

But if there is a person whose name and description substantially correspond with those given in the will, the Court will not allow the gift to take effect in favour of a person who answers the description but is of a different name. As in *Mostyn* v. *Mostyn* (*p*), where there was a gift to John Henry Mostyn, with a gift over, in the event of his not marrying, to Samuel Mostyn, John Mostyn, and Mary Davies (formerly Mostyn), "all of them late of Calcott Hall," that having been the residence of the testatrix's deceased brother, who had five children, Robert John, John Henry, Samuel, Thomas, and Mary; the last four left Calcott Hall on the death of their father, and it was therefore clear that the testatrix meant the gift over to take effect in favour of Samuel, Thomas and Mary, but it was held that as there was a son named John Henry, it was impossible to say that Thomas was meant. Mere conjecture is not admissible.

Ambiguous description of charity.

The same kind of question frequently arises in the case of gifts to charitable institutions: thus where (*q*) a testatrix by will bequeathed a legacy of £250 to the British Home for Incurables, Streatham, and by a codicil which recited twice incorrectly that she had, among other legacies, given by will £500 to the British Home for Incurables, Streatham, she revoked all the legacies and "instead thereof" bequeathed £500 each to the Royal Home for Incurables, Streatham, and another institution; this legacy was claimed by both the British Home and Hospital for Incurables and by the Royal Hospital for Incurables, and evidence was given as to the testatrix's subscriptions to both institutions; it was held that the Royal Hospital for Incurables was entitled to the legacy.

In *Charter* v. *Charter* (*r*) the question arose as to the

(*o*) *Ryall* v. *Hannam*, 10 Bea. 536; and see *Rickit's Trust*, 11 Hare, 299.

(*p*) 5 H. L. C. 155. See *Delmare* v. *Robello*, 1 Ves. jun. 412; *Andrews* v. *Dobson*, 1 Cox, 425; *Holmes* v. *Custance*, 12 Ves. 279; *In b. Peel*, L. R. 2 P. & D. 46, and other cases cited *ante*, pp. 503 *seq.*

(*q*) *British Home for Incurables* v. *Royal Hospital for I.*, 90 L. T. 601. See *Re Clergy Society*, 2 K. & J. 615; *Re Kilvert's Trusts*, L. R. 7 Ch. 170; *Re Alchin's Trusts*, L. R. 14 Eq. 230; *Coldwell* v. *Holme*, 2 Sm. & G. 31, and the other cases cited *ante*, p. 217.

(*r*) L. R. 7 H. L. 364. Followed in *In b. Chappell*, [1894] P. 98. See also *In b. Brake*, 6 P. D. 217; *In b. Twohill*, 3 L. R. Ir. 21.

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Appointment of executor by wrong name.

appointment of an executor, and it was held that the nature of the duties imposed by the will on the executor, and the circumstances of the testator's family, showed that the testator, in appointing his son "Forster Charter" really meant to appoint his son Charles Charter, although he had another son called William Forster Charter.

Ambiguity partially removed by context.

The claim of a person who might otherwise be entitled is sometimes excluded by the context. Thus in *Douglas* v. *Fellows* (*s*) a testatrix gave a legacy of £300 to Commodore Peter Douglas and a like legacy "to the children of Peter Henry Douglas." The commodore's real name was Peter John Douglas; there was no such person as Peter Henry Douglas, but Peter John Douglas had a brother named Henry Osborn Douglas, who died before the date of the will, leaving three children, who claimed the second legacy; it was also claimed by the five children of Peter John Douglas, but Wood, V.-C., decided in favour of the children of Henry Osborn Douglas.

Where devisee or legatee is described but not named.

The same principles are applicable for the construction of wills where the devisee is not mentioned by name, but the description is composed wholly of "demonstration," as, where the gift is to the first or second son, or to the children, of some named person. Thus in *Camoys* v. *Blundell* (*t*), where the gift was to the "second son of Edward Weld, of Lulworth, for life," and there was among other subsequent remainders, a remainder to the first and other sons of each brother, except the eldest, of Edward Weld, and also a remainder to Lady S., one of the sisters of Edward Weld: the facts were, that there was no Edward Weld, of Lulworth, but there was a Joseph Weld of that place, who had three sons and an elder brother, and a sister, Lady S., and there was an Edward Joseph Weld, of the same place (son of Joseph Weld), who had no children or elder brother, and no sister named Lady S.; and it was decided that the second son of Joseph, as more perfectly answering the description, was the person designated to take the first estate for life under the description of the second son of Edward.

So a legacy to "my wife" may take effect in favour of a person whom the testator intended to marry (*u*).

(*s*) Kay, 114. For the application of the same rule to a gift to a charity, see *Lee* v. *Pain*, 4 Ha., at p. 254, *ante*, p. 1228.

(*t*) 1 H. L. C. 778. See also *Del Mare* v. *Rebello*, 3 B. C. C. 446; 1 Ves. jun. 412; *Holmes* v. *Custance*, 12 Ves. 279; *Daubeny* v. *Coghlan*, 12 Sim. 507; *Re Ingle's Trusts*, L. R. 11 Eq. 578; *Bristow* v. *Bristow*, 5 Bea. 289 (where both fathers bore the same name). As to cases where there is a blank, see *ante*, p. 446, and *Re Gregson's Trusts*, 2 H. & M. 504; as to cases where the description is composed wholly of "demonstration," see *ante*, p. 491.

(*u*) *Schloss* v. *Stiebel*, 6 Sim. 1; *Re Brown*, 54 Sol. J. 251.

Complete misnomer.

Sometimes cases of complete misnomer occur. Thus a testator may give a legacy to "Mrs. Sawyer" when he means a person whose real name is Mrs. Swapper, or to "Catherine Earnley" when he means a person whose real name is Gertrude Yardley (*w*). These and similar cases are referred to in connection with the admission of parol evidence (*x*).

Parol evidence.

The cases of *Doe* d. *Hiscocks* v. *Hiscocks* (*y*), *Doe* d. *Thomas* v. *Beynon* (*z*), *Grant* v. *Grant* (*a*), and other cases bearing on this subject are also discussed in connection with the question as to the admissibility of parol evidence (*b*).

Name and description evenly balanced.

If the ambiguity is not removed by the context and by parol evidence of the surrounding circumstances, the gift necessarily fails for uncertainty; for direct evidence of the testator's intention is inadmissible. Thus in *Drake* v. *Drake* (*c*), where a testator gave a legacy to "his sister Mary Francis T. D.," and the residue of his estate to "his niece Mary Frances T. D." and three other persons. The testator had a sister-in-law, but no niece of that name, though he had nieces, one of whom was named Frances Isabella T. D., another Mary Caroline T. D., and a third Mary Elizabeth T. D.; there was no circumstance showing that one niece was intended to take the share of residue rather than another, and nothing to take it from a niece and to give it to the sister-in-law, unless, without any evidence to prove error of demonstration, there was a rigid rule that the name should prevail. It was therefore held in the House of Lords that the gift of one-fourth of the residue failed.

In the case of *Thomas* v. *Thomas* (*d*), in which Lord Brougham laid great stress on *Camoys* v. *Blundell* (*e*), the decision seems to have proceeded chiefly on the notion, which may now be regarded as exploded, that the heir-at-law had a vested interest in his ancestor's land. It is the duty of the Court to prevent an intestacy if possible (see *per* Lord Northington in *Fox* v. *Collins*, 2 Ed. at p. 108) and the principle applies to real estate as well as to personalty. It is submitted that the case of *Thomas* v. *Thomas* (although it is certainly near the line) fell within the principle of *Smith* v. *Coney* (*f*).

(*w*) *Masters* v. *Masters*, 1 P. W. 421; *Beaumont* v. *Fell*, 2 P. W. 141.
(*x*) Chap. XV.
(*y*) 5 M. & Wels. 363.
(*z*) 12 Ad. & El. 431.
(*a*) L. R. 5 C. P. 380, 727.
(*b*) Chap. XV.
(*c*) 8 H. L. C. 172, affirming Romilly, M.R., 25 Bea. 642.
(*d*) 6 T. R. 671.
(*e*) 1 H. L. C. 778, *ante*, p. 1230.
(*f*) 6 Ves. 42, stated p. 1226.

Case of indefinite reference to locality.

Where the objects of gift are described by reference to locality, there must be some definite local limit. Thus, a gift to persons resident in the hospitals of or in the vicinity of C., has been held void for uncertainty as to what should be said to be in the vicinity of C. (*g*). But a gift to the inhabitants of T. Row was held good (*h*).

Falsa demonstratio non nocet.

II.—Falsa Demonstratio non nocet.—In determining what property is comprehended in the terms used to describe the subject of gift, frequent recourse is had to two rules of construction, one of which is expressed by the maxim "Falsa demonstratio non nocet cum de corpore constat," the other by the maxim "Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram."

Meaning of the rule.

The first rule means that where the description is made up of more than one part, and one part is true, but the other false, there, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise. "The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only" (*i*).

Devise of "freehold houses in A. street, London." The word "freehold" rejected.

Thus, in *Day* v. *Trig* (*j*), where one devised "all his freehold houses in Aldersgate Street, London," having in fact only leasehold houses there, it was held that the word "freehold" should rather be rejected than the will be wholly void, and that the leasehold houses should pass (*k*).

"House called 'The Corner House' in A., in the tenure of B. and H."

So, in *Blague* v. *Gold* (*l*), where a testator, having two houses in A, one called "The Corner House," in the tenure of B and N, the other adjoining thereto and in the tenure of H, devised "his house called 'The Corner House' in A, in the tenure of B and H": the testator having no house in the joint

(*g*) *Flint* v. *Warren*, 15 Sim. 626. As to the extent of London in a gift to "the hospitals of London," see *Wallace* v. *Att.-Gen.*, 33 Bea. 384.

(*h*) *Rogers* v. *Thomas*, 2 Keen, 8.

(*i*) *Per* Alderson, B., *Morrell* v. *Fisher*, 4 Exch. 591; see also Wigram, Wills, pl. 67.

(*j*) 1 P. W. 286; *Doe* d. *Dunning* v. *Cranstoun*, 7 M. & Wels. 1; *Nelson* v. *Hopkins*, 21 L. J. Ch. 410. See also *Welby* v. *Welby*, 2 V. & B. 187. Compare the case of a testator who specifically bequeaths leaseholds and afterwards acquires the reversion in fee, *ante*, p. 384.

(*k*) This statement of the law (which is taken from the third edition of this work by Messrs. Wolstenholme and Vincent) has been frequently cited with approval by the Courts: see *Cowen* v. *Truefitt*, [1899] 2 Ch. 309; *Anderson* v. *Berkley*, [1902] 1 Ch. 936; *ante*, p. 377. In *Re Rayer*, [1903] 1 Ch. 685, it was held that a testator, in referring to "legacy duty" really meant "succession duty," and the headnote treats the case as one of *falsa demonstratio*, but this use of the expression is unusual. As to the application of the maxim to deeds, see *Doe* d. *Smith* v. *Galloway*, 5 B. & Ad. 43; *Cowen* v. *Truefitt*, *supra*; *Griffiths* v. *Penson*, 9 Jur. (N.S.) 385.

(*l*) Cro. Car. 447, 473.

tenure of B and H, it was held that the description by tenure was mere surplusage and might be rejected.

Freeholds misdescribed as leaseholds held to pass.

Conversely, freeholds may pass under a gift of "my leasehold estate at A, commonly called, &c.," if there is no leasehold property answering the description (*m*).

And even if the testator has freehold property as well as leaseholds, the latter may pass by the description of freehold; thus if he has a farm at A which is partly freehold and partly leasehold, and devises "my freehold farm at A," this may pass the leasehold portion as well as the freehold (*n*). So if the testator has a freehold and a leasehold interest in a messuage in A and devises his freehold messuage in A, this may pass his leasehold interest (*o*).

Where principle does not apply.

But the principle does not apply where the circumstances show that the testator had in mind some property to which the description strictly applied at the date of the will. Thus in *Re Knight* (*p*) a testator gave to his wife "the lease of" the house in which he should reside at the time of his decease; he resided at the date of the will in a house which he held on a short lease at a rack rent; he subsequently purchased a freehold house in which he resided at the time of his death: it was held that the gift did not pass the freehold house to the wife.

Extension of the rule.

In the application of the principle in question, the Courts have not confined themselves to cases which are strictly within its terms. It is often found, on a disclosure of the facts of the case, that of two particulars of which the description is composed, each separately finds some corresponding subject, but the one is applicable to a larger portion of the testator's property than the other, thereby raising the question whether the more limited term be restrictive of the other, or expressive only of a suggestion or affirmation. It is a mere question of construction; for it is clear that if the answer be that the more limited term is merely suggestive or affirmative, it will be disregarded in deciding upon the quantity to be considered as covered by the description.

Question where parts of the description are not co-extensive.

Limited term rejected where property is described as an entire subject.

Now if the testator describe the subject of the devise as an entire subject, and in terms of sufficient certainty as his "farm" called A, or his "house" in a particular place, or his "B estate," or the like, then, although he adds a clause to the effect that the property is in the occupation of a particular

(*m*) *Denn* d. *Wilkins* v. *Kemeys*, 9 East, 366.

(*n*) This seems to follow from the principle laid down by Chitty, J., in *Re Bright-Smith*, 31 Ch. D. 314, where *Stone* v. *Greening*, 13 Sim. 390, and *Hall* v. *Fisher*, 1 Coll. 47, which are *contra*, are discussed.

(*o*) *Mathews* v. *Mathews*, L. R. 4 Eq. 278, stated *post*, p. 1245.

(*p*) 34 Ch. D. 518. Compare the cases of *Emuss* v. *Smith*, 2 De G. & S. 722; *Cave* v. *Harris*, 57 L. T. 768; and *Re Seal*, [1894] 1 Ch. 316, *post*, p. 1236.

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tenant, or is situate in a particular county, street or other locality, and it turns out that such clause is true only of a part of the property, the entire subject may well pass, unrestricted by the additional clause, if such a construction be in accordance with the general intent of the testator (*q*).

Inaccuracy in statement of locality.

Thus where a testatrix devised all her messuages situate in Denmark Court, it was held that the devise passed not only five houses in the court, but also an adjacent house numbered 383 Strand, which practically formed part of the Denmark Court property (*r*). So a devise of " my freehold estate situate in Three Colt Street " may pass a house in Old Ford Road (*s*).

" Estate."

Doe v. *Jersey.*

An example of the rejection of words as *falsa demonstratio* when used with reference to the word " estate," is presented by *Doe* d. *Beach* v. *Earl of Jersey* (*t*), where A devised all that her " Briton Ferry estate, with all the manors, advowsons, messuages, buildings, lands, tenements and hereditaments thereunto belonging, and of which the same consists." In a subsequent part of the will, after describing another estate, she added, " which, as well as my Briton Ferry estate, is situate, lying and being in the county of Glamorgan." It turned out that part of the Briton Ferry estate was situate in the county of Brecon; but is was found by special verdict that the whole had been known by the name of the Briton Ferry estate for fifty years before the death of the testatrix; and it was held that the whole passed (*u*).

Inaccuracy in statement of occupancy.

There are numerous cases in which an inaccuracy with regard to the occupancy of lands has been rejected as immaterial. Thus in *Goodtitle* d. *Radford* v. *Southern* (*x*), where a testator devised all that his farm, called Trogues Farm, situate in the parish of D., now in the occupation of A. C. The question was, whether two closes, part of Trogues Farm, but not in the occupation of A. C., passed by this devise. It was held that the devise com-

(*q*) See *per* Lord Ellenborough, *Roe* d. *Connolly* v. *Vernon*, 5 East, at p. 80; *Norman* v. *Norman*, [1919] 1 Ch. 297 (the words " purchased by me of T." rejected); and the earlier cases cited in the last case.

(*r*) *Newton* v. *Lucas*, 1 My. & C. 391; *Gauntlett* v. *Carter*, 17 Bea. 586. See also *Re Mayell*, [1913] 2 Ch. 488 (Castle Street for Thomas Street); *Moore* v. *Phelan*, [1920] 1 Ir. R. 233 (eight houses passed under a bequest of seven).

(*s*) *Harman* v. *Gurner*, 35 Bea. 478.

(*t*) 1 B. & Ald. 550.

(*u*) Observe the agreement between the principle of these cases and that of those which are cited in connection with the subject of uncertainty, as illustrative of the rule that a false addition does not vitiate a devise, *ante*, p. 1219; see also *Doe* v. *Nickliss*, 4 Jur. 660.

(*x*) 1 M. & Sel. 299; see also *Paul* v. *Paul*, 2 Burr. 1089; *Whitfield* v. *Langdale*, 1 Ch. D. 61, as to " Hookland " and " Tickeridge." In the same case it was held that a devise of a " messuage and lands called Claggetts and Sievelands " carried the whole of Claggett's farm, upon evidence that this farm included Claggetts and Sievelands and a good deal more, *sed qu.* *Qu.* also as to the exclusion of the wood from Tickeridge.

prehended the whole of Trogues Farm, which was a plain and certain description, and was not affected by the defective description of the occupation.

So, in *Down* v. *Down* (*y*), where A. devised all his farm and lands called Colt's-foot Farm, situate in or near the parishes of D., W. and T., now on lease to Mary Field, at the yearly rent of £150. It was held that a close of seven acres, called Williamspring, which was a part of Colt's-foot Farm, but was excepted out of Mary Field's lease, as well as out of a subsequent lease granted by the testator to another, passed (*z*); the Court being of opinion that it was the intention of the testator to pass the whole of the farm, and not that only which was in the occupation of Mary Field.

And in *Re Champion* (*a*), North, J., thought that the words "now in my own occupation" following a description of the devised property, were not a vital part of the description. So in *Re Willis* (*b*) the words "and in which I now reside," and in *Re Horton* (*c*) the words "now held by me," were held not to cut down the generality of the description in earlier words.

"now reside."

"But though," says Mr. Jarman (*d*), "a devise of 'my farm called A in the occupation of B' is not, under these circumstances limited to that part of the farm which is in the occupation of B, yet perhaps it does not follow that the same construction would be given to a devise of 'all my farm in the occupation of B called A.' In this case, the reference to the occupancy forms the primary substantive part of the description, and the name is merely an addition. Thus, in the early case of *Woodden* v. *Osbourn* (*e*), where A, having lands called *Hayes* Lands, which extended into two vills, *Cokefield* and *Cranfield*, devised all his lands in *Cokefield* called *Hayes* Lands, to J. S., it seems to have been held that the part which was in *Cranfield* did not pass. Unless a reference to locality be more restrictive than a reference to occupation (*f*), this case seems to warrant

Distinction where the reference to the occupancy precedes that to the name.

(*y*) 1 J. B. Moo. 80.

(*z*) The farm consisted of about 172 acres.

(*a*) [1893] 1 Ch. 101. In the C. A. the decision turned on the question of republication: *ante*, p. 188.

(*b*) [1911] 2 Ch. 563. (*c*) [1920] 2 Ch. 1.

(*d*) First ed., p. 716.

(*e*) Cro. Eliz. 674; s. c. *nom. Tuttesham* v. *Roberts*, Cro. Jac. 22; and Lord Ellenborough's judgment in *Roe* d. *Connolly* v. *Vernon*, 5 East, at p. 78. The principal point in the case in Croke seems to have been whether the Hayes Lands, being so restricted in the devise to J. S., was subject to the same restriction in a subsequent devise of it as Hayes Lands generally; and the decision, of course, was in the affirmative. As to words of description being narrowed by the effect of the general context, see *Doe* d. *Harris* v. *Greathed*, 8 East, 91.

(*f*) See *Doe* d. *Beach* v. *Earl of Jersey*, 1 B. & Ald. 550, stated *ante*, p. 1234.

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the distinction suggested." It is to be observed, however, that Popham, C.J., and Gawdy and Yelverton, JJ., went on to say, that if the words had been " all his lands called Hayes Lands, in Cokefield " (thus reversing the order), nothing had passed but the land in Cokefield (*g*). And, on the other hand, a distinction for this purpose between a reference to locality and a reference to occupation is discountenanced by the case of *Doe* d. *Beach* v. *Earl of Jersey* (*h*).

Where subject of devise described as " a house," followed by terms applicable to a part only.

Next, with regard to the devise of a " house," it was decided in *Chamberlaine* v. *Turner* (*i*), where a testator devised " the house or tenement wherein W. N. dwelt, called the White Swan, in Old Street," and it appeared that W. N. occupied only the entry or alley of the said house and three upper rooms in the same, divers other persons occupying other parts, that the whole house passed (*j*).

Re Seal.

On the other hand, in *Re Seal* (*k*) the testator at the time of making his will owned S. House and also an adjoining stable, and other buildings; he occupied the house and a room on the first floor of the stable, to which the only access was through the house : he had let the rest of the stable, and also the other buildings belonging to the house, to his sons; by his will he devised " my residence called S. House and premises thereto as the same are now occupied by me " : it was held that the devise included the room over the stable, but not the rest of the stable or the other buildings occupied by the sons.

" Messuages and lands called the D."

The same principle is illustrated by *Hardwick* v. *Hardwick* (*l*), where the devise was of " the messuages, lands and premises called " The Dyffrydd, situate in the parish of K., now in the occupation of E."; although part of " The Dyffrydd " was not in the parish of K., and other part was not in the occupation of E., yet the whole was held to pass : and by *Travers* v. *Blundell* (*m*), where a testator, having under his

(*g*) In *Stukeley* v. *Butler*, Hob. 171, it is said " it is vain to imagine one part before another : for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence " : see also *Doe* v. *Galloway*, 5 B. & Ad. at p. 50.

(*h*) 1 B. & Ad. 550, 3 B. & Cr. 870.

(*i*) Cro. Car. 129. The Court seems to have treated the case as if the words had been " in the occupation of W. N.," which might perhaps be restrictive, where the terms actually used would not; see *per* Lord Hardwicke, 3 Atk., at p. 9; see also *Doe* d. *Hubbard* v. *Hubbard*, 15 Q. B. 227, *per* Erle, J., and Lord Campbell, C.J.

(*j*) See also *Re Midland Ry. Co.*, 34 Bea. 525, stated *ante*, p. 393; *Hibon* v. *Hibon*, 32 L. J. Ch. 374; 9 Jur. (N.S.) 511 (" house and premises ").

(*k*) [1894] 1 Ch. 316.

(*l*) L. R. 16 Eq. 168, explaining *Pedley* v. *Dodds*, L. R. 2 Eq. 819; and see *Whitfield* v. *Langdale*, 1 Ch. D. 61, *ante*, p. 1234.

(*m*) 6 Ch. D. 436; *Armstrong* v. *Buckland*, 18 Bea. 204; *Cooch* v. *Walden*, 46 L. J. Ch. 639. See also *Cunningham* v. *Butler*, 3 Gif. 37. The decision

father's will power to appoint "all that part of R.'s estate purchased by me, situate at P., consisting of" six specified closes, appointed "all that part of the property comprised in my late father's will as is therein described as that part of R.'s estate purchased by my father, situate at P., consisting of," and then specifying four only of the six closes; it was held that all six were well appointed. The appointment was of a certain corpus or subject as described by the father's will, and representing that description to be in certain specified terms; one of the terms specified differed from the corresponding term of the description actually contained in the father's will, and, not being needed for the ascertainment of the subject, was rejected as *falsa demonstratio*.

"All that estate as described in the will of A."

A different construction, however, prevailed in *Hall* v. *Fisher* (*n*), where a testator, by will dated 1841, devised "all that freehold farm called the Wick Farm, in Headington, containing 200 acres or thereabouts, occupied by William Eeley as tenant thereof to me." It appeared that the person from whom the testator claimed the Wick Farm, which was all freehold, had sold a small portion of it, but had continued to occupy it as part of the Wick Farm, under a demise from the purchasers, and to treat it as such, and that the testator had let the whole to W. Eeley. There was therefore a sufficiently certain description, in accordance with the testator's undoubted intention, and corresponding in every particular but the word freehold with the actual state of the property; but Sir J. K. Bruce, V.-C., said he could not view the case as one of *falsa demonstratio*; that if the word "freehold" had been omitted, the probability was the leasehold in question would have been held to pass; but that there was a subject here which properly answered the description given in the will. But the case has been questioned (*o*), and in *Re Bright-Smith* (*p*), a gift of "my freehold farm and lands, situate at E., and now in the occupation of J. B.," was held to pass a farm of 76 acres of which 25 acres were freehold and 26 acres copyhold.

Different construction in *Hall* v. *Fisher*.

Re Bright-Smith.

Mr. Jarman observes (*q*) that "As a subsequent reference to the occupancy does not limit a devise of a farm by name to the

Subsequent reference to occupancy does not extend devise.

was commented on and distinguished in *Re Seal*, [1894] 1 Ch. 316, *ante*, p. 1236.

(*n*) 1 Coll. 47. See also *Emuss* v. *Smith*, 2 De G. & S. 722, stated *ante*, p. 384.

(*o*) By Lord Selborne, L. R. 16 Eq., at p. 177, who also (*ib.*) questions *Stone* v. *Greening*, 13 Sim. 390. Both of these cases were also questioned by Chitty, J., in *Re Bright-Smith*.

(*p*) 31 Ch. D. 314. Compare *Re Steel*, [1903] 1 Ch. 135, which, however, does not rest on the principle now under discussion.

(*q*) First ed., p. 716.

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lands so occupied, it is clear that it would not, under such circumstances, enlarge a devise in which the occupancy extended to lands not included in the name. Consequently, under a devise of 'my *Trogues* Farm, in the occupation of A,' lands of another farm in the occupation of A would unquestionably *not* pass; and this hypothesis agrees with the principle of a class of decisions stated in the sequel" (*r*).

Erroneous reference to testator's title.

On the same general principle, an erroneous reference by the testator to the manner in which he acquired title to the devised property, may be rejected as *falsa demonstratio* (*s*).

Words not rejected, if required to prevent the devise being contradictory to another.

Parts of a description which, if the will contained no other devise than that to which they belong, would be rejected as *falsa demonstratio*, sometimes derive a restrictive force from another devise in the same will, with which they would otherwise stand in contradiction. Thus, in *Higham* v. *Baker* (*t*), where a testator devised his farm called Whiteacre, and the lands to the same belonging, then in the tenure of W., to A, and devised his farm called Blackacre, and the lands to the same belonging, to B; and it appeared that there were 100 acres of land belonging to Whiteacre, and no land belonging to Blackacre, but that the testator had let Whiteacre with 60 acres of the land belonging to it, and the remaining 40 acres with Blackacre: it was clear that only so much of the land belonging to Whiteacre as was in the tenure of W. was devised to A.

So, in *Press* v. *Parker* (*u*), where a testator devised to A "my freehold messuage, &c., in the parish of H., wherein he now lives, with the yard, back estate and premises thereunto belonging, part of which is now in my own occupation, and other part whereof is in the occupation of C. and M."; and he devised to B his front messuage in K. street, in the parish of H. aforesaid, with the appurtenances, "now in the occupation of E., with a right of way to the yard adjoining, and the use of the pump, &c., in the yard. The question was whether a coal-cellar passed to A or B. It was within the range of the house devised to B, but was in the occupation of the testator, who had put up a partition between it and B's premises, the entrance being from his own house. It was held that the cellar, being in the testator's occupation, passed to A; the intention, it was thought, being manifest to give to A whatever was so occupied. But Best, C.J.,

Whether devise passed all that was occupied by the person described.

(*r*) See *Doe* d. *Tyrrell* v. *Lyford*, 4 M. & Sel. 550; *Hall* v. *Fisher*, 1 Coll. 47; *Doe* d. *Renow* v. *Ashley*, 10 Q. B. 663.

(*s*) *Welby* v. *Welby*, 2 V. & B. 187. See also *Norman* v. *Norman*, [1919] 1 Ch. 297, *ante*, p. 1234, n. (*q*).

(*t*) Cro. Eliz. 15.

(*u*) 10 J. B. Moo. 158, 2 Bing. 456.

said if the latter devise had stood alone, the words "in the occupation of E." might have been deemed mere words of description.

Doe v. *Martin.*

In connection with the subject of the construction of words referring to occupancy, it may be here observed, that in *Doe* d. *Templeman* v. *Martin* (*x*), where a testator devised all his messuage, the Ark Cottage, gardens and lands at S., rented to Mrs. S., and others; and it was attempted to confine the devise to a particular property at S., forming a distinct purchase made by the testator, of which Mrs. S. was the principal occupant; the devise was held to comprise all the land situate at S., by whomsoever rented, including a considerable farm, in the occupation of a tenant, not Mrs. S.; the suggestion, that the testator could scarcely mean to describe a large property in such terms (omitting the name of the tenant), not being allowed to prevail against the clear import of the words of the will.

Limited term rejected though applicable to large proportion.

It is to be observed that in the foregoing cases where terms of occupancy or locality were not allowed by reason of their inapplicability to particular portions of the subject to exclude them from the devise, those portions bore but a small proportion to the whole. But in *Whitfield* v. *Langdale* (*y*), an erroneous statement of the acreage as being "by estimation 80 acres, more or less," was not permitted to exclude any portion of the "farm" devised, although the real quantity was 175 acres, and as to a small part of the disputed lands there was a mistake also made in the locality.

General, followed by specific, description.

When property is devised by a general description, and this is followed by a specific description or enumeration of particulars, the latter will as a rule prevail (*z*). Thus in *Re Brocket* (*a*) a testatrix devised the real estate to which she became entitled under the will of A, namely, the residence known as O. House and lands in the parishes of O., S., M. and H.; it was held that the devise was confined to the property so described, and did not include some land in the City of London, to which the testatrix was also entitled under the will of A. Possibly if the property not specifically mentioned had formed part of the O. House estate, it would have passed by the devise (*b*).

Land subject to trust for sale.

If a testator is entitled to dispose of the proceeds of sale of an estate which is subject to a trust for sale, and by his will

(*x*) 4 B. & Ad. 770; cf. *Chester* v. *Chester*, 3 P. W. 55, where an attempt was made to limit the sense of "elsewhere" by reference to previously specified places.

(*y*) 1 Ch. D. 61, *ante*, p. 1234, n. (*l*).

(*z*) *West* v. *Lawday*, 11 H. L. C. 375.

(*a*) [1908] 1 Ch. 185.

(*b*) See *Travers* v. *Blundell*, 6 Ch. D. 436, *ante*, p. 1236, and *Armstrong* v. *Buckland*, 18 Bea. 204.

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devises the estate itself, by name, the devise will, as a general rule, pass the proceeds of sale, the supposition being that the testator meant to give his interest in the land, whatever it might be, but mistook the nature of that interest (*c*). And even if the devise is of "all the real estate of or to which I shall be seised or entitled or over which I shall have any power of disposition or appointment by will at the time of my death," the interest of the testator in the proceeds of sale of certain lands to which he was entitled at the date of the will, may pass by the devise, if he was not beneficially entitled to any real estate (*d*). Otherwise it seems clear that the proceeds of sale would not pass by a general devise of real estate (*e*).

Personal property.

The doctrine of *falsa demonstratio* also applies to gifts of personal property (*f*). Thus in *Re Weeding* (*g*) a testatrix bequeathed all her shares in the Great Western Trunk Railway of Canada: there was no such company, but the testatrix formerly owned some debenture stock (not shares) of the Great Western Railway Company of Canada, which before the date of the will was converted into a debenture stock known as "Great Western Perpetual Debenture Stock" of the Grand Trunk Railway of Canada. It was held that this passed by the bequest. So in *Flood* v. *Flood* (*h*) stock owned by a testatrix in the Dublin and Kingstown Railway was held to pass under a bequest of stock in the Dublin, Wicklow and Wexford Railway, it appearing that the former railway was leased to and worked by the latter, and that the two were commonly looked upon as one undertaking. Shares in a slate quarry company may pass under a bequest of "shares in mines" (*i*).

Shares, stock, debentures, etc.

The cases in which bequests of "shares" in a company have been held to pass capital stock or even debenture stock of that company, have been already referred to (*k*). So a bequest of "debenture stock or shares in the S. Company" may pass debentures of that company if it has no debenture stock (*l*).

(*c*) *Cooper* v. *Martin*, L. R. 3 Ch. 47; *Re Lowman*, [1895] 2 Ch. 348.

(*d*) *Re Glassington*, [1906] 2 Ch. 305. On the question of the admissibility of evidence in this case, see *ante*, p. 478.

(*e*) See *Goold* v. *Teague*, 5 Jur. (N.S.) 116, where the gift was of "all my leasehold estates."

(*f*) Leaseholds are for present purposes treated as landed property.

(*g*) [1896] 2 Ch. 364; *Trinder* v. *Trinder*, L. R. 1 Eq. 695; *Re Jameson*, [1908] 2 Ch. 111 (shares in a bank which had ceased to exist): *ante*, p. 1054.

(*h*) [1902] 1 Ir. R. 538. Compare *Townsend* v. *Townsend*, 1 L. R. Ir. 180, where the testatrix displayed great ingenuity in misdescribing her investments.

(*i*) *Cleveland* v. *Meyrick*, 37 L. J. Ch. 125.

(*k*) *Ante*, p. 1220.

(*l*) *Re Nottage* (*No.* 2), [1895] 2 Ch. 657.

If the testator has shares and debentures, a bequest of shares will not pass debentures (*m*).

In all these cases, however, it must be remembered that if the testator has property answering the description, that is *prima facie* sufficient to satisfy the gift (*n*).

If a testator bequeaths shares in a company and he has shares of different classes, this may give the legatee a right of selection (*o*).

"Stock standing in my name," etc.

Where a testator erroneously describes stocks or other investments as standing in his name, or in the name of some other person, this does not, as a general rule, invalidate the gift (*p*).

A more detailed examination of the authorities on these subjects will be found in a subsequent section of this chapter (*q*).

Contract to purchase stock.

In *Collison* v. *Girling* (*r*) Lord Cottenham laid it down as a general principle that if a man has contracted to purchase a thing, such as stock, and then makes his will, by which he bequeaths "all my stock" of that description, the legatee is entitled to the benefit of the contract: "What a party is entitled to under a contract he considers as his own." The principle is perhaps laid down too widely. If the testator at the date of his will had stock of the particular description, it might be difficult to avoid the application of the rule considered in the next Section. Of course, if the gift were of "all the stock which I may be entitled to at my death," stock which the testator had contracted to purchase would pass; and (equally of course) stock contracted to be purchased by the testator's brokers a few hours after his death would not pass (*s*).

Debts.

There are several cases in which an inaccuracy in the description of sums of money referred to in the will as debts, was not allowed to defeat the intention of the testator (*t*), there being no debt which answered the description (*u*).

Distinction between mistake and misdescription.

Where it is clear that the testator has made a mistake as to the nature of the property which he wishes to dispose of,

(*m*) *Re Connolly*, 110 L. T. 688, distinguishing *Re Weeding*, [1896] 2 Ch. 364.

(*n*) See next section.

(*o*) *Ante*, p. 436.

(*p*) *Mackinley* v. *Sison*, 8 Sim. 561; *Sheffield* v. *Van Donop*, 7 Ha. 42; *Quennell* v. *Turner*, 13 Bea. 240; *Ellis* v. *Eden*, 25 Bea. 482.

(*q*) *Post*, pp. 1275 *seq.*

(*r*) 4 M. & Cr. 63.

(*s*) *Thomas* v. *Thomas*, 27 Bea. 537.

(*t*) *Maybery* v. *Brooking*, 7 D. M. & G. 673; *Re Rowe*, [1898] 1 Ch. 153; *Re Dyke*, 44 L. T. 568; *Re Hodgson*, [1899] 1 Ch. 666. As to bequests of debts where the amount is wrongly stated, see *Wilson* v. *Morley*, 5 Ch. D. 776; *Whitfield* v. *Clemment*, 1 Mer. 402, cited *ante*, p. 600. *Davies* v. *Hopkins*, 2 Bea. 276, would probably not be followed at the present day.

(*u*) As was the case in *Ex p. Kirk*, 5 Ch. D. 800.

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no question of *falsa demonstratio* really arises: instead of misdescribing something which he has, he means to give something which he has not, and the gift therefore fails. Thus in *Waters* v. *Wood* (*x*), where the testator bequeathed "all the policies of life insurance which I have effected in the U. and L. I. offices" in such a way as to show clearly that he supposed that he had effected policies in those offices, it was held that shares which he held in those offices did not pass by the bequest. So, in *Millar* v. *Woodside* (*y*), a testatrix had forty-one shares in a bank, and was entitled to a life interest in twelve other shares in the same bank standing in the name of B as trustee of a deed by which she had settled those twelve shares; by her will she recited that she was entitled to twelve shares in the bank, which stood in the name of herself and B as trustee for her, and bequeathed them to X; it was held that the gift was inoperative, and could not be made good out of her own shares. But the natural tendency of the Courts is to disregard mistakes of this kind, if the identity of the property is clear, and the testator's mistake only relates to the nature of his interest in it. Such are the cases where a testator's interest in the proceeds of sale of land is held to pass by a devise of that land (*z*). And there are cases in which this tendency has led to a construction which puts a considerable strain on the words of the will. Thus, in *Findlater* v. *Lowe* (*a*), the testatrix had lent a firm a large sum of money; when the firm was turned into a company the testatrix accepted debenture stock and shares in respect of her debt. She afterwards made her will by which she "forgave" the debt: it was held that the debtors were entitled to a legacy of the same amount. The case of *Selwood* v. *Mildmay* (*b*) is supposed to have been decided on this principle, but whether it was or not, neither case has any connection with the doctrine of *falsa demonstratio* (*c*). Nor is it possible that any question of *falsa demonstratio* should arise where the testator specifically bequeaths a certain thing and never had anything which could pass by that description: in such a case the gift fails because there is nothing for it to take effect on (*d*).

Waters v. *Wood.*

Limits of the doctrine.

In *Slingsby* v. *Grainger* (*e*) an attempt was made to apply

(*x*) 5 De G. & S. 717.
(*y*) Ir. R. 6 Eq. 546.
(*z*) *Ante*, p. 1240.
(*a*) [1904] 1 Ir. 519. The question in this case must be distinguished from that which arose in *Goodlad* v. *Burnett*, 1 K. & J. 341.
(*b*) 3 Ves. 306.
(*c*) See *ante*, p. 1066.
(*d*) *Evans* v. *Tripp*, 6 Mad. 91. The general principle is stated *ante*, p. 1052.
(*e*) 7 H. L. C. 273. See also *Waters* v. *Wood*, 5 De G. & S. 717, *supra*.

Slingsby v. *Grainger.*

the doctrine of *falsa demonstratio*. There the testatrix possessed property in the Funds and in Bank Stock: she left to her brother "everything I may be possessed of at my decease, for his life. . . . Should he die a bachelor, I leave the whole of my fortune now standing in the Funds to E. S." The brother died a bachelor. It was held that the Bank Stock did not pass to E. S. "The distinction," said Lord Cranworth, "is between those cases in which there has been a complete description of the thing given, and a subsequent misdescription as to some particular connected with it, and cases in which that which is subsequently connected with the description is so connected as to form part of the description of the thing given." The case falls within the rule stated in the following Section.

Devise of property not described as a whole is confined to what exactly answers it.

III.—Property answering the Description alone passes.—The second maxim above referred to is "non accipi debent verba in falsam demonstrationem quæ competunt in limitationem veram," and accordingly Mr. Jarman lays it down as a well-settled canon of construction (*f*) "that where a given subject is devised, and there are found two species of property, the one technically and precisely corresponding to the description in the devise, and the other not so completely answering thereto, the latter will be excluded; though, had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject.

"Entitled to on decease of X."

"As in *Doe* d. *Ryall* v. *Bell* (*g*), where a testator devised all his copyhold estates situate at G., *which he became entitled to on the decease of his father*. The fact was, that on the death of his father, the testator had taken possession of two copyhold estates at G.; one which his father had in his lifetime surrendered to him in fee, but of which he (the father) had retained possession until his death, and another which descended to the testator as heir. It was held, that the latter estate being sufficient to satisfy the words, the former did not pass" (*h*).

(*f*) First edition, p. 720. The rule has been frequently recognised in cases where, owing to the description not accurately fitting any particular property, the rule *falsa demonstratio non nocet* is applied: see *Hardwick* v. *Hardwick*, L. R. 16 Eq. 168, and *Re Bright-Smith*, 31 Ch. D. 314, *ante*, p. 1237.

(*g*) 8 T. R. 579; see also *Wills* v. *Sayers*, 4 Mad. 409; *Doe* d. *Gillard* v. *Gillard*, 5 B. & Ald. 785; and see the rule exemplified in cases treated of *ante*, p. 1238. But see *Doe* d. *Newton* v. *Taylor*, 7 B. & C. 384, where a devise by A, of her moiety of all her late father's messuages, etc., situate, etc., was held to extend as well to lands which had been the property of the father, and had been devised by him to a granddaughter, from whom they had descended to the testatrix, as to those which had descended to her immediately from him. In this case, the terms used were equally applicable to both properties.

(*h*) See also *Wilkinson* v. *Bewicke*, 1 Eq. Rep. 12. But a devise of lands, which the testator had from time to time "purchased," has been held to apply to lands which he had received in exchange, and not (as contended) to

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"Purchased of S."

Again, it has been held (*i*), that a devise of lands at W., in the parish of C., "which I purchased of S.," did not include lands not at W., though purchased of S., in the parish of C. So in *Cave* v. *Harris* (*k*), a devise of property "which I have lately purchased," was held not to include a piece of land which did not strictly fall within those words. And in *Roe* d. *Conolly* v. *Vernon* (*l*), a surrender to the use of the testator's will of all the lands, etc., situate in certain specified places, which he held of the manor of W., being of the yearly rent to the lord in the whole of £4 10s. 8½d., and compounded for, was held to be confined to copyholds compounded for, though the rent specified exceeded the amount of rent paid for the compounded copyholds, but did not correspond with the amount paid for the whole.

"In my occupation."

So, in *Doe* d. *Parkin* v. *Parkin* (*m*), where a testator, seised of a house and five acres of land in his own occupation, and of an inn and nine acres of land in the same place, not so occupied, devised all his messuages, tenements, lands, grounds, hereditaments and premises situate at or in the township of A., in the parish of B., and then in his own occupation, with the appurtenances, to certain uses, the Court held that these words were clearly restrictive, and consequently that the inn did not pass. And in *Re Seal* (*n*), where there was a devise of a "residence and premises thereto, as the same are now occupied by me," full effect was given to the latter words as restrictive of the devise.

In *Pullin* v. *Pullin* (*o*), a testator, reciting that he was seised in fee of divers freehold lands in the parish of St. Mary, Islington, and of certain copyholds within and holden of the manor of the Prebendary of Islington, and *all* which lands, etc., were subject to a mortgage thereof made by him to R. (minutely referring to the mortgage), gave and devised all his *said* freehold and copyhold lands and hereditaments; it was held that twenty-one acres of freehold land in Islington, not in mortgage to R., did not pass under his devise, but were included in a general devise in a subsequent part of the will of the residue of his freehold, copyhold and leasehold estate; the Court being of opinion that the testator intended to confine the former devise to the property in mortgage to R. It seems that a contrary

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be confined to those which he had bought with money; the word "purchase" admitting, it was considered, of application to what was purchased for money or lands: *Doe* d. *Meyrick* v. *Meyrick*, 1 Cr. & M. 820.

(*i*) *Doe* d. *Tyrrell* v. *Lyford*, 4 M. & Sel. 550.

(*k*) 57 L. J. Ch. 62.

(*l*) 5 East 51.

(*m*) 5 Taunt. 321; doubted in *White* v. *Birch*, 36 L. J. Ch. 174, *sed qu.*

(*n*) [1894] 1 Ch. 316, *ante*, p. 1236.

(*o*) 10 J. B. Moo, 464, 3 Bing. 47, see also *Wilson* v. *Mount*, 3 Ves. 191.

construction would have left the residuary clause nothing to operate upon; but this circumstance was not relied on, and seems indeed entitled to little weight, as the clause embraced copyholds as well as freeholds, and the testator had no copyholds except those in mortgage. The testator's expressions certainly indicated that he considered the mortgage as extending over the whole subject devised.

Morrell v. *Fisher*.

And in *Morrell* v. *Fisher* (*p*), where a testator devised "all his leasehold farm-house, home-stead, lands and tenements at Headington, held under Magdalen College, Oxford, and then in the possession of T. B. as tenant to him," it was contended, that two pieces of land at Headington, containing together twelve acres and being leasehold, held of the College, but not in the possession of T. B., passed by this devise. But the Court of Exchequer were of a contrary opinion, there being other lands which fully answered the description.

This principle is applicable to descriptions of property with reference to its tenure, as freehold or copyhold, or with reference to the testator's estate and interest in it. So that if a testator devises his freehold hereditaments at X to A B, this will not, as a general rule, pass his copyholds at X (*q*). And in the absence of special circumstances, a devise of freeholds at X will not pass leaseholds at X, nor will a gift of leaseholds at D pass freeholds at D (*r*). But where, besides a fee simple estate in one part and a leasehold interest in a second part of a block of buildings in A Street and B Court, a testator had in a third part of the same block a leasehold interest in possession, and (subject to an intermediate reversionary term) the ultimate reversion in fee, and devised his "freehold messuages in A Street and B Court"; it was held that everything passed in which he had the fee, and that as he had the fee in the third part, although he had another sort of interest in it besides, yet the whole of his interest in it passed by the devise, the testator having sufficiently denoted the thing which he intended to pass. The portion in which he had only a leasehold interest of course did not pass by the devise (*s*). And it seems that the same construction would have been applied even if the testator had expressly bequeathed his leasehold interest to another person (*t*). But where the description of the property is specific, the word "freehold" may be rejected as *falsa demonstratio* (*u*).

Mathews v. *Mathews*.

(*p*) 4 Exch. 591; and see *Homer* v. *Homer*, 8 Ch. D. 758 (land at Stock Green).

(*q*) *Doe* v. *Brown*, 11 East, 441; *Quennell* v. *Turner*, 13 Bea. 240.

(*r*) *Corballis* v. *Corballis*, 9 L. R. Ir. 309.

(*s*) *Mathews* v. *Mathews*, L. R. 4 Eq. 278.

(*t*) *Re Guyton and Rosenberg*, [1901] 2 Ch. 591. As to the effect of section 26 of the Wills Act, see *ante*, p. 936.

(*u*) See *Re Bright-Smith*, 31 Ch. D. 314, *ante*, p. 1237.

CHAP. XXXV.

Webber v. *Stanley.*

The principle in question has most frequently been applied to terms of local description. Thus, if a testator have property in, and property contiguous to a particular place, it is clear that a devise of houses or buildings in that place will carry the former to the exclusion of the latter (*x*). The leading case in this doctrine is *Webber* v. *Stanley* (*y*), where a testatrix first charged her Welsh estates with a sum of money as " an addition to her Tedworth estates thereinafter devised," then gave her mansion-house at Tedworth, in the county of Hants, and all her manors, farms, lands, etc., in the county of Hants, devised to her by her husband (subject to the annuities charged thereon by his will), and all other her hereditaments in the county of Hants, " all which hereditaments in the county of Hants were thereinafter described as her Tedworth estates," to uses in strict settlement, and she subsequently referred to " her said Tedworth estates " : it appeared that the husband, being owner of property in Hants and Wilts, together known as " the Tedworth Estate," had devised to the testatrix all his estates at or near Tedworth, charged with certain annuities : it also appeared that there was only one manor in Hants, but several in Wilts, that some of the farms of " the Tedworth Estate " lay partly in one county and partly in another, and that the charges thrown on the devised property were or might become out of all proportion to the value of the Hants property. It was held in C. P. that the words " in the county of Hants " were not *falsa demonstratio*, but confined the devise to lands in that county. Erle, C.J., delivered judgment and " laid down the law with a clearness and authority which cannot be strengthened or added to " (*z*) : there was a property which every part of the description fitted, and on which every word of it had full effect : if the testatrix had devised " her Tedworth estates " simply, that would have sufficed ; but that phrase was never used by her without referring to the definition (her " said " Tedworth estates), which confined it to property in Hants. As to the word " manors " (in the plural), it occurred only in a sweeping general clause ; and as to the charges, a similar disproportion had been disregarded in *Doe* d. *Templeman* v. *Martin* (*a*) ; and such considerations could not outweigh the clear words of the devise. The correctness of

(*x*) See *Doe* d. *Browne* v. *Greening*, 3 M. & Sel. 171 ; *Pogson* v. *Thomas*, 6 Bing. N. C. 337 ; *Smith* v. *Ridgway*, L. R. 1 Ex. 46, 331 ; *Evans* v. *Angell*, 26 Bea. 202 ; *Lister* v. *Pickford*, 34 Bea. 576. But where a house, with the appurtenances, is described to be in a certain place, lands quasi appurtenant to the house may pass, though not in that place : *Boocher* v. *Samford*, Cro. Eliz. 113 ; and see *Moser* v. *Platt*, 14 Sim. 95.

(*y*) 16 C. B. (N.S.) 698, virtually overruling *Stanley* v. *Stanley*, 2 J. & H. 491, on same will. See *Re Brocket*, [1908] 1 Ch. 185.

(*z*) *Per* Willes, J., in *Smith* v. *Ridgway*, L. R. 1. Ex. 331.

(*a*) 4 B. & Ad. 771.

the principle laid down in *Webber* v. *Stanley* is well established (*b*).

"At, in or near," how construed.

So, in *Doe* d. *Ashforth* v. *Bower* (*c*), where a testator devised all his messuages, tenements or dwelling-houses, and buildings situate at, in or near Snig Hill, in Sheffield, which he had lately purchased from the Duke of Norfolk. The testator had six houses at Sheffield all purchased from the Duke, and comprised in one conveyance, four of which houses were distant about twenty yards from Snig Hill, and the remaining two about four hundred yards therefrom. The testator had redeemed the land tax for all the houses by one contract. It was held, that the devise did not comprise the two latter houses, part only of the description applying to them, and there being other houses to which the whole of the description did apply.

Description applied to a subject not strictly falling within it, for want of a more appropriate one.

But if the testator had no property in the street named, a contiguous property may pass. Thus, in *Doe* d. *Humphreys* v. *Roberts* (*d*), where a testator devised all that his messuage or dwelling-house, with the appurtenances, situate in High Street, in the town of Holywell, wherein his mother inhabited, and nearly opposite to the White-horse inn, together with the shop adjoining the said messuage, and all and every his buildings and hereditaments in the same street, to A. It appeared that the testator had only one house in High Street, and that was occupied by his mother; but he had two cottages in a lane called Bakehouse Lane, behind the house, from which it was separated by a road wide enough to admit carriages; but there was no thoroughfare in the lane, and the only entrance to it was out of High Street under an arch a little below the testator's house. It was held that these cottages passed under the devise, the Court relying much on the fact that the testator had no other property which could answer to that part of the description; and there being, it was thought, a clear intention to pass some property in the street in addition to the house; and as there was no access to them but from the street, it was considered that the cottages might, without much impropriety, be described as situate in the street.

It is observable, that if the cottages in question had not passed under this devise, there was a general clause which would have comprised them, so that the construction was not induced by an anxiety to avoid intestacy.

(*b*) See *Re Seal*, [1894] 1 Ch. 316, *ante*, p. 1236.

(*c*) 3 B. & Ad. 453. See also *Attwater* v. *Attwater*, 18 Bea. 330. The case of *Newton* v. *Lucas*, 6 Sim. 54, is generally cited in support of the same position; but the final decision was given, under the particular circumstances, in favour of the greater comprehensiveness of the devise, 1 My. & Cr. 391.

(*d*) 5 B. & Ald. 407; *Baddeley* v. *Gingell*, 1 Exch. 319; *Goodright* d. *Lamb* v. *Pears*, 11 East, 58; *Nightingall* v. *Smith*, 1 Exch. 879; *Doe* d. *Campton* v. *Carpenter*, 16 Q. B. 181.

CHAP. XXXV.

Devise of lands in one county not applied to lands in another county.

Local name used in peculiar sense.

"It is clear, however," as Mr. Jarman points out (*e*), "that where a testator having lands in a certain county, devises all his estates in another county, in which he has actually no property, the lands in the former county will not pass (*f*).

"And though a testator may show by the context of his will, that he uses a local appellation in a peculiar and extraordinary sense, yet this hypothesis will not be adopted upon slight and equivocal grounds. Thus, where (*g*) the devise was of a testator's lands, 'in Leverington,' and it appeared that there was within the parish of this name a district called Leverington Parson's Drove, for which a chapel of ease had long ago been endowed, and that the testator had lands in the parish which were within the chapelry, and lands in the parish which were not; it was contended that this devise was to be confined to the latter, on the ground that the testator had himself distinguished the parish and the chapelry by describing himself to be 'of Leverington,' and one of his devisees as being of 'Leverington Parson's Drove': but the Court held, that the lands in the parish, whether in the chapelry or not, passed by the devise; Lord Denman observing, that though if the description of locality had been 'Leverington Parson's Drove,' that would have been exclusive of every other part of the parish; yet the use of the larger term did not exclude the less."

But in a case (*h*) where a man was seised of land in a vill and in two hamlets of the same vill, and devised all his lands being in the vill, and in one of the two hamlets by name, it was held that nothing of the land in the other hamlet should pass; for the naming of the one hamlet argued his intent fully.

"Estates in or near L., near M."

In regard to proximity, it has been decided that a devise of estates, situate "in or near Latchingdon, near Maldon," did not include a close which was situate four or six miles from Latchingdon, and in the town of Maldon (*i*).

"Lands at or within D."

Some minute but not unserviceable criticism was devoted to the words "at or within" in *Homer* v. *Homer* (*k*), where, among other devises of distinct properties, one "in the parish of" A, another "in the parish of" B, and a third "in the

(*e*) First edition, p. 723.

(*f*) *Miller* v. *Travers*, 8 Bing. 224; *Pogson* v. *Thomas*, 6 Bing. N. C. 337; *Moser* v. *Platt*, 14 Sim. 95; *Barber* v. *Wood*, 4 Ch. D. 885.

(*g*) *Doe* d. *Edwards* v. *Johnson*, 5 Nev. & M. 281.

(*h*) *Anon.*, 3 Dy. 261, pl. 27. In the parish of Street were two vills, *viz.*, Street and Walton; by fine levied of "all his lands in Street," land in Walton did not pass, *Stork* v. *Fox*, Cro. Jac. 120. But this is explained to have been because the law then took notice only of civil, not (unless named) of ecclesiastical, divisions, 4 Cruise Dig. p. 265.

(*i*) *Doe* d. *Dell* v. *Pigott*, 1 J. B. Moo. 274; 7 Taunt. 552; see also *Doe* v. *Bower*, 3 B. & Ad. 453.

(*k*) 8 Ch. D. 758. See also *Att.-Gen.* v. *Horner*, 11 A. C. 66, which was a case of a grant by charter of a market "*in sive juxta*" a particular locality.

parish of " C, a testator devised his " manor of D, and all his messuages, tenements and lands at or within D then in the occupation of J. S." The testator had two farms, the greater part of which was in the parish (which was co-extensive with the manor) of D, but a small part of each was in an adjoining parish, separated from the bulk, in the one case by a hedge (which was close to the church of D), in the other by a high road. It was held by Fry, J., that the outlying portions did not pass by the devise. But his decision was reversed by the L.JJ., who held that D meant the place so called, not the parish of D.

Whether gift of hereditaments " situate at A." will pass advowson.

It may here be observed that although an advowson in gross (*l*) is merely a right collateral to the land, and is therefore not properly described as being " in " or " situate at " a particular place (*m*), yet a devise of " all my real estate in the county of A " will pass an advowson in gross in respect of a parish church situate in the county of A, if it appears from all the circumstances that the testator intended it to pass (*n*).

Effect where there is property of another answering to the description.

Mr. Jarman remarks (*o*) with reference to the general rule discussed above : " Sometimes the application of the principle in question is embarrassed by the circumstance, that the terms of description, though not applicable to any property of the testator, precisely answer to the property of some other person. For instance, a testator having a manor, called North Dale, in A, devises his manor, called South Dale, in A. Now, supposing that there was in A no manor of South Dale, the authorities would authorise the application of the devise to the manor of North Dale; but if it should turn out that there was in A a manor called South Dale, belonging to some other person, it might be contended that the testator conceived himself to have some devisable interest in the manor of South Dale, and intended to devise that interest, or, in respect of wills operating under the present law, he might have contemplated the subsequent acquisition of a devisable interest in such manor."

Bequests of money in the funds, etc.

The rule above discussed is also applicable to gifts of personalty. Thus where a testator at the date of his will owned Government stock standing in his name in the Bank of Ireland, and also Government debentures payable to bearer, the accounts of which were kept at the Bank of Ireland, it was held that the

(*l*) See *ante*, p. 69.

(*m*) *Crompton* v. *Jarratt*, 30 Ch. D. 298, where the earlier authorities are discussed.

(*n*) *Re Hodgson*, [1898] 2 Ch. 545. In *Anon.*, Dyer, 323a, an advowson was held to pass by a lease of " hereditaments situate, lying and being in T."

(*o*) First edition, p. 724.

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latter did not pass under a bequest of "the whole of my Irish funded property standing in my name in the Bank of Ireland" (*p*). So a bequest of "shares in the A company" will not pass debentures of that company if the testator has shares (*q*). Nor will a bequest of policies in a certain insurance company pass shares in that company, although the testator never had any policies in it, if it appears from the will that the testator drew a distinction between shares and policies (*r*).

Policies.

Public funds "in my name."

If a testator is entitled to a beneficial interest in Government funds standing in the names of trustees, and has no such funds standing in his own name, a bequest of "all moneys standing in my name in the public funds" will pass his interest in the funds standing in the names of the trustees (*s*).

Securities, money on deposit, etc.

And a bequest of a particular investment may pass a different kind of investment, if there is nothing accurately answering the description (*t*). Thus a bequest of a sum described as invested on the deposit receipt of a bank may pass shares in that bank (*u*).

Stock.

If a testator bequeaths a sum of X stock, and he has at the time of his death a smaller sum of X stock, the bequest will pass only that stock, and not stock of a similar description into which some X stock formerly belonging to the testator had been converted (*x*).

Effect of testator acquiring stock after date of will.

It has been already explained that if a testator bequeaths "my shares" in a certain company, and at the date of the will he holds debenture stock of the company and no shares, the debenture stock may pass under the bequest (*y*). But suppose the testator, after the date of the will, were to acquire shares in the company? According to North, J. (*z*), this would prevent the debenture stock from passing by the bequest, but this seems an illogical result, which can only be justified by supposing that when the testator made his will he contemplated buying the shares—a somewhat improbable supposition.

Debts.

On the same principle, if a testator bequeaths "all debts which shall be due to me by B at the time of my decease," and there is at the time of the testator's death a debt due to him by B, this satisfies the bequest, and it will not pass debts due

(*p*) *Ridge* v. *Newton*, 2 Dr. & W. 239; *Slingsby* v. *Grainger*, 7 H. L. C. 273 (stated *ante*, p. 1242); *Ex p. Kirk*, 5 Ch. D. 800 (debt).

(*q*) *Re Bodman*, [1891] 3 Ch. 135; *Dillon* v. *Arkins*, 17 L. R. Ir. 636. *Aliter* if he has no shares: *Re Weeding*, *ante*, p. 1240.

(*r*) *Waters* v. *Wood*, 5 De G. & S. 717.

(*s*) *Quennell* v. *Turner*, 13 Bea. 240. *Mangin* v. *Mangin*, 16 Bea. 300, is not a valuable authority: see *Slingsby* v. *Grainger*, 7 H. L. C. 273, *ante*, p. 1242. As to the meaning of "public stocks" see *Re Hill*, 58 Sol. J. 399.

(*t*) *Richards* v. *Patteson*, 15 Sim. 501, *ante*, p. 436.

(*u*) *Mosse* v. *Cranfield*, [1895] 1 Ir. R. 80.

(*x*) *Gilliat* v. *Gilliat*, 28 Bea. 481.

(*y*) *Re Weeding*, [1896] 2 Ch. 364, *ante*, p. 1240.

(*z*) *Ib.*

to the testator by B jointly with other persons. If, however, there is no debt accurately answering the description, the doctrine of *falsa demonstratio* may be applicable (*a*).

Account at bank.

A bequest of "money standing to my account at the X Bank" will not necessarily pass money standing in the name of the testator at the Y Bank (*b*).

Classes of relations, etc.

IV.—Words of Description.—(A) PERSONS.—The meaning to be given to many generic words of description is discussed in other chapters of this work, especially in connection with gifts to children (*c*), nephews and other classes of relations (*d*), and to heirs (*e*), issue, descendants, family, next-of-kin, representatives, executors, etc. (*f*).

Residence.

A testator sometimes gives property to such members of a class as live or reside in a certain county: as a general rule, persons who are absent from that county temporarily or as a matter of duty may nevertheless be considered as living there (*g*).

"Lessee."

"Lessee" may include an assignee of the lease (*h*).

Surnames.

Questions sometimes arise as to the effect of a gift to persons bearing a certain surname (*i*), or a gift to a person upon condition that he or she marries a person bearing a certain surname (*k*), but no general principle can be deduced from the cases. The subject of surnames is discussed in a later chapter (*l*).

"Unmarried."

"The word *unmarried* means either never having been married, or, not having a husband or wife at the time. The former is its ordinary signification" (*m*). But it is a word of flexible meaning, to be construed with reference to the context (*n*). In *Re Thistlethwayte's Trust* (*o*) a testator, after giving

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(*a*) *Ex p. Kirk*, 5 Ch. D. 800; *Maybery* v. *Brooking*, 7 D. M. & G. 673.
(*b*) *Re Howes*, [1892] W. N. 102.
(*c*) Chap. XLII.
(*d*) Chap. XLI.
(*e*) Chap. XL.
(*f*) Chap. XLI.
(*g*) *Dale* v. *Atkinson*, 3 Jur. (N.S.) 41; *Woods* v. *Townley*, 11 Ha. 314. See *Re Arbib*, [1891] 1 Ch. 601. Compare the cases on conditions as to residence, *post*, p. 1518.
(*h*) *King* v. *Rymill*, 78 L. T. 696.
(*i*) *Pyot* v. *Pyot*, 1 Ves. sen. 335 ("my nearest relations of the name of Pyot"); *Leigh* v. *Leigh*, 15 Ves. 92 ("kindred of my name and blood"); *Bon* v. *Smith*, Cro. Eliz. 532 ("the next of my name"); *Jobson's Case*, *ib.* 576.
(*k*) *Barlow* v. *Bateman*, 3 P. W. 65, *post*, p. 1515.
(*l*) Chap. XXXIX, *post*, p. 1516.
(*m*) Mr. Jarman, in the first edition of this work, p. 457; *ante*, p. 592. *Heywood* v. *Heywood*, 29 Bea. 9; *Radford* v. *Willis*, L. R. 7 Ch. 7; *Dalrymple* v. *Hall*, 16 Ch. D. 715; *Re Sergeant*, 26 Ch. D. 575; *Blundell* v. *De Falbe*, 57 L. J. Ch. 576 (marriage settlement).
(*n*) *Clarke* v. *Colls*, 9 H. L. C. 601, affirming decree of Wood, V.-C., in *Mitchell* v. *Colls*, John. 674.
(*o*) 24 L. J. Ch. 712.

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his daughter an annuity during the joint lives of herself and her mother, gave her a larger annuity if she should survive her mother "and be still unmarried"; and he gave her a sum of money at her mother's decease if she should be "then unmarried"; it was held that "unmarried" meant "a spinster." On the other hand, in *Re Sanders' Trusts* (*p*) there was a gift to A for life, remainder to any wife he might thereafter marry for life, remainder to his children absolutely, and in case he died unmarried and without issue, to B, C, and D absolutely. A survived B, C, and D, and died a widower, without ever having had a child, and it was held that the representatives of B, C, and D, were entitled to the legacy. The same construction was adopted in *Re King* (*q*) and *Re Chant* (*r*).

Effect of divorce.

Upon the principle that the word "unmarried" is of flexible meaning, where a testatrix by her will gave a fund to trustees upon trust to pay the income to A for life, and on his death to divide the fund into four parts, and as to one of the parts "upon trust to pay the same to J. H., spinster, if she be then sole and unmarried, but if she be then married" to hold the fund upon trusts for J. H. for her life, and after her death for her children; it was held by North, J. (*s*), that J. H., who had married after the date of the will, and whose marriage had previously to the death of A been dissolved by decree absolute, was entitled absolutely to the one-fourth of the fund.

Class of unmarried persons.

Where there is a gift to a class of unmarried persons (as to "my unmarried sisters") the class is *prima facie* to be ascertained at the testator's death (*t*).

Maintenance of unmarried children.

Where a testator gives the income of his property to his wife for life for the benefit of herself and his unmarried children, it might be supposed that he means his children for the time being unmarried; but in *Jubber* v. *Jubber* (*u*), Shadwell, V.-C., decided otherwise; he remarked: "The term 'unmarried' is *designatio personarum*; and, if once the child is entitled to participate in the fund by filling the character of an unmarried child, he will not lose that right if he subsequently marries."

Hypothetical death "unmarried."

The meaning of the word "unmarried" has been much discussed in connection with gifts to the persons who would

(*p*) L. R. 1 Eq. 675.
(*q*) 62 L. T. 789
(*r*) [1900] 2 Ch. 345.
(*s*) *Re Lesingham's Trusts*, 24 Ch. D. 703. See *Knox* v. *Wells*, 48 L. T. 655. *ante*, p. 1224.
(*t*) *Blagrove* v. *Coore*, 27 Bea. 138. As to the rules for ascertaining classes, see Chap. XLII.
(*u*) 9 Sim. 503. See *Garratt* v. *Niblock*, 1 R. & My. 629; *Hall* v. *Robertson*, 4 D. M. & G. 781; *Elliott* v. *Elliott*, 11 Ir. Ch. R. 482.

have been the statutory next-of-kin of a woman "if she had died unmarried" (*x*).

"Sole."

The primary meaning of "sole," as applied to a married woman, is that she has no husband at the time; it therefore includes the case of a widow (*y*).

"Married."

The phrase "married," as applied to a woman, *prima facie* means a woman who has a husband at the time (*z*).

Wife, husband, etc.

The question whether a gift to the wife (or husband) of A without the name of the legatee being given, refers to the person who answers that description at the date of the will, or at some other period, has been already discussed (*a*), as has also the question whether a gift to a person whose name is given, and who is described in the will as the wife (or husband) of A, takes effect although the person is not lawfully married (*b*). In *Re Brown* (*c*), "my wife" was held to mean the testator's housekeeper, whom he intended to marry.

"Widow."

In *Re Wagstaff* (*d*) a testator gave his residuary estate to his "wife, Dorothy Josephine Wagstaff" and two other persons upon trust for sale and investment, and to pay the income to "my said wife during her life, if she shall so long continue my widow, for her own use and benefit, and upon or after her decease or second marriage" upon the trusts therein mentioned. Four years before the date of the will the testator went through the ceremony of marriage with Dorothy Josephine Jalland, knowing that she was then the wife of A. G. Jalland; they both survived the testator. It was held that Mrs. Jalland was entitled to a life interest in the residue unless and until she married after the testator's death.

Divorce.

A woman whose marriage has been dissolved is not the widow of her divorced husband if she survives him (*e*).

Lord Mayor.

In *Re Daniels* (*f*) a legacy to the Lord Mayor of London for the time being, to be distributed by him was held to be payable to the person who held the office of Lord Mayor at the testator's death.

(*x*) *Post*, p. 1579.

(*y*) *Re Lesingham's Trusts*, 24 Ch. D. 703; *Hardwick* v. *Thurston*, 4 Russ. 380.

(*z*) *Re Lesingham's Trusts*, *supra*; *Rudall* v. *Nichols*, [1900] W. N. 133.

(*a*) *Ante*, p. 377; *Blount* v. *Crozier*, [1917] 1 Ir. R. 461 (husband held to be first person who subsequently answers the description).

(*b*) *Ante*, p. 376; *Schloss* v. *Stiebel*, 6 Sim. 1.

(*c*) 54 Sol. J. 251.

(*d*) [1907] 2 Ch. 35; [1908] 1 Ch. 162; *Re Smalley*, [1929] 2 Ch. 112. As to *Rishton* v. *Cobb*, 5 Myl. & Cr. 145, see *ante*, p. 1225.

(*e*) *Re Boddington*, 25 Ch. D. 685; *Re Kettlewell*, 98 L. T. 23.

(*f*) 118 L. T. 435. So *Re Jones*, 43 T. L. R. 324 (the president of the M. branch of the E. C. U.). See *ante*, p. 214.

CHAP. XXXV.

"Tenements and hereditaments," include what.

(B) PROPERTY.—(1) *Words descriptive of Land, Houses, etc.* (*g*).—Mr. Jarman lays it down (*h*) that "The most comprehensive words of description applicable to real estate are *tenements* and *hereditaments*; as they include every species of realty, as well corporeal as incorporeal (*i*).

"Lands."

"The word 'lands' is not equally extensive; for though, generally, it includes as well the surface of the ground as every thing that is on and under it, as houses and other buildings (*k*), mines, etc., yet it seems that the term will not, *proprio vigore*, comprehend incorporeal hereditaments, as advowsons, tithes, etc. (*l*), unless there is no other real estate to satisfy the words of the devise: a circumstance, however, which in regard to wills made or republished since 1837, would be immaterial. Thus it seems that if a man devise all his lands in A, and he has no other real estate there than tithes, they will pass (*m*). So, if he devise a certain manor, and has only a fee farm rent issuing out of it, such rent will pass (*n*).

Whether it includes houses.

"But though a devise of *lands* will, unaided by the context, carry *houses* (*o*), or rather the land on which the houses are built; yet of course this does not hold where the testator evidently uses the term in contradistinction to *house*.

"As where (*p*) A having a messuage at L. and a messuage and lands at W., devised his house at L., with all other his lands, meadows, pastures, with their appurtenances, lying in W., the house at W. was held not to pass.

"The observation is equally applicable to other words of description, any of which may be diverted from their ordinary

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(*g*) The questions discussed in this section are closely connected with those treated of in Chaps. XXV and XXVII.

(*h*) First edition, p 706. Mr. Jarman must here be understood as referring to technical words of description, for "estate" and "property" are words of equally wide import: see *ante*, p. 958. As to the meaning of "tenements" and "hereditaments," which are not co-extensive, see Co. Litt. 6a.

(*i*) Co. Litt. 6a, 19b, 20a, 154a. In *Wybrants* v. *Maude*, [1895] 1 Ir. 214, "lands and tenements" was held to mean an undivided share of land. As to the effect of "hereditaments" in passing money subject to a trust for reinvestment in land, see *Basset* v. *St. Levan*, 43 W. R. 165; *Re Gosselin*, [1906] 1 Ch. 120, *post*, p. 1256.

(*k*) *Ewer* v. *Heydon*, Moore, 359, pl. 491.

(*l*) See Com. Dig. Advowson, C. 1; *Anon.*, Dyer, 323a; *Bishop of London* v. *Chapter of Southwell*, Hob. 303. Mr. Jarman must be understood as speaking of advowsons in gross: an advowson appendant or appurtenant passes with the manor or land to which it is annexed. That a rent-charge or rent-seck will not generally pass by devise of "lands," see *West* v. *Lawday*, 11 H. L. C. 375, *per cur.*; and as to the effect of a devise of real estate "in" or "situate at" a particular locality in passing advowsons, see *ante*, p. 1249.

(*m*) See *Ritch* v. *Sanders*, Styles, 261.

(*n*) *Inchley* v. *Robinson*, 2 Leon. 41, c. 57.

(*o*) Co. Litt. 4a.

(*p*) *Heydon's Will*, 2 And. 123; Cro. Eliz. 476, 658 (*Ewer* v. *Heydon*). See also *Re Portal and Lamb*, 30 Ch. D. 50.

signification, by being placed in contrast or opposition to others " (*q*).

Words of locality referred to immediate antecedent.

Where a testator devises two kinds of property by a general description, and adds words referring to locality, the question may arise whether these words apply to both kinds of property or only to the latter. Thus in *Doe* d. *Gillard* v. *Gillard* (*r*), where the devise was " of all my lands for ever, and leasehold property here or at Beeston," the main question was whether the restrictive words " here or at Beeston," applied to both freehold and leasehold, or to leasehold lands only; and it was held that they were confined to the latter, and that the devise of the freehold lands was general, without any local restriction.

Locality, how described.

A term descriptive of locality is not necessarily taken in its strictly accurate sense (*s*).

Reference to testator's title.

Sometimes a testator describes land by referring to the mode in which he acquired it: as when he devises the land " which I became entitled to on the death of my father," or the land " which I purchased of A " (*t*). Here again strict accuracy is not required: thus, a devise of lands, " which I have from time to time purchased," may include lands acquired by exchange (*u*).

" Land " includes leaseholds.

With reference to the meaning of the word " land," an old rule of construction has been abolished by section 26 of the Wills Act, which enacts that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general way, shall be construed to include the leasehold estates of the testator, unless a contrary intention appears. This section is chiefly of importance with reference to residuary devises, and has accordingly been considered in Chapter XXV (*x*). Some of the cases there cited relate to devises of " all my land " in a particular place.

Whether " freeholds " will pass leaseholds, and *vice versa*.

As a general rule, a devise of " freehold " land does not pass leaseholds, but as already mentioned, where the devise is specific, and the testator has no freehold land answering the description, leasehold land may pass; and conversely, where the gift is of land described as leasehold (*y*). And it seems clear that if a

(*q*) See *Hockley* v. *Mawbey*, 1 Ves. jun. 143; and *Doe* d. *Ryall* v. *Bell*, 8 T. R. 579, stated *ante*, p. 1243.

(*r*) 5 B. & Ald. 785; also cited *ante*, p. 963. Compare *Domvile* v. *Taylor*, 32 Bea. 604.

(*s*) *Wallace* v. *Att.-Gen.*, 33 Bea. 384 (gift to " the hospitals of London ").

(*t*) *Roe* d. *Ryall* v. *Bell*, 8 T. R. 579; *Doe d. Tyrrell* v. *Lyford*, 4 M. & Sel. 550, both cited *ante*, pp. 1243, 1244; *Hounsell* v. *Dunning*, [1902] 1 Ch. 512, *ante*, p. 962.

(*u*) *Doe* d. *Meyrick* v. *Meyrick*, 1 Cr. & M. 820, *ante*, p. 1243, n. (*h*).

(*x*) *Ante*, p. 936.

(*y*) *Ante*, p. 1220.

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testator devises " my freehold farm called Blackacre, now in the occupation of X," and it appears that part of the farm is leasehold (the whole being in the occupation of X), the leasehold portion will pass (*z*).

Whether "real estate" will pass leaseholds.

The question whether a devise of " real estate " passes leaseholds is discussed elsewhere (*a*).

Customary and copyhold land.

A devise of " freehold " land does not, as a general rule, pass customary freeholds or privileged copyholds; see *post*, p. 1266.

It will be remembered that under section 26 of the Wills Act, a devise of " land " *prima facie* passes customary and copyhold land as well as freeholds (*b*).

Money to be laid out in lands.

Money impressed with a trust for investment in the purchase of land will pass under a devise of " lands " or " hereditaments "; but if it may be invested in land situate anywhere in England, it will not pass under a devise of " all my lands in the county of S." (*c*).

Land subject to a trust for conversion.

Where a testator is entitled to property which is constructively personalty, being land subject to a trust for sale but not sold, it will pass under a gift of the testator's " real estate " or of his " lands, tenements and hereditaments," if the property is sufficiently identified (*e.g.*, by a reference to its locality or to the settlement in which it is comprised), or if the testator had no interest in any land or real estate in the proper sense of the term, so that it can fairly be inferred that he must have meant to refer to the property in question (*d*).

Mortgage debt.

It is noticed elsewhere that a devise of lands does not, as a general rule, pass the beneficial interest in a mortgage (*e*).

Merger of charge.

Where a testator is entitled to land which is subject to a charge, and is also entitled to the charge itself or a beneficial interest in it, the question may arise whether a merger has taken place. If it has, of course a devise of the land passes the benefit of the charge, but if no merger has taken place, the benefit of the charge will pass under any gift expressed in appropriate words (*f*), or the testator may direct it to merge (*g*).

(*z*) See *Re Bright-Smith*, 31 Ch. D. 314 (stated *ante*, p. 1237), where the question was as to copyholds, but the principle seems the same. *Hall* v. *Fisher*, 1 Coll. 47, and *Stone* v. *Greening*, 13 Sim. 390, are commented on by Chitty, J. The case of *Emuss* v. *Smith*, 2 De G. & Sm. 722 (stated, *ante*, p. 384), seems to have turned on the special language of the will: *sed qu.* whether the doctrine of *falsa demonstratio* might not have been applied.

(*a*) *Ante*, pp. 937 *seq.*

(*b*) *Ante*, p. 936.

(*c*) *Re Duke of Cleveland's S. E.*, [1893] 3 Ch. 244; *Basset* v. *St. Levan*, 71 L. T. 718; *Re Gosselin*, [1906] 1 Ch. 120.

(*d*) *Re Lowman*, [1895] 2 Ch. 348; *Re Glassington*, [1906] 2 Ch. 305.

(*e*) *Ante*, pp. 1221 *seq.*, where the exceptions to the general rule are stated.

(*f*) *Wilkes* v. *Collin*, L. R. 8 Eq. 338. As to the rule with regard to merger in these cases, see *ante*, p. 944.

(*g*) *Re Nunn's Estate*, 23 L. R. Ir. 286.

"Premises."

The word " premises " properly denotes that which is before mentioned, and in this view, its comprehensiveness is of course measured by that of the expression to which it refers (*h*). Thus (*i*), where a testator devised a certain messuage and the furniture in it to A for life, and after A's decease gave the said messuage " and premises " to B, the latter devise was held to carry the furniture as well as the messuage to B, on the ground that the word " premises " included all that went before. But the word is constantly used, not only in popular language but also in modern Acts of Parliament, without reference to what is before mentioned, in the general sense of houses, land and the like; and it has often been so construed when used in wills (*k*). It is also frequently used to denote appurtenances, in the popular sense of that expression (*l*). Even a gift of " the leasehold premises No. 32 Princes Gate " will pass stables at 3 Princes Mews, held under a different lease (*m*).

Devise of "messuages" generally.

It sometimes happens that a testator, in making a residuary devise, or a specific devise of land in a particular locality, uses a number of general words, such as " messuages, lands, tenements, and hereditaments." Before the Wills Act, the use of the word " messuages " did not make the devise include leasehold messuages, unless an intention that it should do so appeared from the will or from the circumstances (*n*). The Wills Act has not directly altered the rule, but as a devise of " land " now *prima facie* includes leaseholds, the question as to the effect of the word " messuages " is not likely to be of importance (*o*).

(*h*) *Doe* d. *Biddulph* v. *Meakin*, 1 East, 456. This doctrine was advanced in the judgment, and is indeed unquestionable; but the case did not turn precisely on the question. A devised a messuage or tenement, lands, buildings and premises, then in his own possession, and all other his real estate whatsoever, to his wife for life. And after her decease, he devised the said messuage, or tenements, buildings, lands, and premises, to his son W. in fee. The question was, whether the devise to W. included all that was given to the wife, or only the premises in his own occupation; and it was held, that it included all. The point, therefore, was not so much whether the word " premises " included the whole antecedent subject, as whether the testator, having used precisely the same words as those by which he had described the property in his own occupation, was not to be understood to mean to confine the devise in question to that property. If the devise were not so restrained, there were other words sufficient to carry the reversion in dispute, without calling in aid the word premises.

(*i*) *Sanford* v. *Irby*, 4 L. J. Ch. (o.s.) 23, cor. Lord Gifford, M.R. See *Doe* d. *Bailey* v. *Sloggett*, 5 Exch. 107.

(*k*) *Doe* d. *Hemming* v. *Willetts*, 7 C. B. 709; and see *Ross* v. *Veal*, 1 Jur. (N.S.) 751; *Lethbridge* v. *Lethbridge*, 3 D. F. & J. 523, 4 D. F. & J. 35; *Hibon* v. *Hibon*, 32 L. J. Ch. 374 (detached piece of land held to pass with house).

(*l*) *Read* v. *Read*, 15 W. R. 165. See *Cave* v. *Harris*, 57 L. T. 768, and *Re Seal*, [1894] 1 Ch. 316, *ante*, p. 1236.

(*m*) *Mocatta* v. *Mocatta*, 49 L. T. 629, following *Hibon* v. *Hibon*, 32 L. J. Ch. 374.

(*n*) *Thompson* v. *Lady Lawley*, 2 B. & P. 303; *Hobson* v. *Blackburn*, 1 My. & K. 571.

(*o*) As to *Arkell* v. *Fletcher*, 10 Sim. 299, see *post*, p. 1264, n. (*m*).

CHAP. XXXV.

As a word of particular description, "messuage" has been variously construed; sometimes a greater and sometimes a less degree of comprehensiveness having been attributed to it.

"Messuage" includes curtilage, garden and orchard :

In an early case (*p*) it is laid down, that the grant of a messuage did not include a garden, but was confined to the house, "and the circuit thereof," and it was thought that the words "messuage or tenement" must receive the same construction, the word "tenement" being in such case used as synonymous with messuage; it was said, however, that it would have been otherwise if the expression had been "messuage and tenement": indeed, one of the Judges (Weston) expressed an opinion, that a garden would pass by the name of a messuage or tenement, if they had been held together; and in *Carden* v. *Tuck* (*q*), a devise of a messuage was held to include the garden as well as the curtilage (*r*), the garden being, as was said, as well for necessity as pleasure. So, in *Smith* v. *Martin* (*s*), it was held that a garden might be said to be parcel of a house, and by that name would pass in a conveyance.

—but not meadow or arable land.

In *Hearn* v. *Allen* (*t*), two acres of land occupied with the messuage, but distant four miles from it, were held not to pass under a devise of a messuage "*cum pertinentiis*." On the other hand, in *Gulliver* d. *Jefferies* v. *Poyntz* (*u*), two closes of meadow and six acres of arable land were held to pass under a devise of "three messuages, with all houses, barns, stables, stalls, etc., that stands upon or belongs to the said messuages." Much reliance was placed by the Court on the fact that the property had been conveyed to the testator by the description of "a messuage or tenement with the appurtenances"; and Mr. Jarman remarks (*x*), with reference to this, that "it is

(*p*) Moore, 24, pl. 82, Dal. 29.

(*q*) Cro. Eliz. 89, 3 Leon. 214, pl. 283 (*Chard* v. *Tuck*). Lord Coke was also of this opinion, *post*, n. (*a*).

(*r*) As to what is a curtilage, see *Marson* v. *London, Chatham and Dover Ry. Co.*, L. R. 6 Eq. 101. The unfortunate use of the word in the Public Health Act, 1875, has, as might have been expected, given rise to difficult questions : *Pilbrow* v. *St. Leonard, Shoreditch*, [1895] 1 Q. B. 433; *Harris* v. *Scurfield*, 91 L. T. 536.

(*s*) 2 Saund. 400; see also *Hill* v. *Grange*, Plowd. at p. 170a; *Bettisworth's Case*, 2 Rep. 32a. It has been held that "house" in section 92 of the L. C. Act includes all that would pass by the grant of a "house"—includes therefore a garden, though partly used for trade purposes : *Salter* v. *Metropolitan Ry. Co.*, L. R. 9 Eq. 432 (nursery garden); but not if wholly so used : *Falkner* v. *Somerset and Dorset Ry. Co.*, L. R. 16 Eq. 458 (market garden). See also *Grosvenor* v. *Hampstead Junction Ry. Co.*, 1 De G. & J. 446; *Fergusson* v. *Brighton Ry. Co.*, 33 Bea. 103, aff. 33 L. J. Ch. 29; *Steele* v. *Midland Ry. Co.*, L. R. 1 Ch. 275; *Richards* v. *Swansea Improvement Com.*, 9 Ch. D. 425.

(*t*) Cro. Car. 57; *S. C.*, Litt. Rep. 5, nom. *Kene* v. *Allen*. Compare *Hibon* v. *Hibon*, 32 L. J. Ch. 374. As to the proper meaning of "appurtenances," see *post*, p. 1261.

(*u*) 2 W. Bl. 726, 3 Wils. 141

(*x*) First edition, p. 708.

clear, that intrinsic evidence of this nature was inadmissible to enlarge the established import of the words of the devise (*y*). The influence which this circumstance appears to have had in the determination certainly weakens its authority, and it is probable that the same construction would not now be adopted. At this day, indeed, the distinction suggested in the early cases (*z*) between *messuage* and *house*, in regard to the greater comprehensiveness of the former, is not to be relied on (*a*); and it is clear, that even the word messuage would not now be held to carry land beyond a homestead or orchard, though contiguous to, or enjoyed with it (*b*).

"House."

"In *Doe* d. *Clements* v. *Collins* (*c*), it was held, that under a devise of 'the house I live in and garden,' stables and a yard, which were in a ring fence that inclosed the whole, and a coal-pen which was on the opposite side of the road near the house, and both which were in the testator's own occupation, were included. The coal-pen was used in his trade, as well as for the purposes of his family. It was admitted, that the question as to the coal-pen was doubtful; but considering that it was in the testator's own occupation, was used by him partly for domestic purposes, and was annexed to no other tenement, the Court thought it passed.

"House I live in and garden."

"There is indeed a case (*d*) in which a devise of the testator's house at C. was held to include land; on the ground, it should seem, that the devisee was directed to be at the charge of house-keeping, servants' wages and coach-horses, to the number that the testator had maintained; and it appearing that he had a small piece of land, which he had employed to raise hay and corn for the house, and which was ploughed with the coach-

Case in which "house" was held to include land.

(*y*) *Doe* d. *Brown* v. *Brown*, 11 East, 441, *ante*, p. 465. But evidence of a similar character was admitted in *Ross* v. *Veal*, 1 Jur. (N.S.) 751.

(*z*) *Thomas* v. *Lane*, 2 Ch. Ca. 26, Keilw. 57, where it is said that *messuage* extends to the curtilage, though not to the garden; but that *domus* comprises only buildings.

(*a*) See Mr. Justice Ashhurst's judgment in *Doe* d. *Clements* v. *Collins*, 2 T. R. at p. 502; and Co. Lit. 5b, where Lord Coke says, "By the grant of a messuage or house, *mesuagium*, the orchard, garden and curtilage doe passe; and so an acre or more may pass by the name of a house." See also *King* v. *Wycombe Ry. Co.*, 28 Bea. 104.

(*b*) See *Roe* d. *Walker* v. *Walker*, 3 B. & P. 375; but in this case "lands" were expressly devised with the house in an earlier part of the will. See also Shepp. Touchst. 94. As to "house and farm," see *M'Gonigle* v. *M'Gonigle*, [1910] 1 Ir. R. 297. See also *Re Fuller*, 59 Sol. J. 304 ("house and land now occupied by R.").

(*c*) 2 T. R. 498; Ashhurst, J., seems to treat the case as if the word "appurtenances" had been in the will: *ib.* pl. 502. See observations on the case by Turner, L.J., L. R. 1 Ch., at p. 291. In *Heach* v. *Prichard*, [1882] W. N., p. 140, "cottage and garden" was held to include an adjoining orchard.

(*d*) *Blackborn* v. *Edgley*, 1 P. W. 600.

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horses (*e*). The Court, therefore, thought that as everything was to be carried on as it was in his lifetime, and the same style of living observed, the lands, the profits whereof had been used to be applied to the maintenance of the house, should continue to be so applied.

"However strong these circumstances may be as affording conjecture, they seem not to amount to that species of evidence on which to found a judicial exposition of the testator's intention" (*f*).

It has accordingly been laid down by an eminent modern Judge (*g*) that "house" will include whatever is necessary for the convenient occupation of the house, but not all that the occupier finds it convenient to occupy with it.

Direction to erect mansion-house held to include formation of suitable grounds.

But where a testator directed his trustees to erect a mansion-house, and suitable offices fit for the residence of the owner of his estates (which were worth about £15,000 per annum), on some convenient spot, Sir L. Shadwell, V.-C., held that the direction authorised the formation of a garden and pleasure-grounds (*h*).

It is hardly necessary to say that if the testator himself distinguishes between "house" and "land," this may restrict the operation of the former word (*i*).

"House," "cottage," what amounts to.

So much for the comprehensiveness of the word "house." The converse question is, what kind of tenement will satisfy this and other similar terms. In *Doe* d. *Hubbard* v. *Hubbard* (*k*), it was held that the word "cottage" (defined by Lord Coke (*l*) to be a little house without land to it) was satisfied by a tenement partitioned off from a larger cottage and having a separate entrance, though not including an upper room under the same roof.

Easements.

It is clear that a devise of a house or land carries with it all easements and similar rights belonging to it, and that the doctrine of the implied grant of easements of necessity applies to devises as well as to conveyances by deed (*m*).

(*e*) The Court assumed that there was a direction that the horses should continue to plough the lands; but the will, as stated in the report, contains no such clause.

(*f*) See 2 B. & P., at p. 308.

(*g*) Turner, L.J., in *Steele* v. *Midland Ry. Co.*, L. R. 1 Ch. 275. Knight-Bruce, L.J., was apparently disposed to give the word a wider meaning.

(*h*) *Lombe* v. *Stoughton*, 18 L. J. Ch. 400.

(*i*) *Roe* d. *Walker* v. *Walker*, 3 B. & P. 375. See also *Buck* d. *Whalley* v. *Nurton*, 1 B. & P. 53, *post*, p. 1261.

(*k*) 15 Q. B. 227.

(*l*) Co. Lit. 56b. "A cottage is a small dwelling-house," *Doe* v. *Sotheron*, 2 B. & Ad., at p. 638.

(*m*) *Pearson* v. *Spencer*, 3 B. & S. 761; *Phillips* v. *Low*, [1892] 1 Ch. 47. See *Taws* v. *Knowles*, [1891] 2 Q. B. 564; *Corbett* v. *Jonas*, [1892] 3 Ch. 137. But the devise to A of a house "as now in the occupation of T" does not give A the right to use a way and pump on an adjoining property of

"Appurtenances."

It has been sometimes a question what will pass under the denomination of "appurtenances" to a messuage or house. Strictly speaking, land cannot be appurtenant to a house (*n*) or to other land (*o*). The case of *Hearn* v. *Allen* (*p*) was decided on this ground. But in *Boocher* v. *Samford* (*q*), where a testator devised "the tenement with the appurtenances in which H. B. dwelleth in Ebley," it was held that lands that had been held at one rent with the house for sixty years passed, though not strictly appurtenant. And in *Doe* d. *Lempriere* v. *Martin* (*r*), a devise of the testator's copyhold messuage, with all outhouses, gardens, and appurtenances to the same belonging, situate at F., and then in his own possession, was held to include a small piece of land, being the site of several cottages pulled down by the testator, who had laid the ground open to his court yard, and then occupied it with the house, though his estate in the two was different (*s*).

Gardens, etc., held to pass as appurtenances to a house.

But in a subsequent case (*t*), a direction by the testator that his steward should enjoy his mansion-house "with the appurtenances," for one year after his death, was held to extend to orchards, but not to fifty or sixty acres of land, which the testator had kept in his own hands with the house. And this construction was corroborated by the fact of there being, in another part of the same will, a devise of this property "with the lands and grounds," also "with the appurtenances," showing that the testator had the distinction in view. Eyre, C.J., said if this had not been so, and if they had found a house situated in a park, which had always been occupied with it, being, as it were, an integral part of the thing, it might have proved the intention of the testator to pass the whole together.

Mr. Jarman remarks (*u*) that "this would be carrying the construction of the word very far. At all events, it is not to be doubted that whatever is necessary to the commodious enjoyment of the house will in general pass under the word

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the testatrix which had been used by T with the knowledge and consent of the testatrix: *Polden* v. *Bastard*, L. R. 1 Q. B. 156. As to what is an easement of necessity, see *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557. As to the creation of easements *de novo* by express words, see *ante*, p. 69, and *post*, p. 1782.

(*n*) Plowd. 169a, 170.

(*o*) Co. Lit. 121b; 8 B. & Cr. 141; 6 Bing., at p. 161.

(*p*) Cro. Car. 57, *ante*, p. 1258, and *post*, p. 1262.

(*q*) Cro. Eliz. 113.

(*r*) 2 W. Bl. 1148; *Re Midland Ry. Co.*, 34 Bea. 525, stated *ante*, p. 393.

(*s*) In *Yates* v. *Clincard*, Cro. Eliz. 704, it was held that a piece of freehold land occupied with a copyhold house did not pass under the devise of the house with the appurtenances: *sed quære.*

(*t*) *Buck* d. *Whalley* v. *Nurton*, 1 B. & P. 53; see also *Harwood* v. *Higham*, Godb. 40.

(*u*) First edition, p. 711.

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'appurtenances' (*x*); *a fortiori* if then actually enjoyed with it by the person in whose occupation the house is described to be; though in some of the cases more weight has been given to this circumstance than it seems fairly entitled to. It is not likely that at this day the word would be carried beyond its ordinary acceptation." It has a definite meaning, and though it may be enlarged by the context, the burden of proof lies on those who so contend (*y*).

"Lands appertaining to" a house, etc.

There is, however, a difference between the devise of a house and the "appurtenances," and of a house with the "lands appertaining thereto." It is clear that by the latter expression some lands are intended, and therefore the primary sense of the word "appertaining" is excluded. Thus in *Hill* v. *Grange* (*z*), it was held that the demise of a messuage, "with all lands appertaining thereto," comprised all lands usually occupied with or lying near to the messuage; for when "appertaining" was placed with the said other words, it could not be taken in any other sense, and therefore it should there be taken, not according to the true definition of it, because that did not stand with the matter, but in such sense as the party intended it. And in *Hearn* v. *Allen* (*a*), the Court, while holding that the lands there in dispute were not included by the term "*cum pertinentiis*," said it would have been otherwise if it had been "*cum terris pertinentibus*."

"Thereunto belonging."

The construction of the words "thereunto belonging," which are not words of art (*b*), has often come under discussion.

Thus, in *Ongley* v. *Chambers* (*c*), where a testator devised the rectory or parsonage of Minster, with the messuages, lands,

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(*x*) See *Nicholas* v. *Chamberlain*, Cro. Jac. 121; *Hobson* v. *Blackburn*, 1 My. & K. 571; *Thomas* v. *Owen*, 20 Q. B. D. 225, where in a lease of a house a right of way over an accommodation road was held to pass by the words "appurtenances thereto belonging"; for this purpose, however, the word is generally unnecessary: *Steele* v. *Midland Ry. Co.*, L. R. 1 Ch. 275; *Phillips* v. *Low*, [1892] 1 Ch. 47; *ante*, p. 1260.

(*y*) See acc. *Evans* v. *Angell*, 26 Bea. 202; *Lister* v. *Pickford*, 34 Bea. 576 (in both of which "appurtenances" was construed strictly); *Smith* v. *Ridgway*, L. R. 1 Ex. 46, 331; also *per* Parke, B., *Pheysey* v. *Vicary*, 16 M. & W., at p. 494. See also *Cuthbert* v. *Robinson*, 15 L. J. Ch. 238, where having regard to the context of the will and the circumstances of the case, Kay, J., held that land passed by the word "appurtenances."

(*z*) Plowd., at p. 170a.

(*a*) Cro. Car. 57, *ante*, p. 1258; see also *Gennings* v. *Lake*, Cro. Car. 168; *Higham* v. *Baker*, Cro. Eliz. 15, *per* Anderson, C.J.

(*b*) *Per* Pollock, C.B., *Maitland* v. *Mackinnon*, 1 H. & C. 607.

(*c*) 8 J. B. Moo. 665, 1 Bing. 483; see also *Doe* v. *Holton*, 5 Nev. & M. 391, 4 Ad. & Ell. 76; *Bodenham* v. *Pritchard*, 1 B. & Cr. 350 ("lands thereto belonging as now enjoyed by me"); with which cf. *Polden* v. *Bastard*, L. R. 1 Q. B. 156; *ante*, p. 1260, n. (*m*). In *Marshall* v. *Hopkins*, 15 East, 309, a house and nineteen acres of land, all held by the testator under one title, and which at a former period of his ownership had been, but at the date of the will were not, in one and the same occupation, were held to pass by a devise of "all that my messuage, dwelling-house or tenement, with all lands, hereditaments and appurtenances thereto belonging."

tenements, tithes, hereditaments and all and singular other the premises "thereunto belonging," with the appurtenances; it was held that, by the effect of these words, the devise operated on certain lands which had been purchased by the owners of the rectory between the years 1607 and 1632, and had been since uninterruptedly occupied with it, and had been in various leases described as belonging to the rectory; for though not, strictly speaking, appurtenant to the rectory, they had become, by unity of title and concurrent occupation, joined to the rectory, and might be taken in popular acceptation as belonging thereto. Lord Gifford, C.J., referred to several old cases and text books in which it was laid down that lands, which had been occupied with a house for ten or twelve or even five or six years, might pass as parcel of or belonging to such house.

The effect of the words "thereto belonging" was also considered in *Doe* d. *Gore* v. *Langton* (*d*), where they were used in connection with a manor, and in *Downe* v. *Sheffield* (*e*).

"Thereto adjoining."

In *Josh* v. *Josh* (*f*), the question was what passed by the description of "the piece of land adjoining" a house and premises previously described; whether it comprised several contiguous fields, each one situated beyond the other, and forming with the house and premises the whole of the testator's real property, or was limited to the single field next to the house and premises: and it was held to comprise the whole.

"Farm."

The word "farm" usually means a definite quantity of land with buildings on it, used for agricultural purposes or the like. The word has long since lost its original sense of land leases for life or years at a rent. In the sixteenth century it was used to mean a capital messuage with a considerable quantity of land belonging to it (*g*). At the present day "farm" *prima facie* means land and buildings used for agriculture and the pasturage of beasts, but a farm may, and often does, include woodland (*h*). The term implies "some entire subject-matter," such as, if let, would be let to one tenant (*i*). It may include houses, lands and tenements (*k*) of every tenure, and therefore a specific devise of a "freehold farm" will, it seems, *prima facie* include copyholds and leaseholds (*l*). Even before the Wills Act, the use

(*d*) 2 B. & Ad. 680. In *Kennedy* v. *Keily*, 28 Bea. 223, a bequest of a lease of a house "with all buildings belonging to me" was held to pass stables occupied with the house by the testator though under a different title.

(*e*) 71 L. T. 292.

(*f*) 5 C. B. (N. S.) 454.

(*g*) Plowd. 191; Termes de la Ley; Jacob's Law Dict.

(*h*) *Portman* v. *Mill*, 3 Jur. 356; Shepp. Touch. 93.

(*i*) See *Re Bright-Smith*, 31 Ch. D. 314; *Lane* v. *Stanhope*, *post*, p. 1264. As to the effect of words describing a particular farm as being in the occupation of a certain person, see the next Section of this chapter.

(*k*) Co. Litt. 5a.

(*l*) *Re Bright-Smith*, *supra*.

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in a residuary devise of the word "farms" sometimes had the effect of making it include leaseholds (*m*). Since the Act the question is not likely to arise (*n*).

Devise of "rents and profits" passes the land.

In the absence of a context indicating a contrary intention (*o*), a devise of the rents and profits (*p*) or of the income (*q*) of land passes the land itself both at law and in equity: a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits (*r*). And since the Wills Act, 1837, such a devise carries the fee simple (*s*); before that Act it carried no more than an estate for life, unless words of inheritance were added (*t*). But even under the old law, where a testator, seised or possessed of a reversion in fee or for years, to which rent was incident, devised or bequeathed his "ground rent," not only the rent, but the reversion would pass (*u*); as he was considered, when speaking of the ground rent, to mean by that term all the reversionary interest, of which the rent was the immediate fruit.

"Ground rent" held to include reversion.

(*m*) *Lane* v. *Stanhope*, 6 T. R. 345 (where part of the farm was leasehold); *Doe* d. *Belasyse* v. *Lucan*, 9 East, 448; *O'Connor* v. *O'Connor*, Ir. R. 4 Eq. 483. In *Holmes* v. *Milward*, 47 L. J. Ch. 522, Fry, J., held that the use of the word "farms," in a residuary devise of real estate, did not make it include the leasehold part of a farm belonging to the testator, apparently on the ground that the residue was devised "in fee," and that the testator throughout his will distinguished between his real estate and his personal estate. But the case of *Lane* v. *Stanhope* was even stronger, for there the devise was in strict settlement, and yet it was held that the leasehold part of the farm passed. Whether the decision in *Holmes* v. *Milward* is right or wrong, exception must be taken to the learned Judge's statement that the primary meaning of "farm" is land let out by the owner; no one uses the word in that sense at the present day. In *Arkell* v. *Fletcher*, 10 Sim. 299, the limitations were applicable to freeholds only, but the residuary devise included the words "messuages and farms," and the only messuages and farm buildings belonging to the testator were held by him for the remainder of a term of 4800 years; it was therefore clear that he intended them to be included in the residuary devise, as in *Hobson* v. *Blackburn*, 1 My. & K. 571.

(*n*) See Chap. XXV, *ante*, p. 936, where the effect of section 26 is discussed.

(*o*) *Re Coward*, 57 L. T. 285; *S. C.*, *Coward* v. *Larkman*, 60 L. T. 1. See *Blann* v. *Bell*, 2 D. M. & G. 775, cited *ante*, p. 1155.

(*p*) Co. Lit. 4b; *Parker* v. *Plummer*, Cro. Eliz. 190; *South* v. *Alleine*, 1 Salk. 228; *Doe* d. *Goldin* v. *Lakeman*, 2 B. & Ad. 30; *Re Martin*, [1892] W. N. 120. The word "profits" by itself is sufficient: *Johnson* v. *Arnold*, 1 Ves. sen. 169; *Baines* v. *Dixon*, *ib.* 42.

(*q*) *Mannox* v. *Greener*, L. R. 14 Eq. 456; *Baker* v. *Blount*, [1917] 1 Ir. R. 316.

(*r*) *Per* Lord Cranworth, *Blann* v. *Bell*, 2 D. M. & G., at p. 781.

(*s*) *Plenty* v. *West*, 6 C. B. 201; *Mannox* v. *Greener*, L. R. 14 Eq. 456. As to the cases where an indefinite bequest of the income of personal estate passes the absolute interest, see *ante*, p. 1154.

(*t*) *Hodson* v. *Ball*, 14 Sim., at p. 571, and see *Belt* v. *Mitchelson*, Belt's Suppl. to Vesey sen. 227.

(*u*) *Kerry* v. *Derrick*, Moore, 771; *Maundy* v. *Maundy*, 2 Stra. 1020; *Kaye* v. *Laxon*, 1 Br. C. C. 76 (leasehold ground rents); and see *Ashton* v. *Adamson*, 1 Dr. & War. 198.

So a gift of the rents of leaseholds may pass the absolute interest in them (*x*).

Rents of leaseholds.

A gift of arrears of rents may give rise to questions as to its effect (*y*).

Arrears of rents.

A devise of "rents and profits" includes an advowson (*z*); and with it of course the right of presentation in case the living is vacant; unless the will devotes the "rents and profits" wholly to purposes which can be answered only by money or money's worth, as the augmentation of poor livings (*a*), investment in lands (*b*), or the maintenance of children and accumulation of surplus (*c*); in which case the right of presentation, not being the subject of profit, will (before 1926) result to the heir. If the living is full the future right of presentation might have been sold for the purposes of the will, like any other fruit of property (*d*), but see now the Benefices Act, 1898, and the Benefices Act (Amendment) Measure, 1923.

Advowson will pass under "rents and profits."

An advowson appendant or appurtenant passes, of course, under a devise of the land to which it is annexed.

The effect of the devise of an advowson has been already referred to (*e*).

What passes by devise of advowson.

The devise of a "living" may pass the advowson or the next presentation, according to the context (*f*).

A devise of the "free use" (*g*), or of the "use and occupation" (*h*) of land, passes an estate in the land, and consequently a right to let or assign it, and is not confined to the personal use or occupation of the property, unless the context clearly calls for the more limited construction, as where there is a gift over on cesser of occupation (*i*), or where the house is devised to trustees, with a direction that A may reside in it rent free (*k*).

Devise of "use and occupation."

(*x*) *Watkins* v. *Weston*, 32 Bea. 238, 3 D. J. & S. 434.

(*y*) *Lindsay* v. *Earl of Wicklow*, Ir. R. 6 Eq. 72; *Re Lucas*, 55 L. J. Ch. 101; *Re Duke of Cleveland's Estate*, [1894] 1 Ch. 164; *ante*, p. 1256; *Wills* v. *Wills*, [1909] 1 Ir. R. 268.

(*z*) *Earl of Albemarle* v. *Rogers*, 2 Ves. jun. 477, 7 Br. P. C. Toml. 522; *Sherrard* v. *Lord Harborough*, Amb. at p. 167, *per* L. C.

(*a*) *Kensey* v. *Langham*, Ca. temp. Talb. 143.

(*b*) *Sherrard* v. *Lord Harborough*, Amb. 165.

(*c*) *Martin* v. *Martin*, 12 Sim. 579.

(*d*) *Cooke* v. *Cholmondeley*, 3 Drew. 1; *Cust* v. *Middleton*, 11 W. R. 456.

(*e*) *Ante*, p. 69.

(*f*) *Webb* v. *Byng*, 2 K. & J. 669.

(*g*) *Cook* v. *Gerrard*, 1 Saund. 181, 186, e.

(*h*) *Manning's Case*, 8 Rep. 94b; *Whittome* v. *Lamb*, 12 M. & Wels. 813; *Rabbeth* v. *Squire*, 19 Bea. 70, 4 De G. & J. 406; *Mannox* v. *Greener*, L. R. 14 Eq. 456; *Coward* v. *Larkman*, 60 L. T. 1. "Occupation is not living and residing": *per* Lord Eldon, in *Fillingham* v. *Bromley*, T. & R. 530, stated *post*, p. 1519.

(*i*) *Maclaren* v. *Stainton*, 27 L. J. Ch. 442; *Stone* v. *Parker*, 29 *ib.* 874. As to conditions requiring "residence" and the effect of the Settled Land Acts, see *post*, p. 1520.

(*k*) *May* v. *May*, 44 L. T. 412.

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Prima facie, a devise of the use and occupation of a house or land is limited to the life of the devisee (*l*).

Option to reside.

A mere option to use and occupy a house does not create the donee a tenant for life under the Settled Land Acts until the option is exercised (*m*).

Customary freeholds pass as copyholds,

It is clear that customary estates, held by copy of court roll, although not at the will of the lord as in the case of proper copyholds, would pass under the denomination of copyholds, and not, unless in special circumstances, under that of freeholds (*n*).

except in special circumstances.

Special circumstances were held to exist in *Re Steel* (*o*). In that case a testatrix had inherited four fields at M., two of which were of freehold tenure, but the other two were privileged copyholds, not held at the will of the lord, and commonly known in the locality as "customary freeholds," or "freeholds": it was held that they passed by a devise of "my freehold land and hereditaments at M."

Manor.

The devise of a manor, even under the old law, included copyholds, parcel of the manor, acquired by the lord after the date of his will (*p*), and freeholds, held of the manor, coming to the lord by escheat after the date of his will (*q*); but such freeholds, if purchased by the lord, do not become parcel of the manor (*r*), except possibly in reputation (*s*).

"Pits and veins of clay."

The question whether a devise of "pits and veins of clay" in certain lands together with the rents and profits of such pits and veins, passed pits, etc., open at the death of the testator was discussed in *Brown* v. *Whiteway* (*t*).

"Moiety."

A testator may use "moiety" in the sense of a part or share (*u*).

Question whether one moiety or both moieties passed.

Where (*v*) a testator, having a fee simple in possession in one moiety of lands called H., and a reversion in fee in the other, devised "All that my part, purpart and portion of and in the tenement called H.," with other lands, "and the

(*l*) *Re Coward*, 57 L. T. 285; *S. C.*, *Coward* v. *Larkman*, 60 L. T. 1, where Lord Halsbury suggested that section 28 of the Wills Act affects the question: but the section speaks of a devise of real estate, not of a devise of the use and occupation of real estate. Moreover, section 28 does not apply to interests created *de novo*: see *post*, p. 1782.

(*m*) *Re Anderson*, [1920] 1 Ch. 175; *Re Gibbons*, [1920] 1 Ch. 372.

(*n*) *Roe* d. *Conolly* v. *Vernon*, 5 East, at p. 83; *Doe* d. *Cook* v. *Danvers*, 7 East, 299.

(*o*) [1903] 1 Ch. 135.

(*p*) *Roe* d. *Hale* v. *Wegg*, 6 T. R. 708; *Hicks* v. *Sallitt*, 3 D. M. & G. 782.

(*q*) *Delacherois* v. *Delacherois*, 11 H. L. C. 62.

(*r*) *Ib.*

(*s*) *Reg.* v. *Duchess of Buccleugh*, 6 Mod. 151. As to what is comprised in the expression "reputed manor," see *Doe* d. *Clayton* v. *Williams*, 11 M. & W. 803 (deed).

(*t*) 8 Ha., at p. 150.

(*u*) *Morrow* v. *McConville*, 11 L. R. Ir. 236.

(*v*) *Doe* d. *Phillips* v. *Phillips*, 1 T. R. 105.

reversion and reversions, remainder and remainders, rents, issues and profits thereof," it was held that both moieties passed.

"Property, brewery, etc."

In *Waite* v. *Morland* (*w*) a disposition of "all my property, brewery &c." was held to mean "all my brewery property," and therefore to include a number of public-houses belonging to the testatrix, the tenants of which were bound to buy their beer from her brewery.

Real estate "not partitioned."

In *Re Trimmer* (*x*) the question arose what passed under a devise of real estate held by the testator under the will of his father as tenant in common "and not partitioned."

Locality and source.

(2) *Words descriptive of Personal Property* (*y*).—The authorities on the effect of bequests of property described with reference to its locality, or the source from which it is derived, are referred to elsewhere (*z*).

"Estate" and "property."

It has already been pointed out that "estate" and "property" are words of wide meaning, and *prima facie* include both real and personal property, although their meaning may be restricted by the context (*a*).

"Effects," "goods," "chattels," "money," etc.

It has also been pointed out that the entire personal estate of a testator may pass by the word "effects," or "goods," or "chattels," and even by the word "money" and other informal words (*b*).

It is here proposed to discuss the meaning of words descriptive of personal property not comprised in a residuary bequest.

Gift of income.

The operation of a gift of the income of property in passing an absolute interest in it, has been discussed in Chap. XXXIII.

"Goods," "chattels," "effects," etc.

The operation of a gift of "goods," "chattels," "effects," "things," "movables," or the like, may be restrained by a reference to a locality (*c*), or by being employed in conjunction with words of a narrower meaning, thus leading to the *ejusdem generis* construction (*d*).

"Movables."

The word "movables," it has been said, may, if not restrained by the context, pass the whole purely personal estate of the testator (*e*), by which appear to be meant choses in action as well as choses in possession, but not leaseholds.

(*w*) 12 Jur. (N.S.) 763.

(*x*) 91 L. T. 26.

(*y*) Other than leaseholds, which for this purpose fall under the head of "lands, houses, etc.," *supra*.

(*z*) *Ante*, pp. 1046 *seq.*

(*a*) *Ante*, p. 958. See *Askew* v. *Rooth*, L. R. 17 Eq. 426, *Lee* v. *Lee*, 27 L. J. Ch. 824, and other cases cited *post*. Also *Re Featherstonhaugh*; *Whitney's Estate*, [1924] 1 Ir. R. 153.

(*b*) *Ante*, p. 992.

(*c*) See *post*, p. 1277, as to furniture and household goods, etc., and *ante*, pp. 1062 *seq.*

(*d*) *Ante*, p. 981.

(*e*) *Steignes* v. *Steignes*, Mos. 296.

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"Money."

With regard to the word "money," Mr. Jarman says (*f*): "In its strict acceptation, 'money' will, it seems, extend to bank notes (*g*); and no doubt to Exchequer bills and other documents payable to bearer; probably also to bills of exchange indorsed in blank" (*h*). It will extend to money in the hands of an agent (*i*), or on deposit with a banker (*j*). But money in the hands of a stakeholder to abide an event which does not happen in the testator's lifetime will not pass by a bequest of his "money" (*k*). And in an Irish case of *Dillon* v. *M'Donnell* (*l*), it was held that a gift of "money" did not pass an unpaid fine for a grant of land in perpetuity which had not been completed at the time of the testator's death.

In *Re Taylor* (*m*) the context was sufficient to prevent the word "money" having its strict sense and was held to include all the testator's investments his interest in which was expressible or receivable in terms of currency. In *In b. Gates* (*n*) a gift of "all my money" was held to dispose of all the testator's estate except furniture and an equity of redemption of some cottages. But in *Re Putner* (*nn*) there was no context to extend the meaning of "all my money."

It was held in *Shelmer's Case* (*o*) that money lent on mortgage passed by a bequest of money belonging to the testatrix at her death; for "money," said Gilbert, C.B., "is a genus that comprehends two species, *viz.*, ready money and money due, *i.e.*, the money in the owner's own hands and his money in the hands of anybody else" (*p*). So a gift of "moneys of which I may at the time of my decease be absolutely possessed," was held to pass all moneys owing to the testatrix on security or otherwise (*q*). On the other hand, in *Re Mason's Will* (*r*), a legacy due from another testator's estate was

(*f*) First edition, p. 702, n.

(*g*) *Downing* v. *Townsend*, Ambler, 280.

(*h*) *Collins* v. *Martin*, 1 B. & P. 648, at p. 651; *Wookey* v. *Pole*, 4 B. & Ald. 1; *Sealy* v. *Stawell*, Ir. R. 2 Eq. 326; and see 1 Roper on Legacies by White, 252.

(*i*) *Ogle* v. *Knipe*, L. R. 8 Eq. 434.

(*j*) *Manning* v. *Purcell*, 7 D. M. & G. 55; *Re Glendinning*, 120 L. T. 222.

(*k*) *Manning* v. *Purcell*, *supra*.

(*l*) 7 L. R. Ir. 335.

(*m*) [1923] 1 Ch. 99. See also *O'Connor* v. *O'Connor*, [1911] 1 Ir. R. 263, where "money" was held to include consols, stocks, arrears of rent, but not capital sums secured by mortgage.

(*n*) [1928] P. 128, 179.

(*nn*) 45 T. L. R. 325.

(*o*) Gilb. Eq. Rep. 200.

(*p*) In *Re Townley*, 32 W. R. 549, Pearson, J., said that in its strict sense "moneys" means cash.

(*q*) *Langdale* v. *Whitfield*, 4 K. & J. 426. The decision turned partly on the context.

(*r*) 34 Bea. 494. In *Collins* v. *Collins*, L. R. 12 Eq. 455, arrears of a Government allowance and a sum payable for funeral expenses by a friendly society were assumed to pass as "moneys," and in *Byrom* v. *Brandreth*,

held not to pass by a bequest of "money and securities for money," because it was only a debt.

"Money due to me."

However, a bequest of "money due to me" will pass a legacy due from another testator's estate, if that estate has been got in by the executor so as to constitute the legacy a debt from him (*s*); otherwise if the estate has not been so got in (*t*). A gift of "moneys owing to me from A" will not pass the testator's interest in a sum of money due from A to the estate of an intestate of which the testatrix is entitled to a distributive share (*u*). "Money due (or owing) to me" will also include money at a bank (*x*), money on deposit at a bank (*y*), moneys under a policy on the testator's own life (*z*), and damages to which he was entitled, though the amount was unascertained at his death (*a*). But not money to be paid for a service not completed at the testator's death (*b*).

Debt due by a firm.

If A is indebted to the testator in £500, and a firm of which A is a member is indebted to the testator in £1,000, and the testator bequeaths "all debts due to me by A," this bequest does not include the £1,000 (*c*). "I forgive all debts due to me" does not release mortgages and charges (*d*).

Set-off of moneys owing by legatee.

A bequest to a person of all moneys due by him to the testator carries only the balance remaining due, after deducting any debts owing by the legatee to the testator (*e*).

Moneys to arise from sale.

The bonus payable under section 48 (*f*) of the Irish Land

L. R. 16 Eq. 475, Selborne, L.C., thought that an acknowledged legacy or any money payable to the testator on application would pass by a bequest of "money of which I may die possessed," but not an apportioned part of an annuity or an unacknowledged legacy: see *Re Beaven*, 53 L. T. 245.

(*s*) *Bainbridge* v. *Bainbridge*, 9 Sim. 16.

(*t*) *Martin* v. *Hobson*, L. R. 8 Ch. 401.

(*u*) *Collins* v. *Doyle*, 1 Russ. 135. In *Brown* v. *Brown*, 6 W. R. 613, money raisable at A's request under the trusts of a term of years was held to pass by a gift in A's will of "all moneys due to me on mortgage and all debts owing to me on any account." It is not easy to justify the decision, as it does not appear that the testator had requested the sum to be raised: compare *Re Salvin*, [1906] 2 Ch. 459, cited *ante*, p. 782, and see *Earl Poulett* v. *Hood*, 35 Bea. 234; *post*, p. 1273.

(*x*) *Carr* v. *Carr*, 1 Mer. 541, n.

(*y*) *Re Derbyshire*, [1906] 1 Ch. 135.

(*z*) *Petty* v. *Willson*, L. R. 4 Ch. 574.

(*a*) *Bide* v. *Harrison*, L. R. 17 Eq. 76; but not the apportioned part of dividends declared after the testator's death: *Re Burke*, [1914] 1 Ir. R. 81.

(*b*) *Stephenson* v. *Dowson*, 3 Bea. 342.

(*c*) *Ex p. Kirk*, 5 Ch. D. 800. But if there had never been any debt owing to the testator by A individually, the doctrine of *falsa demonstratio* might perhaps have been applied, as in *Maybery* v. *Brooking*, 7 D. M. & G. 673. *ante*, p. 1241.

(*d*) *Re Neville*, [1925] 1 Ch. 44.

(*e*) *Ganly* v. *Dowling*, 5 L. R. Ir. 628; *Ekins* v. *Morris*, 8 W. R. 301. Compare *Chick* v. *Blackmore*, 2 Sm. & G. 274 (book debts), cited *post*, p. 1281.

(*f*) *Re Livingstone*, 61 Sol. J. 384; see *Heard* v. *Gabbett*, [1915] 1 Ir. R. 213; and *Re Annaly's Trust*, 92 L. T. 13.

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Act, 1903, was held to be moneys arising from the sale of land (*f*); but they are not part of the purchase money (*g*).

Whether "money" includes stock.

"Money" does not include money invested in the funds, or in other stocks or shares, etc., unless there is something in the context or the surrounding circumstances to give it this extended meaning (*h*). Thus "my money in the Bank of England" may mean stock in the funds, if the testator never had any cash in the Bank (*i*). So "money deposited in the Post Office Savings Bank" may include money invested in consols through that bank (*k*). And, of course, "moneys in the Funds" is equivalent to "moneys invested in English Government securities" (*l*).

What words will pass money at a banker's.

Although money at a banker's is, in fact, a debt due from the banker (*m*), and will pass under a bequest of a debt (*n*), yet the term "ready money" or "money in hand" does also sufficiently describe such money and generally will pass it (*o*). Money in a banker's hands on a deposit account which, at the testator's death, can be withdrawn without notice, will also pass by a bequest of "money" or "ready money" (*p*), but not if notice is required (*q*). Money on deposit at a bank, whether notice of withdrawal is required or not, will pass under a bequest of "moneys owing to me" (*r*), or "property at interest" (*s*). Stock is not "ready money" (*t*), nor are notes

What will not pass under a bequest of "ready money" or "money in hand."

(*f*) See note (*f*), *ante*.

(*g*) *Re Oliver*, 103 L. T. 422.

(*h*) *Lowe* v. *Thomas*, Kay, 369, 5 D. M. & G. 315; *Waite* v. *Combes*, 5 De G. & S. 676; *Hotham* v. *Sutton*, 15 Ves. 319; *Gosden* v. *Dotterill*, 1 My. & K. 56; *Glendening* v. *Glendening*, 9 Bea. 324; *Whateley* v. *Spooner*, 3 K. & J. 542; *Newman* v. *Newman* (*No.* 1), 26 Bea. 218; *Hart* v. *Hernandez*, 52 L. T. 217; *Stooke* v. *Stooke*, 35 Bea. 396 (stated *ante*, p. 997); *Collins* v. *Collins*, L. R. 12 Eq. 455; *Re Harding*, 55 Sol. J. 93; *Re Putner*, 45 T. L. R. 325; and see the other cases stated *ante*, p. 998. *Ommanney* v. *Butcher*, T. & R. 260, and other cases in which the question was whether the general residue passed by a bequest of "money," are considered *ante*, pp. 992 *seq.*

(*i*) *Gallini* v. *Noble*, 3 Mer. 691; *Brennan* v. *Brennan*, Ir. R. 2 Eq. 321.

(*k*) *Re Adkins*, 98 L. T. 667; distinguished in *Re Mann*, [1912] 1 Ch. 388.

(*l*) *Burnie* v. *Getting*, 2 Coll. 324; *Slingsby* v. *Grainger*, 7 H. L. C. 273; and other cases cited *post*, p. 1274.

(*m*) *Foley* v. *Hill*, 2 H. L. C. 28.

(*n*) *Parker* v. *Marchant*, 1 Ph. 361; *Carr* v. *Carr*, 1 Mer. 541, n.; *Pott* v. *Glegg*, 16 M. & W. 321.

(*o*) *Parker* v. *Marchant*, 1 Ph. 356; 1 Y. & C. C. C. 290; *Vaisey* v. *Reynolds*, 5 Russ. 12; *Taylor* v. *Taylor*, 1 Jur. 401.

(*p*) *Re Powell's Trust*, Johns. 49; *Manning* v. *Purcell*, 7 D. M. & G. 55; *Stein* v. *Ritherdon*, 37 L. J. Ch. 369; *Re Boorer*, [1908] W. N. 189; *Re Rodmell*, 108 L. T. 184. See *Re Vear*, 62 Sol. J. 159 (money on current account held to pass money on deposit where the testatrix had no current account); *Re Bradfield*, [1914] W. N. 423 ("money to my account").

(*q*) *Mayne* v. *Mayne*, [1897] 1 Ir. R. 324; *Re Wheeler*, [1904] 2 Ch. 66; *Re Price*, [1905] 2 Ch. 55.

(*r*) *Re Derbyshire*, [1906] 1 Ch. 135, *ante*, p. 1269, n. (*y*).

(*s*) *Sealy* v. *Stawell*, Ir. R. 2 Eq. 326.

(*t*) *Beavan* v. *Beavan*, 5 L. R. Ir. 57; *Enohin* v. *Wylie*, 10 H. L. C. 1.

of hand (*u*), or money in the hands of an agent (*x*), or unreceived dividends on stock, the warrants for which have neither been received nor demanded (*y*); or rent or the interest on a mortgage (*z*); or apportioned parts of pensions or dividends (*a*).

"Cash."

"Cash" is a stricter term than "money." In *Beales* v. *Crisford* (*b*) it was held that a promissory note payable to order, some Columbian bonds, and long annuities were not included in "cash or moneys so called" (*i.e.* "cash or money commonly called cash"). The word "money," coupled with the word "cash," is confined to money strictly and properly so called (*c*).

"Cash at bankers."

A bequest of "the cash balances standing to the credit either of my current account or deposit account with any of my bankers" means what it says, and does not include money in the hands of an agent for sale (*d*). "Cash at my banker's" means money on current drawing account, and such money on deposit as is withdrawable without notice (*e*). "Cash in house" has been held to pass Post Office money orders (*f*).

"Cash in house."

Securities.

The word "securities" has the primary meaning of money secured on property, and does not extend to a share of property or shares in the capital of a company (*g*), and consequently the expressions "securities for money" and "investment of money upon securities," and even the expression "investment of money in securities," would, in the absence of anything to negative that view, be held to apply only to securities in the sense above stated (*h*); but the context may show that the testator used the word in the sense of "investments" (*i*). Thus "securities for money standing invested in my name" will pass

(*u*) *Re Powell's Trust*, Johns. 49, *supra*, n. (*p*).
(*x*) *Parker* v. *Marchant*, 1 Ph. 356, *supra*; *Smith* v. *Butler*, 3 Jo. & Lat. 565; *Cooke* v. *Wagster*, 2 Sm. & G. 296, *infra*, n. (*h*).
(*y*) *May* v. *Grave*, 3 De G. & S. 462.
(*z*) *Fryer* v. *Ranken*, 11 Sim. 55; *Stein* v. *Ritherdon*, 37 L. J. Ch. 369.
(*a*) *Stein* v. *Ritherdon*, *supra*.
(*b*) 13 Sim. 592.
(*c*) *Nevinson* v. *Lady Lennard*, 34 Bea. 487.
(*d*) *De Roebeck* v. *Cloncurry*, Ir. R. 5 Eq. 588.
(*e*) *Re Boorer*, [1908] W. N. 189.
(*f*) *Re Windsor*, 108 L. T. 947.
(*g*) *Murphy* v. *Doyle*, 29 L. R. Ir. 333.
(*h*) *Per* Romer, L.J., in *Re Rayner*, [1904] 1 Ch. 176, at p. 189. In *Cooke* v. *Wagster*, 2 Sm. & G. 296, money left in the hands of an agent for investment was held to pass under a gift of "ready money and securities for money, money in the Funds, and money in the bank or banks (if any), which may be due and owing to me." See also *Wilkes* v. *Collin*, L. R. 8 Eq. 338 ("money on real securities").
(*i*) *Re Rayner*, *supra*; *Re Gent and Eason's Contract*, [1905] 1 Ch. 386; *Re Scorer*, 132 L. T. 529. As to the word "securities" changing in meaning according to circumstances, occasion and date, see the judgment of Vaughan Williams, L.J., in *Re Rayner*.

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mortgage bonds, India stock, debenture stocks, preference stocks and shares (*k*).

In *Re Maitland* (*l*) a gift of "securities in my name held for me by the L. Bank" was held not to pass shares, the certificates for which were held by the bank, nor some stock in respect of which the testator had given the bank a power of attorney authorising it to receive the dividends and sell the stock.

Real securities.

It seems that turnpike bonds secured by a charge on tolls, are "real securities" (*m*), but not "mortgages on real securities" (*n*).

Securities for money.

The words "securities for money" will include stocks in the Funds even without the aid of the context (*o*), so also unpaid purchase money in respect of which the testator had a vendor's lien (*p*), but not bank stock (*q*), nor shares in an insurance (*r*) or canal (*s*) or banking (*t*) company; nor an I O U given for goods sold (*u*), nor a banker's deposit note (*x*), nor a balance at a bank bearing interest (*y*), nor a legacy due from another testator's estate (*z*). A mortgage is, of course, a "security for money," but whether a mortgage debt forming part of a trust estate in which a testator is beneficially interested will pass under a bequest of "my securities for money," depends on the nature of his interest (*a*). Without the aid of the context, a gift of "securities for money" does not include shares in a public company, but does include debenture stock (*b*). A bill of exchange or promissory note is a "security for money" in the legal and proper sense of the word (*c*), and so is a bond (*d*) and

(*k*) *Re Johnson*, 89 L. T. 84, 520.
(*l*) 74 L. T. 274; *Re Hutchinson*, 121 L. T. 239.
(*m*) *Robinson* v. *Robinson*, 1 D. M. & G. 247.
(*n*) *Cavendish* v. *Cavendish*, 30 Ch. D. 227.
(*o*) *Bescoby* v. *Pack*, 1 S. & St. 500; *Re Beaven*, 53 L. T. 245; *Dicks* v. *Lambert*, 4 Ves. 725; *Rickman* v. *Ives*, 1 Jur. 234; *Turner* v. *Turner*, 21 L. J. Ch. 843.
(*p*) *Callow* v. *Callow*, 42 Ch. D. 550, doubting *Goold* v. *Teague*, 7 W. R. 84.
(*q*) *Ogle* v. *Knipe*, L. R. 8 Eq. 434.
(*r*) *Turner* v. *Turner*, 21 L. J. Ch. 843.
(*s*) *Ogle* v. *Knipe*, *supra*; *Hudleston* v. *Gouldsbury*, 10 Bea. 547.
(*t*) *Re Kavanagh*, 27 L. R. Ir. 495, aff. *sub. nom. Murphy* v. *Doyle*, 29 L. R. Ir. 333.
(*u*) *Barry* v. *Harding*, 1 Jo. & Lat. 475; *Turney* v. *Dodwell*, 23 L. J. Q. B. 137 (promissory note).
(*x*) *Hopkins* v. *Abbott*, L. R. 19 Eq. 222.
(*y*) *Vaisey* v. *Reynolds*, 5 Russ. 12.
(*z*) *Re Mason's Will*, 34 Bea. 494.
(*a*) *Ogle* v. *Knipe*, L. R. 8 Eq. 434.
(*b*) *M'Donnell* v. *Morrow*, 23 L. R. Ir. 591. See *Harris* v. *Harris*, 29 Bea. 107; *Re Beaven*, *supra*, n. (*o*).
(*c*) *Barry* v. *Harding*, *supra*; *Re Beaven*, *supra*, where the decision in *Stiles* v. *Guy*, 4 Y. & C. Ex. 571, on an investment clause was not followed as to a gift in a will.
(*d*) *Bacchus* v. *Gilbee*, 3 De G. J. & S. 577.

a judgment (*e*). A policy of assurance on the life of a debtor is a "security" (*f*), and money on deposit in the Post Office Savings Bank has been held, having regard to the provisions of the statute 24 & 25 Vict. c. 14, s. 5, to pass under a bequest of money invested in Consols or other securities (*g*).

Money due on mortgage.

The words "money due or owing to me on mortgage from any person" do not pass sums of money charged on a family estate and secured by a term of years (*h*). But a specific bequest of a mortgage debt for £10,000 may pass a registered judgment against the mortgagor (*i*).

"Investment."

"Investment" is a vague term, and no general rule can be laid down as to its meaning. In *Re Price* (*k*) it was held that money on deposit at a bank did not pass by a bequest of "pecuniary investments."

"Money invested in" a company.

A bequest of "money invested in" a certain company will apparently pass shares and stocks of every description in that company (*l*).

"All I hold" in a company.

A bequest of "all I hold" in a bank or other company may pass money on deposit, or stocks or shares in the company (*m*).

"Standing in my name."

In *Re Mayne* (*n*), a bequest of stocks, shares, debentures, debenture stock and all the securities which shall be "standing in my name" at my decease, was held not to include bonds to bearer.

Investments in a company.

In *Re Connolly* (*o*), the testator bequeathed to his trustees his investments in the A Company consisting of preference shares and ordinary shares and his investments in the B Company consisting of £500 debentures and £500 shares. He held £500 in debentures and £500 ordinary shares in the A Company and £200 mortgage debenture stock and twenty preference shares in the B Company. It was held that in spite of the inaccurate description the debentures and debenture stock passed.

(*e*) *West Ham Union* v. *Ovens*, L. R. 8 Ex. 37 ("valuable security" within 12 & 13 Vict. c. 103, s. 16).

(*f*) *Phillips* v. *Eastwood*, 1 Ll. & G. at p. 291, where it was suggested that policies might pass under a gift of "debentures," but the meaning of the word has changed since 1835, and no one would now think of describing a policy as a debenture.

(*g*) *Re Saxby*, [1890] W. N. 171.

(*h*) *Earl Poulett* v. *Hood*, 35 Bea. 234. See *Brown* v. *Brown*, 6 W. R. 613, *ante*, p. 1269, n. (*u*).

(*i*) *Puxley* v. *Puxley*, 1 N. R. 509.

(*k*) [1905] 2 Ch. 55.

(*l*) See *Re Butler*, [1894] 3 Ch. 250 ("all my invested money"); *Mosse* v. *Cranfield*, [1895] 1 Ir. R. 80 (gift of "£500 invested in the Australian Bank on deposit receipt" held to pass shares in the Union Bank of Australia); and *Re Slater*, [1906] 2 Ch. 480, where the question was whether the bequest was adeemed by the conversion of the stock, etc., into stock of another undertaking. See *ante*, p. 1055. See also *Re Sudlow*, 59 Sol. J. 162, as to the meaning of "invested."

(*m*) *Townsend* v. *Townsend*, 1 L. R. Ir. 180.

(*n*) [1914] 2 Ch. 115.

(*o*) 110 L. T. 688.

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"Annuities."

Formerly many British Government securities and other investments were known as "annuities," and the differences between them were a frequent source of difficulty to testators (*p*). A bequest of "£1,000 Long Annuities now standing in my name," has accordingly been held to pass £1,000 reduced annuities (*q*); and "Consolidated Bank Annuities" may mean South Sea annuities(*r*), unless the testator has annuities answering the description in the will (*s*).

Government stocks or funds.

"The Funds," or "the public funds," generally mean funded securities guaranteed by the British Government—as consols (*t*), reduced annuities, long annuities (*u*), etc. But "the Funds" will not include bank stock (*x*), nor East India stock under 3 & 4 Will. 4, c. 85 (*y*); nor unfounded exchequer bills (*z*), nor Greek bonds guaranteed by this country (*a*).

Bank stock.

On the other hand, a gift of "Bank stock" may pass English Government stock if that construction is assisted by the context and the state of facts at the date of the will (*b*), and conversely a gift of "£700 East India stock in which I am now interested possessed of or entitled unto" will pass £700 Bank stock standing in the testator's name at the date of the will, he having no East India stock (*c*). But a bequest of property "in the funds" will not pass Bank stock if the testator has money in the "funds" properly so called (*d*).

Foreign and Colonial securities.

"Government stock or securities" does not include Indian or Colonial securities (*e*). "Foreign bonds" does not include Colonial bonds (*f*). "Stock in the foreign funds" may pass

(*p*) As to the cases on Long Annuities, see p. 1044.
(*q*) *Penticost* v. *Ley*, 2 J. & W. 207.
(*r*) *Dobson* v. *Waterman*, 3 Ves. 307, n.
(*s*) As to the case of *Selwood* v. *Mildmay*, 3 Ves. 306, see *ante*, p. 1066.
(*t*) For an inaccurate description of consols, see *Re Pratt*, [1894] 1 Ch. 491.
(*u*) *Howard* v. *Kay*, 27 L. J. Ch. 448.
(*x*) *Slingsby* v. *Grainger*, 7 H. L. C. 273 (unless perhaps where there is no property strictly answering the description, or where there is something in the context to give a more extended meaning to the term, *per* Lord Kingsdown, *ib.*, at p. 287). *Mangin* v. *Mangin*, 16 Bea. 300, may be considered overruled on this point. As to the application of the doctrine of *falsa demonstratio* to such cases, see *ante*, p. 1240.
(*y*) *Brown* v. *Brown*, 4 K. & J. 704.
(*z*) *Johnson* v. *Digby*, 8 L. J. (o.s.) Ch. 38.
(*a*) *Burnie* v. *Getting*, 2 Coll. 324. See 3 & 4 Will. 4, c. 121. A "funded debt" properly means a more or less permanent debt, as opposed to a temporary or floating debt secured by bills or the like. See *Ridge* v. *Newton*, 2 D. & War. 239 (gift of "my Irish funded property"); *Askew* v. *Rooth*, L. R. 17 Eq. 426 ("funds and property purchased").
(*b*) *Drake* v. *Martin*, 23 Bea. 89. Compare *Gallini* v. *Noble*, 3 Mer. 691, *ante*, p. 996, n. (*f*).
(*c*) *Door* v. *Geary*, 1 Ves. sen. 255.
(*d*) *Slingsby* v. *Grainger*, 7 H. L. C. 273, *supra*.
(*e*) *Re Hamilton*, 6 T. L. R. 173; *Brown* v. *Brown*, 6 W. R. 613 ("government or parliamentary stocks or funds").
(*f*) *Hull* v. *Hill*, 4 Ch. D. 97.

securities for which the faith of a foreign country is pledged (*g*). In *Palin* v. *Brookes* (*h*), United States Government bonds for 6,800 dol. were held to pass by a gift of "my 7,000 dol. or the produce thereof."

Bonds.

In *Re Manners* (*i*) "bonds" (a translation of the Spanish word bonos) was held not to include stocks the certificates for which were not under seal. "My War Loan" was held in *Re Ionides* (*j*) to include Exchequer Bonds issued under the War Loan Act, 1919; "All my shares and War Bonds" was held in *Re Balchin* (*k*) to include War Stock.

War loan.

War bonds.

Stock receipts of inscribed stock and inscription receipts for money invested in war stock are not "shares and securities" (*l*).

Stock receipts.

"My shares in different securities" does not pass the testator's interest as one of the next-of-kin in certain shares and stocks forming part of the unadministered estate of an intestate (*m*).

Share in estate as next-of-kin.

"Stock" is an ambiguous word, and may mean stock in trade (*n*), or farming stock (*o*), or stock in a company.

"Stock" may mean stock in trade, etc.

"Stock in a company may be capital stock or debenture stock, and apparently a gift of "all my stock" in a certain company would include stock of either description (*p*).

Stock in a company.

Where a testator bequeaths shares in a company, and it turns out that he has shares of different classes, the question may arise whether the gift is void for uncertainty or whether the legatee has a right of selection (*q*).

Shares of different classes.

A bequest of a testator's shares in an incorporated company passes all the rights and benefits attached to the shares (*r*).

Shares and stock.

The term "shares" is sufficient to pass the testator's interest in the joint stock or capital of a company, whether such capital

(*g*) *Ellis* v. *Eden*, 23 Bea. 543. As to the meaning of "stocks or funds of any foreign government" and "foreign securities" in an investment clause, see *Cadett* v. *Earle*, 46 L. J. Ch. 798; *Re Langdale's Settlement Trusts*, L. R. 10 Eq. 39.

(*h*) 26 W. R. 876.

(*i*) [1923] 1 Ch. 220.

(*j*) 66 Sol. J. 315.

(*k*) 67 Sol. J. 12.

(*l*) *Re Hay-Drummond*, 128 L. T. 621.

(*m*) *Re Holmes*, [1917] 1 Ir. R. 165. See *Vanneck* v. *Benham*, [1917] 1 Ch. 60.

(*n*) *Elliott* v. *Elliott*, 9 M. & W. 23.

(*o*) See *Creagh* v. *Creagh*, 13 Ir. Ch. 28, *post*, p. 1281; *Randall* v. *Russell*, 3 Mer. 190, where two kinds of "stock" were bequeathed.

(*p*) See *Re Bodman*, [1891] 3 Ch. 135, where the question turned on the difference between shares and debenture stock. As to the application of the *ejusdem generis* construction to the phrase "stock or shares," see *Sellar* v. *Bright*, [1904] 2 K. B. 446. See also *Re Humphreys*, 60 Sol. J. 105 (company reconstructed—debenture bond and stock).

(*q*) *Ante*, p. 436.

(*r*) *Carron Co.* v. *Hunter*, L. R. 1 H. L. Sc. 362.

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consists only of shares properly so called or of consolidated stock (*s*).

Debentures and debenture stock.

Under a gift of "all my debentures in the A Company" debenture stock in that company may pass, even if the testator also had debentures in it (*t*). But debenture stock will not pass by a gift of shares (*u*), unless at the date of the will the testator had no shares, but only debenture stock (*v*). *A fortiori*, debentures will not pass by a gift of "shares" if the testator has any shares (*w*).

In *Re Nottage* (*No.* 2) (*x*) a bequest of £500 debenture stock or shares of the S. Company was held to pass debentures of that company, which had no debenture stock or any shares except ordinary shares: the testator owned some ordinary shares in the company, but some of these he bequeathed by their proper designation.

In *Re Herring* (*y*) the testator bequeathed "all my debentures and preferrred and deferred stock in the M. Company." At the date of his will and at the time of his death he held preferred and deferred stock, debentures, and debenture stock: it was held that the debenture stock passed under the bequest.

Falsa demonstratio in case of stock, etc.

The effect of misdescription in the name of a company in bequeathing shares or stock, has been already considered (*z*).

Ademption in case of stock, bonds, debentures, etc.

The question whether a bequest of the shares or stocks of a particular company is adeemed by their being converted during the lifetime of the testator into shares or stocks of another company is discussed elsewhere (*a*).

"Corporation," "company," etc.

The expression "corporation" or "company" is not necessarily confined to corporations or companies formed and carrying on their business or operations in the United Kingdom (*b*).

Use and enjoyment of personal property.

A gift of the "use" or "use and enjoyment" of chattels, such as furniture or plate, seems to imply a gift for life only (*c*),

(*s*) *Per* Chitty, J., in *Re Bodman*, [1891] 3 Ch., at p. 136. In *Re Gibson*, L. R. 2 Eq. 669, the bequest failed because it was adeemed. In *Brannigan* v. *Murphy*, [1896] 1 Ir. R. 418, a gift of "two ordinary shares" was held to pass £200 stock. See *Morrice* v. *Aylmer*, L. R. 10 Ch. 148, 7 H. L. 717, overruling *Oakes* v. *Oakes*, 9 Hare, 666.

(*t*) *Re Herring*, [1908] W. N. 153.

(*u*) *Re Bodman*, *supra*. Debentures are not "stock or shares" within Order XLVI, r. 1, or the Judgments Act, 1838, s. 14: *Sellar* v. *Charles Bright & Co., Ltd.*, [1904] 2 K. B. 446.

(*v*) *Re Weeding*, [1896] 2 Ch. 364; *Townsend* v. *Townsend*, 1 L. R. Ir. 180.

(*w*) *Dillon* v. *Arkins*, 17 L. R. Ir. 636.

(*x*) [1895] 2 Ch. 657.

(*y*) [1908] 2 Ch. 493.

(*z*) *Ante*, p. 1221.

(*a*) *Ante*, pp. 1054 *seq.*

(*b*) *Re Stanley*, [1906] 1 Ch. 131; see Chap. XXIV, *ante*, p. 898.

(*c*) See *Hyde* v. *Parrat*, 1 P. W. 1; *per* Lord Watson, in *Coward* v. *Larkman*, 60 L. T. 1, where the property was real estate.

and this is clearly so if the gift is contrasted with an absolute gift of other chattels (*d*). But if the nature of the property requires such a gift will pass the absolute interest (*e*).

"Household goods" or "furniture."

The words "household goods" or "furniture" will include pictures hung up, plate and house linen (*f*), unless these words are used elsewhere in the will in contradistinction thereto (*g*); they will also include prize medals, coins and trinkets if framed and hung or otherwise disposed for ornament (*h*), but not books (*i*) (unless an intention to include them appears by the context (*k*)), nor wines, or other consumable articles (*l*). A gift of "household furniture" will not pass goods belonging to the testator in the way of or used in carrying on trade (*m*), nor farming stock; nor, in general, tenants' fixtures, *i.e.*, they will generally pass with the testator's interest in the house (*n*). And even pictures and tapestry may pass as part of the house, and not under a gift of chattels in the house," if they form part of the decoration of the house (*o*). In *Paton* v. *Sheppard* (*p*) the house had been settled without the tenant's fixtures, and these were held to pass to the legatee of the furniture as against the residuary legatees (*q*).

A bequest of "furniture" will pass furniture used by the testator in his trade, if it is described as being in the place

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(*d*) *Terry* v. *Terry*, 33 Bea. 232. As to things *quæ ipso usu consumuntur*, see *post*, p. 1429.

(*e*) *Espinasse* v. *Luffingham*, 3 Jo. & L. 186. As to the use authorised by such a gift, see *Marshall* v. *Blew*, 2 Atk. 217; *Re Williamson*, 94 L. T. 813, *post*, p. 1280.

(*f*) *Kelly* v. *Powlet*, Amb. 605; *Re Londesborough*, 50 L. J. Ch. 9; *Nicholls* v. *Osborne*, 2 P. W. 419; *Cremorne* v. *Antrobus*, 5 Russ. 312. But it has been held that plate not permanently used in a house will not pass by a bequest of furniture in that house: *Wilkins* v. *Jodrell*, 11 W. R. 588. See *Masters* v. *Masters*, 1 P. W. 424.

(*g*) *Franklyn* v. *Earl of Burlington*, Pre. Ch. 251.

(*h*) *Minton* v. *Minton*, 21 L. T. 40; *Cremorne* v. *Antrobus*, 5 Russ. 312; *Field* v. *Peckett* (*No.* 2), 29 Bea. 573; and see *Field* v. *Peckett* (*No.* 2), 9 W. R. 526.

(*i*) *Kelly* v. *Powlet*, *supra*; *Bridgman* v. *Dove*, 3 Atk. 201; *Allen* v. *Allen*, Mos. 112; *Cremorne* v. *Antrobus*, *supra*.

(*k*) Books have been held to pass under a gift of "household effects," although Lord Lyndhurst thought the point doubtful: *Cole* v. *Fitzgerald*, 3 Russ. 301, *post*, n. (*u*).

(*l*) *Porter* v. *Tournay*, 3 Ves. 311; *Sealy* v. *Stawell*, Ir. R. 2 Eq. 326. See *Re Moir's Estate*, [1882] W. N. 139, where the "household goods," etc., were bequeathed to go with the residence as heirlooms. As to whether wines are "household effects," see *Cole* v. *Fitzgerald*, *post*, n. (*u*).

(*m*) *Le Farrant* v. *Spencer*, 1 Ves. sen. 97; *Kelly* v. *Powlet*, Amb. 605; *Pratt* v. *Jackson*, 1 Br. P. C. 222; *Manning* v. *Purcell*, 7 D. M. & G. 55; *MacPhail* v. *Phillips*, [1904] 1 Ir. R. 155.

(*n*) *Finney* v. *Grice*, 10 Ch. D. 13; *Allen* v. *Allen*, Mos. 112; *Re Seton-Smith*, [1902] 1 Ch. 717.

(*o*) *Re Whaley*, [1908] 1 Ch. 615.

(*p*) 10 Sim. 186.

(*q*) For the distinction between fixtures, fixed fixtures, and furniture not fixed, see *Birch* v. *Dawson*, 2 A. & E. 37.

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where he carries on business, the term being wider than "household furniture" (*r*).

"Household effects."

The words "household furniture and other household effects"(*s*) are very wide (*t*) and have been held to comprise pistols, lathes, pictures, organ, books, wines and a haystack if for use (but not if for sale), but not a pony or a cow or a fowling-piece (unless used for domestic defence) (*u*); nor watches, jewellery or other personal ornaments (*x*). Horses and carriages are household effects (*y*). A motor car does not pass under a gift of horses, carriages, harness, saddlery and stable furniture (*z*), but does pass under a gift of furniture and all other articles of personal, domestic or household use (*a*), and has been held to pass under a gift of horses and carriages (*b*). A wireless cabinet passes under a gift of furniture (*bb*).

Motor car.

"Effects" *ejusdem generis.*

A gift of all "furniture, plate, linen, china, pictures, and other goods, chattels and effects" in a house will not include a sum of money found in the house (*c*), for although "effects" by itself is large enough to pass any kind of personal estate (*d*), its use in a gift of a particular part of the testator's property, shows that it is confined to effects *ejusdem generis* (*e*). But bank notes in a house have been held to pass under a bequest of "my dwelling-house and household furniture and all things now therein in my possession," because the context was supposed

(*r*) *Re Seton-Smith*, [1902] 1 Ch. 717. As to the word "household," see *ante*, notes (*k*) and (*l*).

(*s*) The expression "household furniture and effects" has the same meaning: *Northey* v. *Paxton*, 60 L. T. 30; *MacPhail* v. *Phillips*, [1904] 1 Ir. 155.

(*t*) In *Re Johnson*, 92 L. T. 357, a gift of "the remainder of my household property" was held on the context to pass the whole residuary personalty.

(*u*) *Cole* v. *Fitzgerald*, 1 S. & St. 189, aff. 3 Russ. 301. As to a parrot and cage there was a difference of opinion between the reporters: see n. 3 Russ. 301; *Re Labron*, 1 T. L. R. 248; *Stone* v. *Parker*, 29 L. J. Ch. 874; *Re Bourne*, 58 L. T. 537 (wines).

(*x*) *Tempest* v. *Tempest*, 2 K. & J. 635; *Northey* v. *Paxton*, 60 L. T. 30; *Re Hammersley*, 81 L. T. 150; *Boon* v. *Cornforth*, 2 Ves. sen. 277. See also *Re McCalmont*, 19 T. L. R. 490 (gift of a house "together with the furniture and contents therein and appertaining thereto").

(*y*) *Re Hammersley*, 81 L. T. 150. Compare *Re McCalmont*, *supra*.

(*z*) *Re White*, [1916] 1 Ch. 172; *Re Hall*, 107 L. T. 196. See a case in Scotland, *Denholm's Trustees* v. *Denholm*, [1908] S. C. 43.

(*a*) *Re White*, *supra*; *Re Howe*, [1908] W. N. 223 (household furniture and plate); *Re Ashburnham*, 107 L. T. 601; *Re Fortlage*, 60 Sol. J. 527 (horses, carriages, furniture, and other household effects).

(*b*) *Re Sivewright*, 128 L. T. 417—probably there is a tendency nowadays to consider a motor car to be a carriage. See *Att.-Gen.* v. *Hodgson*, [1922] 2 Ch. 429.

(*bb*) *Re Willy*, Times Newspaper, March 14, 1929.

(*c*) *Gibbs* v. *Lawrence*, 7 Jur. (N.S.) 137; *Campbell* v. *McGrain*, Ir. R. 9 Eq. 397; *Re McCalmont*, 19 T. L. R. 490 (debentures and other choses in action held not to pass as "appertaining to" a house); *Re Miller*, 61 L. T. 365; *Re O'Brien*, [1906] 1 Ir. R. 649 ("whatever is in the house").

(*d*) As to the operation of the words "effects" in passing the whole residuary personal estate where there is no residuary gift, see *ante*, pp. 981 *seq.*

(*e*) *Trafford* v. *Berrige*, 1 Eq. Ca. Abr. 201 pl. 14, and other cases cited *ante*, pp. 982 *seq.*

to show an intention to make a sweeping disposition (*f*), and in *Swinfen* v. *Swinfen* (*g*), Romilly, M.R., held that money in a house passed under a gift of "all furniture and other movable goods here," but the decision seems contrary to principle.

Jewellery at bank.

Jewellery temporarily deposited at a bank has been held to pass under contents of a dwelling-house (*h*).

When furniture, etc., goes with house.

If a testator gives a person the use and enjoyment during his life of a residence and of the testator's "furniture, goods and chattels," this means only such furniture and effects as would, if the house were let furnished, go with the occupation, and not such articles as jewellery, guns, pistols, tricycles and scientific instruments (*i*).

"Contents of a house" (not ordinary furniture) has been held to pass panellings, mantelpieces, painted ceilings, etc. (*k*).

Carvings.

Carvings affixed to the walls of a house do not pass under a bequest of chattels (*l*).

Heirlooms.

So a bequest of plate, furniture, china, goods, chattels and effects in a house to be annexed as heirlooms, does not include money or things *quæ ipso usu consumuntur*, or things of a perishable nature, such as carriages, horses, etc. (*m*).

Furniture in a house.

The effect of a bequest of furniture in a particular house, with reference to the question what passes by such a bequest, is discussed in Chap. XXX.

Two residences.

Sometimes a testator has two residences, and bequeaths the furniture, plate or the like in one of them to A, either with or without making a disposition of the articles of a similar description in the other house in favour of some other person : in such a case the principal test seems to be the actual state of things at the death, but other considerations may arise (*n*).

Miscellaneous articles of household use or ornament.

Under the term "household furniture, implements of household and articles of vertu," telescopes have been held to pass (*o*) : but apparently a bust would not pass by a bequest of "household goods and furniture," or of "watches and personal ornaments" (*p*). An altar stone and relics are not passed by

(*f*) *Mahony* v. *Donovan*, 14 Ir. Ch. 262, 388. Compare *Anderson* v. *Anderson*, [1895] 1 Q. B. 749 (deed), where the *ejusdem generis* construction was rejected.

(*g*) 29 Bea. 207.

(*h*) *Re Lea*, 104 L. T. 253.

(*i*) *Manton* v. *Tabois*, 30 Ch. D. 92. Compare *Bradish* v. *Ellames*, 10 Jur. (N.S.) 1170, and other cases cited *ante*, p. 1047, in reference to gifts of chattels "in or about" a dwelling-house.

(*k*) *Re Oppenheimer*, 111 L. T. 937.

(*l*) *Re Chesterfield's S. E.*, [1911] 1 Ch. 237.

(*m*) *Hare* v. *Pryce*, 11 L. T. 101.

(*n*) See *Re Stamford*, 22 T. L. R. 632; *Bruce* v. *Howe*, 19 W. R. 116; *Land* v. *Devaynes*, 4 Br. C. C. 537; *Willis* v. *Curtois*, 1 Bea. 189.

(*o*) *Brooke* v. *Warwick*, 2 De G. & S. 425.

(*p*) *Willis* v. *Curtois*, 1 Bea. 189.

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a bequest of "furniture" or "articles of household use or ornament" (*q*). And jewellery does not pass under a gift of furniture and effects in a house (*r*). But orchids used in a house for ornament from time to time have been held to pass as "articles of household or domestic use or ornament" (*s*).

Kangaroos.

Kangaroos, emus, squirrels, wild geese and golden pheasants are not articles of household use or ornament (*t*).

Drawings.

Drawings framed and hung on the walls (but not those stored in a chest) pass as household ornaments (*u*).

Pictures.

Pictures *prima facie* pass by a gift of furniture (*x*) but not by a gift of "plate, china and all objects of vertu and taste," the *ejusdem generis* construction being applicable to such a gift (*y*). If a testator gives A the use and enjoyment of his pictures during her life, this entitles A to let the pictures as part of the contents of a furnished house (*z*).

Portraits.

"Portraits of myself and all my family and other portraits" was held under the *ejusdem generis* rule to be limited to portraits of relatives and intimate friends (*a*).

Articles of vertu.

Articles of vertu and curiosities may pass and all antique and artistic books and MSS. (*b*).

Stamps.

A collection of stamps does not pass under "books, pictures and other household effects" (*c*).

Log-book.

The MS. log-book of H.M.S. *Victory* passed under a bequest of books (*d*).

Works of art.

"Works of art" may pass tapestries (*e*).

Jewels.

A bequest of family diamonds and other jewels passes masonic orders and silver filigree ornaments (*f*).

MS. notes.

Manuscript notes bound up in volumes will pass as books (*g*).

Plate and plated articles.

"Plate" does not include plated articles (*h*), nor does a bequest of "plate and plated articles" include articles mounted with silver (*i*).

(*q*) *Petre* v. *Ferrers*, 65 L. T. (N.S.) 568.
(*r*) *Re Miller*, 61 L. T. 365; *Re Hammersley*, 81 L. T. 150.
(*s*) *Re Owen*, 78 L. T. 643.
(*t*) *Re Fothergill*, Times Newspaper, March 7, 1916. See 60 Sol. J. p. 652.
(*u*) *Re Du Maurier*, 32 T. L. R. 579.
(*x*) *Kelly* v. *Powlet*, Amb. 605. But a picture may form part of the decoration of a house, so as to pass with it, and not under a gift of "chattels in the house": *Re Whaley*, [1908] 1 Ch. 615.
(*y*) *Re Londesborough*, 50 L. J. Ch. 9.
(*z*) *Re Williamson*, 94 L. T. 813.
(*a*) *Re Layard*, 115 L. T. 15; 33 T. L. R. 261. As to a portrait to be painted, see *Re Lane*, 33 T. L. R. 418.
(*b*) *Re Zouche*, [1919] 2 Ch. 178.
(*c*) *Re Masson*, 117 L. T. 548; doubting *Re Fortlage*, [1916] W. N. 214.
(*d*) *Re Barratt*, 31 T. L. R. 502.
(*e*) *Re Scott*, 30 T. L. R. 345.
(*f*) *Brooke* v. *Warwick*, 2 De G. & S. 425.
(*g*) *Willis* v. *Curtois*, 1 Bea. 189.
(*h*) *Holden* v. *Ramsbottom*, 4 Giff. 205.
(*i*) *Re Lewis*, [1910] W. N. 6.

If a testator has two residences, and is in the habit of removing part of his plate temporarily from one residence to the other, the question what passes by a bequest of "the plate in my residence of A" seems to depend partly on the object of the removal (*k*).

Live and dead stock.

The words "live and dead stock" have been held to pass growing crops (*l*). They have also been held to include books and wine when the bequest was of "furniture, linen, plate, pictures, carriages, horses, and other live and dead stock" (*m*); but the word "furniture" alone does not help to enlarge the words "live and dead stock," coupled with it, so as to include books and wine (*n*). Live and dead stock may pass by a gift of "movable goods" (*o*).

Stock of a farm.

Growing crops, it seems, will pass under a bequest of stock of a farm (*p*) or stock upon a farm (*q*).

Business and goodwill, etc.

Under a gift of "plant and goodwill" the house of business held at a rack rent was decided to pass (*r*); but the question is one of intention, and a direction to transfer a "business" has been held not to pass the freehold shop in which the business was carried on (*s*). Whether a bequest of the testator's interest in a business or in the goodwill of a business passes capital, undrawn profits, stock in trade, etc., seems to depend to some extent on the nature of the business and on the other provisions of the will (*t*). Apparently it would not pass a debt due to the testator from the partnership (*u*). But it will pass a share in the business which the testator has contracted to purchase (*v*).

"Book debts."

"Book debts" appear to be the balance only of what, on the adjustment of the testator's accounts, is due to his estate from those persons with whom he dealt (*w*).

(*k*) *Re Stamford*, 22 T. L. R. 632. Compare *Wilkins* v. *Jodrell*, 11 W. R. 588.

(*l*) *Blake* v. *Gibbs*, 5 Russ. 13 n.

(*m*) *Hutchinson* v. *Smith*, 11 W. R. 417.

(*n*) *Porter* v. *Tournay*, 3 Ves. 311, where the bequest was for life, so that things *quæ ipso usu consumuntur* were considered to be excluded. As to gifts of live and dead stock, see *Randall* v. *Russell*, 3 Mer. 190; *Rudge* v. *Winnall*, 12 Bea. 357.

(*o*) *Swinfen* v. *Swinfen*, 29 Bea. 207. See *Randall* v. *Russell*, 3 Mer. 190.

(*p*) *Cox* v. *Godsalve*, 6 East, 604, n.

(*q*) *West* v. *Moore*, 8 East, 339; *Rudge* v. *Winnall*, 12 Bea. 357; *Re Roose*, 17 Ch. D. 696, overruling *Vaisey* v. *Reynolds*, 5 Russ. 12; and see 1 Roper on Legacies by White, 249. As to farming stock generally, see *Harvey* v. *Harvey*, 32 Bea. 441; *Burbidge* v. *Burbidge*, 16 W. R. 76 (live and dead farming stock); *Creagh* v. *Creagh*, 13 Ir. Ch. 28 (bequest of use of "furniture, stock, and house linen" for limited time).

(*r*) *Blake* v. *Shaw*, Johns. 732.

(*s*) *Re Henton*, 30 W. R. 702; *Devitt* v. *Kearney*, 13 L. R. Ir. 45.

(*t*) See *Re Barfield*, 84 L. T. 28, where *Re Delany*, 15 L. R. Ir. 55, is commented on; *Re Hawkins*, 109 L. T. 969 (business and plant).

(*u*) *Re Beard*, 57 L. J. Ch. 887.

(*v*) *Re Stevens*, [1888] W. N. 110.

(*w*) *Chick* v. *Blackmore*, 2 Sm. & G. 274. Compare *Ekins* v. *Morris*, 8 W. R. 301; *Ganly* v. *Dowling*, 5 L. R. Ir. 628, *ante*, p. 1269; *Terry* v. *Terry*, 33 Bea. 232. Bankers' balances, bonds, etc., are not book debts: *Re Stevens*,

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"Capital."

"Capital invested" in a business has been held to mean everything that the testator was entitled to receive out of the assets of the business, and to include a debt due to him by his partner (*x*).

Stock in trade.

The question what passes by a bequest of stock in trade necessarily depends on the nature of the testator's business and the manner in which it is usually carried on (*y*).

Belongings.

"Belongings" means property (*z*).

Rights in a play.

In *Re Bancroft* (*a*) the testator made a specific bequest of all his rights to or in connection with a play. Before his death his agent accepted the offer of a company to purchase the film rights in English-speaking countries for £1,500. This sum was received by the testator's executors. Held that the specific legatee was entitled to the £1,500.

[1888] W. N. 110. As to "business assets," see *Re Beecham*, 63 Sol. J. 430; as to "net profits of commercial undertakings," *Re Lawes-Wittewronge*, [1915] 1 Ch. 408.

(*x*) *Bevan* v. *Att.-Gen.*, 4 Giff. 361: *sed quære* as to the debt; compare *Re Beard*, *supra*, n. (*u*).

(*y*) *Elliott* v. *Elliott*, 9 M. & W. 23; *Re Richardson*, 50 L. J. Ch. 488.

(*z*) *Re Bradfield*, [1914] W. N. 423.

(*a*) 43 T. L. R. 591.

CHAPTER XXXVI.

ALTERNATIVE AND SUBSTITUTIONAL GIFTS—GIFTS OVER.

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I.—Distinction between Alternative and Substitutional Gifts.—The terms "alternative" and "substitutional" are sometimes used as synonymous and sometimes as opposed to one another. Difference between alternative and substitutional gifts.

In simple gifts, "alternative" has the same meaning as "substitutional" (*a*). Thus where there is a gift to A, or in case of his death to his children, "both are not to take, but either the parent or the children in the alternative" (*b*); consequently if A predeceases the testator he takes nothing, and if he survives the testator the children take nothing. Such a gift might be described either as an alternative or as a substitutional gift. So if a term of years is limited to A for life, with remainder to his first and other sons successively in tail male, with remainder to the first and other sons of B in tail male and A has no son, "the successive limitations, though having the form of remainders,

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(*a*) As to alternative limitations of real estate, taking effect according to the state of facts at the death of the testator, see *ante*, p. 329. *Re Alderton*, [1913] W. N. 129, is a case of alternative original gifts.

(*b*) *Per* Sir W. Grant, M.R., in *Turner* v. *Moor*, 6 Ves. at p. 559; *per* Jessel, M.R., in *Re Sibley's Trusts*, 5 Ch. D. at p. 499.

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operate simply as substitutional or *alternative* bequests, each gift in the series being dependent upon the event of the preceding gift or gifts not taking effect " (*c*). But in many cases there is a distinction between an alternative and a substitutional gift. Thus if the gift is " to A or B " simply, this is an alternative gift, and is, it seems, void for uncertainty (*d*) : while if the gift is " to A and B or C " it may be possible to construe it as intended to take effect in favour of C in the event of its failing as to B, in which case it is a substitutional gift as regards him (*e*). So if the gift is to X for life, and after his death to A or his children, the *prima facie* meaning is that if A survives the testator he takes a vested interest, subject to be divested if he dies during X's lifetime. Such a gift is called substitutional and not alternative. If, however, the second gift is not intended to divest the primary gift, but only to take effect in the event of its failing, the second gift is called alternative. Thus in *Re Roberts* (*f*) a testator gave a share of his residuary estate to each of his two daughters, A and B, for their respective lives, and after their deaths their respective shares were " to be equally divided between their respective children or legal representatives "; A had several children, all of whom predeceased her : it was held that the words " or legal representatives " had not the effect of a substitutional clause, but operated as an alternative gift to take effect only in the event of there being no child that took a vested interest; consequently the vested interests of A's children were not divested by their death in her lifetime (*g*).

Original or substitutional.

Where the primary and secondary (or alternative) gifts are both to classes, the question arises whether the secondary (or alternative) gift is original or substitutional (*h*). This question is discussed later (*i*).

" Alternative " in the sense of " inclusive."

Yet another meaning was given to " alternative " in *Re Delmar Charitable Trust* (*k*). There a testator gave the income of certain property to the P. A. Society, " or some one or more kindred institutions " having similar objects : it was held by Stirling, J., that this was not a substitutional gift, to take effect in the event of the P. A. Society ceasing to exist, but what he

(*c*) Mr. Jarman, in the first edition of this work, Vol. II, p. 504, where he examines the cases of *Brett* v. *Sawbridge*, 3 Br. P. C. Toml. 141 and *Pelham* v. *Gregory*, 3 Br. P. C. Toml. 204.

(*d*) *Ante*, p. 451.

(*e*) *Carey* v. *Carey*, 6 Ir. Ch. R. 255, stated *ante*, p. 452.

(*f*) [1903] 2 Ch. 200.

(*g*) The decision in *McCormick* v. *Simpson*, [1907] A. C. 494, seems to rest on the same principle.

(*h*) See *Re Coulden*, [1908] 1 Ch. 320.

(*i*) *Post*, p. 1307.

(*k*) [1897] 2 Ch. 163. The decision was in substance that " or " was to be construed " and," the difficulty as to uncertainty being obviated by the fact that the gift was charitable.

called an " alternative " gift, and that it included, in addition to the P. A. Society, one or more kindred institutions to be designated by the Court. This use of the term seems hardly consistent with the proper meaning of " alternative," which, as pointed out by Sir W. Grant (*l*), implies mutual exclusion.

Imperfect substitutional gifts.

A complete substitutional gift, indicating the primary legatee, the substituted legatee, and the event in which substitution is to take place, seldom gives rise to questions. In most substitutional gifts, however, one or more of these details are omitted.

Uncertainty as to primary legatee.

Uncertainty as to the primary legatee frequently occurs where the gift is to a class of persons, with a direction that children of a deceased member of the class are to be substituted for their parent (*m*). Thus a gift to " my surviving brothers and sisters " is ambiguous (*n*).

Uncertainty as to substituted legatee.

Uncertainty as to the substituted legatee is often caused by the use of inappropriate expressions : thus in a gift of real and personal property to a person " or his heirs," " heirs " may mean next-of-kin (*o*), heir-at-law (*p*), or issue (*q*).

" Legal representatives " is also an ambiguous expression (*r*), and where the class of substituted legatees is directed to consist of persons " then living " difficult questions may arise (*s*).

Substituted class, how ascertained.

Where the substituted legatees take as a class, the class is ascertained, it seems, in accordance with the general rules applicable to gifts to classes (*t*). The question frequently arises where there is a prior life estate, as in the case of a gift to A for life and after his death to B or his issue; if B dies in the testator's lifetime, the class is ascertained at the testator's death (*u*), while if he survives the testator and dies in A's lifetime, the class consists of all issue coming into existence before the death of the tenant for life (*x*). If there are no words of severance they take

(*l*) *Ante*, p. 1283.

(*m*) See the remarks of Jessel, M.R., in *Re Sibley's Trusts*, 5 Ch. D. at p. 499, *post*, p. 1295.

(*n*) *Shailer* v. *Groves*, 11 Jur. 485.

(*o*) See *Re Porter's Trust*, 4 K. & J. 188, and other cases cited *post*, pp. 1542 *seq.*

(*p*) *Keay* v. *Boulton*, 25 Ch. D. 212.

(*q*) *Speakman* v. *Speakman*, 8 Ha. 180.

(*r*) As to gifts to A " or his executors," or to A " and in case of his death to his executors," see *Re Clay*, 54 L. J. Ch. 648, and other cases cited in Chap. XLI, pp. 1585 *seq.*

(*s*) As in *Hodgson* v. *Smithson*, 21 Bea. 354, 8 D. M. & G. 604; *Heasman* v. *Pearse*, L. R. 7 Ch. 275, 660.

(*t*) As to gifts to next-of-kin, relations, etc., see Chap. XLI; as to gifts to children, see Chap. XLII.

(*u*) *Hobgen* v. *Neale*, L. R. 11 Eq. 48, following *Ive* v. *King*, 16 Bea. 46, where the gift was to children, not issue.

(*x*) *Re Jones's Estate*, 47 L. J. Ch. 775, following *Re Sibley's Trusts*, 5 Ch. D. 494, and dissenting from *Hobgen* v. *Neale*, L. R. 11 Eq. 48.

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as joint tenants, so that the representatives of those dying before the tenant for life are excluded (*y*).

The questions whether issue, descendants, etc., take *per stirpes* or *per capita*, and whether they take as joint tenants or as tenants in common, are discussed elsewhere (*z*).

Substitutional gifts to the children or issue of a prior legatee are further considered in a later Section of this chapter.

Uncertainty as to event.

Uncertainty as to the event in which substitution is to take place is frequently caused by the use of ambiguous expressions. Thus if a testator bequeaths a legacy payable within six months after his decease, and directs that in the event of the legatee's death, "not having received" his legacy, his child or children shall be entitled to it, the question arises whether this refers to death in the lifetime of the testator, or after the testator's death (*a*).

Substitution on death before becoming entitled.

Where the gift was to A for life and after her death the property was to be divided among the children of B, with a substitutional gift in the event of any child dying before becoming entitled, it was held that this meant becoming entitled in possession (*b*).

Whether contingency applies to both classes.

Where the original gift and the substituted gift are both to classes, uncertainty may arise from a doubt whether a contingency referred to by the testator applies to one or both of the classes. Thus in *Atkinson* v. *Bartrum* (*c*) there was a bequest to two persons for their lives, and after the death of the survivor to the testator's surviving brothers and sisters or their children equally. It was held that only those children who survived the tenant for life were entitled to take. As a general rule, a substitutional gift to the children of prior legatees who die before a certain time is not subject to the same condition of survivorship (*d*).

II.—What Words will create a Substitutional Gift.—An intention to create a substitutional gift may be inferred from ambiguous words. The two commonest examples of this construc-

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(*y*) *Re Jones's Estate*, *supra*.

(*z*) Chap. XLI.

(*a*) *Smith* v. *Oliver*, 11 Bea. 494; *Re Green's Estate*, 1 Dr. & Sm. 68, and other cases referred to *post*, p. 2090.

(*b*) *Re Maunder*, [1903] 1 Ch. 451.

(*c*) 28 Bea. 219; *Re Fox's Will*, 35 Bea. 163. See *Re Coulden*, [1908] 1 Ch. 320. From the decree in *Shailer* v. *Groves* (11 Jur. 485) it would seem that Wigram, V.-C., came to a similar decision in that case, but no indication of it is given in the judgment as reported, 6 Hare, 162. In *Congreve* v. *Palmer*, 16 Bea. 435, the gift was to A for life, and after her death to her sisters or their children then living; the words "then living" were, of course, held to be applicable to the children, but the question whether they were applicable to the sisters did not really arise, because without them the gifts to the sisters would have been divested, as they all died before A, leaving children.

(*d*) *Post*, p. 1304.

tion occur where the gift is to a person " or " his issue, children, etc., or to a person " and " his issue, children, etc.

" Or " read as introducing a substituted gift.

(i) *Gift to a Person " or " his Issue, Children, Heirs, Executors, etc.*—In discussing the construction of the word " or " in such gifts as " to A or his issue," Mr. Jarman says (*e*) : " The strong tendency of the modern cases certainly is to consider the word ' or ' as introducing a substituted gift in the event of the first legatee dying in the testator's lifetime : in other words, as inserted in prospect of, and with a view to guard against, the failure of the gift by lapse.

To A *or* her issue.

" Thus, in *Davenport* v. *Hanbury* (*f*), where the bequest was to A *or* her issue, it seems to have been taken for granted that the word *or* was intended to substitute the issue in case of the death of A in the testator's lifetime ; the question discussed being, not *whether* issue were entitled, but *how*, *i.e.*, whether *per stirpes* or *per capita*. So, in *Montagu* v. *Nucella* (*g*), where legacies were bequeathed to the testator's nephews and nieces, ' *or* to their respective child or children,' Lord Gifford, M.R., held the effect to be to vest the legacies absolutely in the children surviving the testator, and that the children were let in only as substitutes for their parent or parents dying in the testator's lifetime. . . .

To legatees, *or* to their respective child or children.

Lastly, in *Gittings* v. *M'Dermott* (*h*), where a testator bequeathed certain stock to the children of his sister, the late Elizabeth Wall, OR *to their heirs*, Sir J. Leach, M.R., considered it to be clear that the word ' or ' implied a substitution, and that the next-of-kin (who in regard to personalty were considered to be designated by the word heirs) of such of the legatees as died in the testator's lifetime were entitled to their legacies; and Lord Brougham on appeal affirmed his Honor's decree.

To the children of A, *or* to their heirs.

" These cases (*i*) seem to be inconsistent with, and therefore to have overruled, *Newman* v. *Nightingale* (*k*), where a sum of £500 was bequeathed to the sole use of A *or of her children* for ever; and Lord Thurlow held, that the true construction of the words was, to give A an interest for life, and the children to take it amongst them at her death.

(*e*) First edition, Vol. I, p. 453. These remarks have been transferred from the chapter on " Supplying, Transposing and Changing Words " (now Chap. XVIII), where they followed a discussion of the cases in which " or " is read " and."

(*f*) 3 Ves. 257: *Crooke* v. *De Vandes*, 9 Ves. 197.

(*g*) 1 Russ. 165.

(*h*) 2 My. & K. 69. The case of *Jones* v. *Torin*, 6 Sim. 255 (cited by Mr. Jarman before *Gittings* v. *M'Dermott*) has been overruled.

(*i*) Later cases, decided on the same principle, are, *Whitcher* v. *Penley*, 9 Bea. 477; *Penley* v. *Penley*, 12 *ib.* 547; *Chipchase* v. *Simpson*, 16 Sim. 485; and see the cases on gifts to classes, *post*, pp. 1295 *seq.*

(*k*) 1 Cox, 341.

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Whether words refer to contingency in lifetime of testator, or afterwards.

" Where, however, the words in question are applied to a bequest which may not take effect in possession on the testator's decease, another point presents itself, namely, whether the word ' or ' (admitting it to be introductory of a substituted gift) is meant to provide against the contingency of the first-named legatee dying in the testator's lifetime, or that of his dying in the interval between the death of the testator and the vesting in possession. Such a question occurred in *Girdlestone* v. *Doe* (*l*), where a testator bequeathed £40 per annum to A for life, and after her decease to B *or his heirs*; and it was held that B, who survived the testator, did not take the absolute interest, but that the latter words created a substitutional gift for his next-of-kin in the event of B dying in the lifetime of A " (*m*).

Death of original legatee at any time.

In certain cases, however, where the prior legatee is an individual (*n*), and there is a prior life estate, a substitutional gift will take effect on the death of the first legatee at any time, *i.e.*, whether in the testator's lifetime or in that of the tenant for life. Thus in *Re Porter's Trust* (*o*), the testatrix, gave her residue to A for life, and at the death of A bequeathed a legacy to B " or his heirs "; B died in the lifetime of the testatrix, and it was held that his statutory next-of-kin were entitled to the legacy.

Re Whitehead.

In *Re Whitehead* (*p*) the testatrix, who died in 1898, gave her residuary realty and personalty, after the death of an annuitant, to her brothers and sister, F, W, J, E (sister), and X, or to their heirs in equal shares and proportions. The annuitant died in 1917. Sargant, J., held that the will did not convert the realty into personalty, that the words " or their heirs " as regarded the realty were words of substitution and not of limitation (it was admitted that as regards the personalty they were words of substitution), and that as regarded both realty and personalty the persons to take must be ascertained in the cases of F, J, and E (all of whom predeceased the testatrix) at the death of the testatrix, and in the case of each brother who survived the testatrix at the death of that brother.

Distinction between words of purchase and words of limitation.

Most of the cases in which the word " or " has been given the effect of a clause of substitution are cases in which the gift is to a

(*l*) 2 Sim. 225; see also *Corbyn* v. *French*, 4 Ves. 418; *Hervey* v. *M'Laughlin*, 1 Price, 264: *post*, p. 2093.

(*m*) The same principle was followed in *Price* v. *Lockley*, 6 Bea. 180; *Burrell* v. *Baskerfield*, 11 Bea. 525; *Doody* v. *Higgins*, 9 Hare, App. xxxii; *Jacobs* v. *Jacobs*, 16 Bea. 557; *Re Craven*, 23 Bea. 333; *Timins* v. *Stackhouse*, 27 Bea. 434; *Blundell* v. *Chapman*, 33 Bea. 648; and apparently in *McCormick* v. *Simpson*, [1907] A. C. 494.

(*n*) As to the rule where the original gift is to a class, see *post*, p. 1296.

(*o*) 4 K. & J. 188; *Collins* v. *Johnson*, 8 Sim. 356, n.

(*p*) [1920] 1 Ch. 298. This case contains important observations on *Re Clerke*, [1915] 2 Ch. 301.

person " or his children," or " issue " (*q*), or where personal property is given to a person " or his heirs " (*r*). But if an ambiguity is caused by the fact that the words introduced by the " or " may possibly have been intended as words of limitation, the construction is more difficult. Thus, before the Wills Act, a devise of real estate to " A or his heirs " was construed to mean " A and his heirs," in order to give him the fee (*s*). So it appears to be doubtful whether in a gift of personal property to " A or his executors " or " personal representatives," the word " or " has a substitutional effect. Sir R. P. Arden seems to have thought that where there is an immediate gift to " A or his representatives " this is a substitutional gift to A's personal representatives in the event of his death in the testator's lifetime. He said (*t*) : " A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear. I will not determine now, because it is not necessary, that where a legacy is given to a person or to his representatives, it can mean anything but, in case of his death in the life of the testator, but it is perfectly clear, that where the fund is given to one for life and after the death of that person to several others, and in case of their deaths to their representatives, there is no reason to presume an intention that it shall not lapse by the death of the legatee in the life of the testator." But if the bequest is deferred, either for a fixed period of time, or by a preceding life interest, a gift to " A or his representatives " may be meant to provide for the case of A dying after the testator and before the bequest is payable. Accordingly, where there is a bequest to A for life, and after his decease to B " or his executors," or to B " or his personal representatives," and B dies before the testator, the bequest lapses; but if the words following " or " imply a beneficial gift (as where the gift is to B " or his issue " or " next-of-kin "), the persons so designated will take by substitution whether B dies in the lifetime of the testator or in that of the tenant for life (*u*). So if the gift is to A for life and

(*q*) *Ante*, p. 1287.

(*r*) *Gittings* v. *M'Dermott*, 2 Myl. & K. 69; *Wingfield* v. *Wingfield*, 9 Ch. D. 658 (where *Lachlan* v. *Reynolds*, 9 Ha. 796, is explained); *Keay* v. *Boulton*, 25 Ch. D. 212 (gift of real and personal property) : *post*, p. 1541; *Re Cusin*, [1917] 1 Ir. 63.

(*s*) See *Read* v. *Snell*, 2 Atk. 642, and other cases cited *ante*, p. 586, where the question whether this rule of construction has been altered by the Wills Act is referred to. As to a gift of realty and personalty to " A or his issue " in a will before 1837, see *Parkin* v. *Knight*, 15 Sim. 83.

(*t*) *Corbyn* v. *French*, 4 Vest. at p. 435.

(*u*) *Bone* v. *Cook*, McClel. 168, stated *post*, p. 2092; *Corbyn* v. *French*, 4 Ves. 418; *Tidwell* v. *Ariel*, 3 Madd. 403; *Re Porter's Trust*, 4 K. & J. 188. The case of *Leach* v. *Leach*, 35 Bea. 185, appears to have been decided on this principle. In *Tidwell* v. *Ariel* and in *Thompson* v. *Whitelock*, 4 De G. & J. 490, the legacies were payable at a certain time after the testator's death. In *Maxwell* v. *Maxwell*, Ir. R. 2 Eq. 478, where the gift was to

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then to B " or his personal representatives," and the context shows that by these words the testator meant " next-of-kin " (*x*), it seems clear that the bequest would not lapse by the death of B in the testator's lifetime.

In case of A dying, leaving issue.

The same rule of construction applies where the substitutional gift is in the form of a direction that in case of the death of the primary legatee leaving issue, they are to take the legacy (*y*).

Effect of gift to A or his issue.

A gift to a person " or his issue," when preceded by a life interest, is in fact equivalent to an absolute gift to the prior legatee, followed by a gift over in the event of his dying before the period of distribution leaving issue, so that if he dies before that period without leaving issue, the gift to him is not divested and his representatives are entitled to it.

Thus in *Salisbury* v. *Petty* (*z*), immediate legacies of £2,000 each were bequeathed to B, C and D or their issue, and further legacies of £3,000 each were bequeathed, subject to a prior life interest in A, to B, C and D or their issue. B died in the lifetime of A, without issue, and C and D died in the lifetime of A, leaving issue. Consequently B took both his legacies absolutely; C and D took their two legacies of £2,000, and the children of C and D took the two legacies of £3,000 by substitution for their parents.

Substitutional gift to survivors.

Where the gift is to A for life, and after his death to B, C and D in equal shares, or to such of them as shall be living at A's death, his, her or their executors, administrators and assigns, this gives B, C and D vested interests liable to be divested : if they all die in A's lifetime, their representatives take in equal shares, but if B and C die in A's lifetime and D survives, he takes the whole (*a*).

Gift by implication to objects of power.

The substitutional construction is not given to the word " or " when it occurs in a power of appointment or selection, and a gift by implication to the objects of the power arises by reason of its not having been exercised (*b*). Thus a gift to A, B and C, " or their children " as X shall appoint, operates as a gift in default of appointment to A, B and C and their children, because they are all objects of the power (*c*).

" my younger sons or their executors," the executors of a younger son who was dead at the date of the will were held to be entitled, because the testator had by an earlier clause in the will shown that he meant the gift to have that effect. See *ante*, p. 401.

(*x*) As in *King* v. *Cleaveland*, 4 De G. & J. 477.

(*y*) *Le Jeune* v. *Le Jeune*, 2 Kee, 701; *Ive* v. *King*, 16 Bea. 46; *Hobgen* v. *Neale*, L. R. 11 Eq. 48.

(*z*) 3 Ha. 86; *Burrell* v. *Baskerfield*, 11 Bea. 525, was a similar case.

(*a*) *Re Sanders' Trusts*, L. R. 1 Eq. 675. Compare *Sturgess* v. *Pearson*, 4 Madd. 411, cited *post*, p. 1340.

(*b*) As to the cases in which this implication arises, see p. 628.

(*c*) *Penny* v. *Turner*, 2 Ph. 493; *Re White's Trusts*, Johns. 656.

(ii) *Gift to a Person "and" his Issue, Children, etc.*—In discussing the effect of a gift of personalty to "A and his issue," Mr. Jarman points out that the *prima facie* effect of such a bequest is to give A the absolute interest (*d*), and continues (*e*): "The word 'issue,' under a joint gift to the ancestor and issue, has also been sometimes construed as introducing a substituted gift in favour of these objects, in the event of the failure of the original gift to the ancestor who, if such gift takes effect, becomes solely and absolutely entitled.

To five persons and their respective issue *per stirpes*.

Pearson v. *Stephen*.

"Thus, in *Pearson* v. *Stephen* (*f*), where the testator, John Pearson, bequeathed to trustees so much stock as should be sufficient to pay thereout the yearly sum of £1,000 to his wife for her widowhood; and after her decease or marriage, in trust for his five sons (naming them) *and their respective issue*, if any, to be divided among them in equal shares; such issue to take *per stirpes* and not *per capita*. He also gave £4,000 to be invested in stock, in trust to pay the dividends to his daughter S. during her coverture, and upon the death of G., her husband, to transfer the capital to her for her sole use; but, in case G. should survive testator's daughter, then in trust for his said five sons *and their respective issue* (if any), to be divided among them in equal shares and proportions, such issue to take *per stirpes* and not *per capita*. The testator also gave the residue of his personal estate to his said five sons '*and their respective issue* (*if any*)'; such issue to take *per stirpes* and not *per capita*, to be divided among them in equal shares and proportions; the shares of such of them as should have attained the age of twenty-one years, to be paid to them respectively forthwith after the testator's decease; the shares of such of them as should be under that age to be paid to them when and as they should respectively attain such age. The question was, what interests the five sons (all of whom survived the testator) took under these bequests? Sir J. Leach, M.R., held that the sons took life interests only (subject, as to the £4,000, to the contingency mentioned in the will), with the ulterior interest for their children. But this decree was reversed in the House of Lords, where it was decided that, under the first bequest, the sons became absolutely entitled; and that, with respect to the £4,000, in the event of S. dying in the lifetime of G., the sons

(*d*) But in wills coming into operation after 1925 this is no longer the case, see Chap. XXXIII, *ante*, p. 1161.

(*e*) First edition, Vol. II, p. 500, where this section formed part of Chap. XLIV in the original work, which was entitled, "Rule that Words which create an Estate Tail in Real Estate confer the Absolute Interest in Personalty"; Chap. XXXIII in the present edition.

(*f*) 5 Bli. (N.S.) 203. "Of course there is less difficulty in the adoption of this construction where the gift is to a person *or* his issue: *vide ante*, Vol. I, p. 453 [first edition]; also *Price* v. *Lockley*, 6 Bea. 180." Mr. Jarman's remarks on this point will be found *ante*, p. 1287.

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of the testator *living at such event* would be absolutely entitled to the stock in equal shares; but if any of the sons should die in the lifetime of S., leaving issue, such issue, if living at the death of S. (*g*), would be entitled to the share or shares of the fund which their parents would have been entitled to, if living, such issue to take the shares in question equally among them; and it was also adjudged that the sons, at the death of the testator, took an absolute interest in the residue. And an opinion was expressed by the Lord Chancellor (Brougham), that, if any of the sons had died in the lifetime of the testator, his children, living at his (the testator's) death, would have taken, by substitution, the share of the parent.

Remarks on *Pearson* v. *Stephen*.

"Here, it will be observed, the words 'and their respective issue' were considered to raise a gift by substitution, to take effect, as to all the bequests, in the event of any of the legatees dying in the testator's lifetime leaving issue, and, as to the £4,000 stock, in the further event of their dying during the suspense of the contingency leaving issue. The clause directing that the issue should take *per stirpes*, seems to be decisive against the word being construed as a word of limitation.

To the daughters of T. and their issue, with benefit of survivorship.

"The case of *Pearson* v. *Stephen* was referred to in *Gibbs* v. *Tait* (*h*), where a testator bequeathed the residue of his personal estate to his wife during her widowhood, and, after her decease or marriage, he gave what should be remaining one moiety to J., the son of T., his executors and administrators, and the other moiety equally among all the daughters of T. *and their issue*, with benefit of survivorship and accruer: Sir L. Shadwell, V.-C., held that the daughters living at the distribution of the fund were absolutely entitled, and not (as had been contended) concurrently with their issue, which, he observed, was an inconvenient construction. He observed that the case was weaker than *Pearson* v. *Stephen*.

Remark on *Gibbs* v. *Tait*.

"This remark shows that the Vice-Chancellor considered the case before him to belong to the same class as the cited authority: perhaps the clauses of accruer (which are not stated) may have aided this interpretation."

Bequest to several and their descendants *per stirpes*.

The decision in *Pearson* v. *Stephen* was followed in *Dick* v. *Lacy* (*i*), where real and personal estate was bequeathed to A for life, and after her decease to the daughters of B and their descen-

(*g*) As to this, see *ante*, p. 1286.

(*h*) 8 Sim. 132.

(*i*) 8 Bea. 214. See also *Hedges* v. *Harpur*, 9 Bea. 479 (issue to take only their parent's share); *Tucker* v. *Billing*, 2 Jur (N.S.) 483; *Clay* v. *Pennington*, 7 Sim. 370; *Hurry* v. *Hurry*, L. R. 10 Eq. 346, were similar cases. In *Young* v. *Davies*, 2 Dr. and Sm. 167, Kindersley, V.-C., refused to treat a gift to "my surviving daughters and their lawful offspring" as substitutional gift. But see *Re Coulden*, [1908] 1 Ch. 320, referred to *post*, p. 1303. As to

dants *per stirpes*, to hold to them, their heirs and assigns for ever; and it was held by Lord Langdale that the limitation to descendants *per stirpes* was a gift to them by way of substitution for their ancestress in case she died in the lifetime of the tenant for life.

Of course the principle of *Pearson* v. *Stephen* did not apply where the context showed that "issue" was used as a word of limitation (*k*).

Issue not entitled concurrently with ancestor.

Mr. Jarman continues (*l*): "Sometimes a testator, having in one instance made an express and particular substitution of issue, thereby affords a ground for applying a similar construction to a bequest in the same will to a person and his issue simply; the inference being, on a view of the entire will, that the intention is the same in the respective cases.

"Thus, in *Butter* v. *Ommaney* (*m*) a testator bequeathed £2,000 to the children of his late sister B and their lawful issue, in case any of them should die leaving lawful issue. He also gave unto and among all and every the child and children of his late brother Jacob *and their issue* (except his nephew A) the sum of £2,000 to be equally divided among them, share and share alike, to be paid within twelve months next after his (the testator's) decease. At the date of the will, there were three children of the testator's brother, who had children, and other children were dead leaving issue. It was contended that the words 'and their issue' were words of purchase, and let in the issue of the deceased children; but Sir J. Leach, M.R., held that the three children of Jacob living at the date of the will were absolutely entitled to the legacy.

"And here it may be observed that, where (as in the two preceding cases) the original legatees are living at the death of the testator or the period of distribution (whichever may happen to be the period of ascertaining the objects), it becomes unnecessary to determine whether 'issue' is a word of limitation or of substitution; the original legatees being entitled to the whole, according to either construction. Hence the only really adjudged point in the two last cases was the rejection of the claim of the issue to participate concurrently with the original legatees.

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a gift to A, and in case of his death to his issue, see *Le Jeune* v. *Le Jeune*, *ante*, p. 1290. *Etches* v. *Etches*, 3 Dr. 447, seems to have been wrongly decided. In *Burrell* v. *Baskerfield*, 11 Bea. 525, the gift was to A for life, and then to certain cousins of the testator "and their children": the substitutional construction was aided by the fact that in an earlier part of the will a legacy was given to each of the cousins and the children of a deceased cousin.

(*k*) *Tate* v. *Clarke*, 1 Bea. 100.

(*l*) First edition, Vol. II, p. 502.

(*m*) 4 Russ. 70. See also *Dick* v. *Lacy*, 8 Bea. 214; *Re Stanhope's Trusts*, 27 Bea. 201.

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Issue held entitled concurrently with ancestor.

" An instance of the admission of such concurrent claims occurs in *Clay* v. *Pennington* (*n*), where a testator, in a certain event, bequeathed a residuary fund to the children of his brother B *and their lawful issue* in equal shares, or unto such of them as shall prove their right within two years after notice in the London Gazette : Sir L. Shadwell decided that all the descendants of B, who were living at the period in question, were entitled to participate, and which of course involved a denial of the proposition that ' issue ' was here used as a word of limitation."

(iii) *Other Cases of implied Substitutional Gifts.*—Reference is made elsewhere (*o*) to the doctrine that where personal estate is limited to several persons not *in esse* successively, in terms which, if the property were realty, would give them estates tail, the successive limitations operate as substitutional or alternative bequests.

In *Prentice* v. *Brooke* (*p*), chattels real were bequeathed to trustees for fifteen years upon certain trusts, and after that term upon trust for H, the trust being so expressed that H took absolutely subject to a gift over in the event of his leaving no issue living at his death ; there was a concluding declaration that " the above bequest " to H was to go to his lawful issue should he leave such issue ; it was held that this was a substitutional gift to his issue in the event of his dying within the fifteen years.

Contingent gift to children, etc.

In *Crozier* v. *Crozier* (*q*), a testator gave property to his wife, " and after her death to be equally divided to the children, should there be any." At the death of the testator there were no children. It was held that the widow took absolutely, but on what ground is not quite clear (*r*). The case is sometimes treated as having been decided on the question how an absolute interest can be cut down to a life interest (*s*).

In *Comiskey* v. *Bowring-Hanbury* (*t*), a gift of property to A absolutely, " in full confidence " that at her death she would devise it to one or more of the testator's nieces, with a direction that in default of any disposition by her by will the property should be equally divided among the nieces, was held to give A an absolute interest defeasible in the event of any niece surviving her.

(*n*) 7 Sim. 370. See also *Law* v. *Thorp*, 27 L. J. Ch. 649, 4 Jur. (N.S.) 447 ; and Prior on Issue, 37, 38.

(*o*) Chap. XXXIII, *ante*, pp. 1164 *seq.*

(*p*) 5 L. R. Ir. 435.

(*q*) L. R. 15 Eq. 282.

(*r*) In *Re Hanbury*, [1904] 1 Ch. 415, Stirling, L.J., treated the case as an example of a defeasible interest which had become absolute owing to the failure of the gift over.

(*s*) *Monck* v. *Croker*, [1900] 1 Ir. 56.

(*t*) [1905] A. C. 84.

III.—Where Primary Gift is to a Class.—It is obvious "that where there is a bequest to a class, followed by a substitutional bequest in case of the death of any member of the class, there, to determine whether the substitutional bequest is to take effect upon the death of any particular individual, you must first inquire whether he was a member of the class at all. If he was not, it is impossible to predicate substitution with respect to him" (*u*). The difficulty in most of the cases is to ascertain what persons the original class is composed of (*x*).

General rule.

It will of course be remembered that where the class is defined by the will, the definition must, as a general rule, be strictly adhered to, although the result often defeats the obvious intention of the testator (*y*). Thus if the gift is to the children of S. living at the testator's death, and in case any of them should die, leaving issue, such issue should be entitled to their parent's share, the issue of a child who dies in the testator's lifetime are not entitled to share (*z*). But if there is an ambiguity on the face of the will, advantage may be taken of this to correct the testator's language. Thus in *Giles* v. *Giles* (*a*) a testator gave his residue to all his children living at the decease of his wife, and if any "such children" should be deceased before his wife, leaving issue, the children of such his son or daughter should be entitled to his or her portion; as it was impossible that any child who survived the wife should predecease her, the word "such" was disregarded.

Where will defines the class.

Giles.

Giles v.

(a) *Where gift is immediate.*

In the case of an immediate gift to a class of persons, such as the children of A, with a substitutional gift to their issue or the like, it is clear that if any child of A dies between the date of the will and the death of the testator, leaving issue, they take by substitution (*b*). The principle is stated (or rather assumed) in *Christopherson* v. *Naylor* (*c*), where the testator bequeathed a legacy to each of his nephews and nieces living at his death, and directed that in the event of any nephew or niece dying in his

Immediate gift to class with clause of substitution.

Christopherson v. *Naylor.*

(*u*) *Per* Wood, V.-C., in *Re Porter's Trust*, 4 K. & J. at p. 191, following *Christopherson* v. *Naylor*, 1 Mer. 320; *Ive* v. *King*, 16 Bea. 46.

(*x*) *Per* Jessel, M.R., in *Re Sibley's Trusts*, 5 Ch. D. at p. 499.

(*y*) See the cases on gifts to "children then living," followed by a clause of substitution, which are cited *post*, p. 1647.

(*z*) *Shergold* v. *Boone*, 13 Ves. 370; *Smith* v. *Farr*, 3 Y. & C. 328. Compare *Re Kinnear*, 90 L. T. 537.

(*a*) 8 Sim. 360. Compare *Habergham* v. *Ridehalgh*, L. R. 9 Eq. 395; *Jeyes* v. *Savage*, L. R. 10 Ch. 555.

(*b*) *Cort* v. *Winder*, 1 Coll. 320.

(*c*) 1 Mer. 320. In *Christopherson* v. *Naylor* the gift to the issue of a deceased nephew was not strictly substitutional, because nothing was given to the parent: the case properly belongs *post*, p. 1301, but it is cited here on account of the general principle laid down in it. See the criticism in *Re Hickey*, [1917] 1 Ch. 601.

lifetime the legacy " intended for " the nephew or niece so dying should be for his or her issue : the question was whether the issue of nephews and nieces who died before the date of the testator's will were entitled to their legacies (*d*). Sir W. Grant said : " The nephews and nieces are here the primary legatees. Nothing whatever is given to their issue, except in the way of substitution. In order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand. But of the nephews and nieces of the testator, none could have taken besides those who were living at the date of the will. The issue of those who were dead at that time can consequently show no object of substitution." And in *Re Webster's Estate* (*e*), where a similar question arose, Kay, J., said : " Where there is a gift to a class and then a substitutionary gift of the share of any one of the class who should die in the lifetime of the testator, no one can take under the substitutionary gift who is not able to predicate that his parent might have been one of the original class, and consequently if the parent was dead at the date of the will, and therefore by no possibility could have taken as one of the original class, his issue are not able to take under the substitutionary gift."

(b) *Where there is a prior life interest.*

Whether same rule applies where there is a prior life estate.

On principle, it would seem to follow that the same rule ought to apply where there is a prior life estate, so that if property is given to X for life, and after his death to the nephews of the testator or their children, the children of any nephew who dies after the date of the will and before the death of X, would be entitled to the share intended for their parent, because every nephew of the testator who is living at the date of the will or is born before the period of distribution is what Sir W. Grant calls an original legatee, or as Kay, J., puts it, one of the original class. And Mr. Jarman evidently inclined to this opinion, for after citing the cases of *Christopherson* v. *Naylor* (*f*), *Butter* v. *Ommaney* (*g*), *Waugh* v. *Waugh* (*h*), *Peel* v. *Catlow* (*i*) and *Gray* v. *Garman* (*k*), he remarks (*l*) :

Suggested distinction where decease is after will.

" It will be observed that, in the five preceding cases, the person whose children it was attempted to bring within the compass of the clause in question was dead at the date of the

(*d*) This question is discussed *post*, pp. 1297 *seq.*
(*e*) 23 Ch. D. at p. 739.
(*f*) 1 Mer. 320.
(*g*) 4 Russ. 70.
(*h*) 2 Myl. & K. 41.
(*i*) 9 Sim. 372.
(*k*) 2 Ha. 268.
(*l*) First edition, Vol. II, p. 681.

will, and could not possibly have been an object of the primary bequest; and it does not follow that the same construction would have obtained, if such person had been then living, and had *subsequently* died in the testator's lifetime. There is, however, not wanting a case even of this kind. Thus, in *Thornhill* v. *Thornhill* (*m*), where a testator directed that a certain estate, which by his marriage settlement he had settled on his wife for life, and another estate, which he had devised to her for her life, should be sold at her decease, and the money arising therefrom equally divided among his nephews and nieces, *the children of such of them* (*n*) *as should be then dead standing in the place of their father and mother deceased.* The question was, whether the children of such of the nephews and nieces as died in the testator's lifetime were entitled. Sir J. Leach, V.-C., decided in the negative; his Honor being of opinion that the latter clause applied to the children of such of the nephews and nieces only as died after the testator, and before the wife.

Thornhill v. *Thornhill.*

" The case of *Thornhill* v. *Thornhill*, however, has been much disapproved of, as applying a very harsh and rigid rule of construction to testamentary provisions for children; and its authority was unequivocally denied in *Smith* v. *Smith* (*o*), where . . . Sir L. Shadwell, V.-C., said: ' I think that the decision in *Thornhill* v. *Thornhill* is wrong.' "

It is certainly difficult to see, on principle, why the existence of a prior estate for life should prevent substitution in the case of a member of the original class dying in the lifetime of the testator, if substitution is allowed where the gift is immediate. In both cases the object of the testator is to benefit a class which includes persons living at the date of the will, and to provide for the issue of members of the class who die before the period of distribution.

However, the authority of *Thornhill* v. *Thornhill* is supported by a dictum of Romilly, M.R., in *Ive* v. *King* (*p*), and by three modern decisions (*q*). The argument on which these decisions are

Authorities supporting *Thornhill* v. *Thornhill.*

(*m*) 4 Madd. 377. " Whether the nephews and nieces were in existence at the date of the will is not stated " (note by Mr. Jarman).

(*n*) In this quotation Mr. Jarman has followed the reporter's marginal note; in the text of the report the clause is thus stated: " the children of such as should be then dead standing in the place of their father and mother deceased."

(*o*) 8 Sim. 353. Mr. Jarman's marginal note to this paragraph is: " Case of *Thornhill* v. *Thornhill* overruled."

(*p*) 16 Bea. at p. 53. In support of his dictum the M.R. cites, not *Thornhill* v. *Thornhill*, but *Peel* v. *Catlow*, 9 Sim. 372, *Waugh* v. *Waugh*, 2 Myl. & K. 41, and *Christopherson* v. *Naylor*, 1 Mer. 320; in all of which, as Mr. Jarman points out, the original legatee was dead at the date of the will. The dictum is therefore not of great weight.

(*q*) *Neilson* v. *Monro*, 27 W. R. 936; *Re Hannam*, [1897] 2 Ch. 39; *Re Ibbetson*, 88 L. T. 461.

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based is that when a testator makes a deferred bequest to a class followed by a substitutional gift, as " to A for life and after his death to my brothers or their heirs," the gift to the brothers only takes effect in favour of those who survive the testator, and that consequently the gift is in effect " to A for life and after his death to my brothers who shall be living at my death or their heirs." But this is not what the testator says, and still less what he means, for a gift to " my brothers " primarily means " my brothers now living." That this is the proper construction of such a bequest, when considered with reference to a subsequent clause of substitution or gift over, is clear from Sir W. Grant's judgment in *Christopherson* v. *Naylor* (*r*); and in *Shergold* v. *Boone* (*s*), where there was a bequest to the children of A who should be living at the testator's decease, equally, with clauses of survivorship and substitution : " The bequest is not to all the children generally, but to such only who shall be living at the testator's decease. Therefore the children, who died during his life, had nothing, either to lapse, or to descend to issue, or to survive to the other children. The children who shall be living at his death are the original and sole legatees." Without this qualification, therefore, all the children living at the date of the will would have been " original legatees " for the purpose of lapse, survivorship or substitution. In *Re Musther* (*t*), where the gift was to nephews and nieces, " but should any of them be dead before me, I then direct that his or her share shall be equally divided between his or her children," Cotton, L.J., said : "As I read that bequest, the gift is one to nephews and nieces of the testatrix who are capable of taking : *that is, to nephews and nieces who were living at the date of the will*, and those nephews and nieces were only intended to take provided they survived the testatrix, for the gift over provides for the event of any of them dying after the date of the will and before the death of the testatrix "; that is, the requirement of surviving the testatrix was not implied in the original gift, but imposed by the terms of the gift over. In *Re Hannam* (*u*), North, J., admitted that if the gift to brothers and sisters had been immediate, followed by a substitution of children of deceased brothers and sisters for their parents, " the reference to children could only be to children of brothers and sisters who had died in the lifetime of the testator "; that is, the gift to brothers and sisters in such a case would have included " my brothers and sisters now living." It is difficult to see why the interposition of a life estate should alter the obvious and

Re Musther.

Re Hannam.

(*r*) Quoted *ante*, p. 1296.
(*s*) 13 Ves. 370.
(*t*) 43 Ch. D. 569.
(*u*) [1897] 2 Ch. 39.

Re Hotchkiss's Trusts.

natural meaning of the words. As James, V.-C., said (*x*): "I think a fallacy arises from applying to the construction of these instruments that rule which says that the class is to be ascertained at the death of the testator; because *prima facie* a testator must be supposed to have had in view living persons, subject to the contingency of such persons continuing to live up to the time of his death" (*y*). If a testator, in making a bequest "to my brothers and sisters," has in view living persons, and adds a clause of substitution, the obvious conclusion is that he wishes to provide for the contingency of some of them dying in his lifetime. The interposition of a prior life estate cannot narrow the construction of the original gift. However, the rule laid down in *Re Ibbetson* and the other cases cited above is clearly binding on all Courts of first instance.

Reference to "share."

In *Re Hannam* (*z*), the clause of substitution directed that the children of a deceased brother or sister should take their deceased parent's share, and one of the grounds on which North, J., based his decision was that a brother or sister who died in the testator's lifetime had no share. But if the gift to the brothers and sisters of the testator included the brothers and sisters living at the date of the will, it seems clear that "by deceased parent's share" the testator meant the share which the deceased parent would have taken if living (*a*). No reference to a share occurred in *Neilson* v. *Monro* (*b*) or in *Re Ibbetson* (*c*).

Re Laing.

In *Re Laing* (*d*) a share in residue was given to the testator's sister Jane, if she should be living at the death of the testator's wife, with a proviso that the share of his sister Jane, if she should not be a widow at the death of his wife, should go to her two grandchildren. Jane died a widow in the lifetime of the testator's wife. It was held that the share Jane would have taken had she survived did not go to her children.

(*x*) *Re Hotchkiss's Trusts*, L. R. 8 Eq. at p. 649. In that the gift was immediate. In *West* v. *Orr*, 8 Ch. D. 60, there was a gift to A for life, and after her death to such of the children of the testator's sisters as should survive A, with a clause of substitution in the event of any of "such children" dying in the testator's lifetime: James, L.J., pointed out that, "ordinarily speaking, the gift to a class is a gift to a class of persons living," and that "any of such children" meant "any of the children now living."

(*y*) See also the same learned Judge's excellent criticism of the rule on which *Thornhill* v. *Thornhill* is supposed to be based, in *Habergham* v. *Ridehalgh*, L. R. 9 Eq. 395.

(*z*) *Ante*, p. 1298.

(*a*) The Court will put a reasonable construction on the word "share" if the technical construction would defeat the obvious intention of the testator: *Re Pinhorne*, [1894] 2 Ch. 276; *Re Powell*, [1900] 2 Ch. 525; *Re Whitmore*, [1902] 2 Ch. 66; *Re Walter*, 56 Sol. J. 632.

(*b*) 27 W. R. 936.

(*c*) 88 L. T. 461.

(*d*) [1912] 2 Ch. 386.

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It is clear that in the class of cases now under discussion substitution takes place as regards any brother or sister who survives the testator and dies in the lifetime of the tenant for life (*f*).

Original gift.

The rule in *Thornhill* v. *Thornhill* does not apply to original gifts (*g*).

IV.—Substitutional Gifts to Children or Issue.—Where there is a gift to persons, or a class of persons, followed by a substitutional gift to their children or issue in the event of their dying before a certain time or event—as to A for life and after his death to his children in equal shares, with a direction that if any of them shall die during A's lifetime, the issue of such child shall take his share—the following rules should be borne in mind (*h*):

Rules for substitutional gifts.

(a) Every child who survives the testator takes a vested interest, subject to be divested if he dies during A's lifetime leaving issue. Consequently, if a child dies during A's lifetime without leaving issue, his share is not divested (*i*). But if he dies during A's lifetime leaving issue, they take his share by substitution (*k*).

(b) It follows from this rule that the issue of a child who dies in A's lifetime cannot take unless they survive their parent (*l*).

The two preceding rules do not apply to cases where the gift to the issue is original or substantive (*m*).

(c) It is not necessary that issue who take by substitution should survive the tenant for life. Consequently, if in the case above put a child survives the testator and dies in A's lifetime, leaving issue who survive him but die in A's lifetime, they take his share (*n*).

There was for many years a conflict of authority on this rule, chiefly with regard to its application to quasi-substitutional

(*f*) *Finlason* v. *Tatlock*, L. R. 9 Eq. 258; *Neilson* v. *Monro*, 27 W. R. 936; *Re Ibbetson*, 88 L. T. 461; *Re Miles*, 61 L. T. 359; *Re Gilbert*, 54 L. T. 752; *Re Flower*, 62 L. T. 216. The decision in *Re Dawes' Trusts*, 4 Ch. D. 210, is erroneous.

(*g*) *Post*, p. 1305.

(*h*) See the judgment of Kindersley, V.-C., in *Lanphier* v. *Buck*, 2 Dr. & S. 484.

(*i*) *Salisbury* v. *Petty*, 3 Ha. 86, stated *ante*, p. 1290; *Re Bennett's Trust*, 3 K. & J. 280; *Re Wood*, 29 W. R. 171; *Bolitho* v. *Hillyar*, 34 Bea. 180; *Ward* v. *Brown*, [1916] 2 A. C. 121. See *Strother* v. *Dutton*, 1 De G. & J. 675, stated *post*, p. 1342.

(*k*) See *Price* v. *Lockley*, 6 Bea. 180, and other cases cited *ante*, p. 1288.

(*l*) *Re Turner*, 2 Dr. & Sm. 501; *Re Bennett's Trust*, *supra*. As to *Re Merrick's Trusts*, see the remarks of Joyce, J., in *Re Woolley*, [1903] 2 Ch. at p. 210.

(*m*) See Section V.

(*n*) *Re Turner*, 2 Dr. & Sm. 501; *Re Bennett's Trust*, 3 K. & J. 280; *Re Flower*, 62 L. T. 677; *Re Battersby's Trusts*, [1896] 1 Ir. R. 600. As to *Pearson* v. *Stephen*, 5 Bli. (N.S.) 203, see *per* Kindersley, V.-C., 34 L. J. Ch. at p. 659; *per* Stirling, J., *Re Flower*, *supra*.

gifts; the conflict did not come to an end until the decision in *Martin* v. *Holgate* by the House of Lords in 1866 (*o*).

Express intention.

If the testator expresses an intention that the gift to the children is to be subject to the same contingency of survivorship as the gift to the primary object, effect will, of course, be given to it: as where the gift is to A for life, and then to her sisters or their children, living at her decease (*p*). In *Re Hickey* (*q*) the gift was "to the descendants of A or their descendants living at my death." It was held that the words "living at my death" governed the whole gift. In *Re Langlands* (*r*), it was held that a contingency (of surviving Whit-Sunday) attached to a gift to children did not attach to a gift in the same sentence to issue of deceased children.

Ascertaining class.

The manner in which the class to take under a substitutional gift to issue is ascertained has been already referred to (*s*).

Double share.

The effect of a clause of substitution to children may be to give the substituted class two shares: as in *Re Smith* (*t*), where a testator gave his residue to all his nephews and nieces, with a gift over to the children of nephews and nieces who should die in his lifetime, such children to take the share which their parent would have taken if he or she had survived the testator; one of the nephews marries one of the nieces, and both died in the testator's lifetime: it was held that their children took two shares.

It may here be mentioned that the rule in *Re Hutchinson's Trusts* (*u*) applies to substitutional gifts (*x*).

Whether gift is original or substitutional.

Lanphier v. *Buck*.

V.—Distinction between Substitutional and Original (or Substantive) Gifts.—In *Lanphier* v. *Buck* the gift was (in effect) to Mary Buck for life, and after her death to the testator's nephews and nieces then living, and the issue of such of them as might be then dead, such issue to be entitled to its parent's share only. Kindersley, V.-C., said (*y*) it was necessary to consider

(*o*) L. R. 1 H. L. 175; distinguished in *Addie's Trustees* v. *Jackson*, [1913] S. C. 681.

(*p*) *Congreve* v. *Palmer*, 16 Bea. 435. The cases of *Bennett* v. *Merriman*, 6 Bea. 360, and *Re Kirkman's Trust*, 3 De G. & J. 558, are sometimes cited as illustrations of this construction, but neither case can be considered a strong authority: see *Martin* v. *Holgate*, L. R. 1 H. L. 175. They were both cases of quasi-substitution, but as regards the question under discussion there is no difference between strictly substitutional and quasi-substitutional gifts.

(*q*) [1917] 1 Ch. 601.

(*r*) 117 L. T. 11; distinguishing *Re Embury*, 109 L. T. 511, on this point.

(*s*) *Ante*, p. 1285.

(*t*) [1892] W. N. 106.

(*u*) 21 Ch. D. 811; *post*, Chap. XLII, p. 1690.

(*x*) *Re Errington*, [1927] 1 Ch. 421.

(*y*) 34 L. J. Ch., at p. 656. "Issue" was construed to mean "children": *post*, Chap. XLI, p. 1568.

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the question "whether there is any distinction, with regard to the question of who is to take, between what is called an original gift and a gift by substitution; and although I am bound to say that I do not think the distinction in language has been very accurately and carefully observed in some of the cases, it appears to me that the distinction is very plain, and very broad and clear. In the present case the gift is to two classes of objects, to such nephews and nieces as shall be living at a given time, and to the issue of such nephews and nieces as shall be dead at that time (*z*). Is that an original gift to the issue, or a gift by substitution? Clearly an original gift to them. It is true you may say in a sense they are substituted for their parents, because they take the share respectively among them which their parent would, if he had come into the first class, have himself taken, and in that sense (but that is not the accurate and proper sense) you may say that there is a substitution; but it is as much an original gift to the issue of such of the nephews and nieces as shall have died before the tenant for life, as it is an original gift to such of the nephews and nieces as shall be living at the death of the tenant for life. One is as much an original gift as the other; and I apprehend that the present case is a clear instance of an original gift. Then what is a gift by substitution? A gift by substitution is this, to take a simple case of it: Supposing it had run thus in the present case: to Mary Buck for life, and after her death without issue (an event which has happened) to all my nephews and nieces, but if any one of those nephews and nieces dies before the tenant for life, then to the issue of that one, the issue taking the parent's share; that is a gift by substitution" (*a*).

Where the language of the will is ambiguous, it may be interpreted by a gift over (*b*).

The gift in *Lanphier* v. *Buck* is probably the commonest form of an original gift to issue or children taking concurrently with another class of objects, but the same effect can be produced by informal words.

Inaccurate wording.

Thus if the testator makes a bequest to all his children living

(*z*) It will be remembered that in considering whether a gift of this kind is open to objection on the score of remoteness, the objects are considered to form one class: *Smith* v. *Smith*, L. R. 5 Ch. 342; *Stuart* v. *Cockerell*, *ib.*, 713; *Pearks* v. *Moseley*, 5 A. C. 714; *ante*, p. 306. Is is now more usual to say that such a gift is to a "composite class": see *per* Chitty, J., in *Re Parsons*, 8 R. 430.

(*a*) The distinction is also explained in *Gray* v. *Garman*, 2 Ha. 268; *Martin* v. *Holgate*, L. R. 1 H. L. 175; and *Re Woolley*, [1903] 2 Ch. 206, and the cases there cited. See also *Re Gilbert*, 54 L. T. 752; *Re Miles*, 61 L. T. 359; *Re Flower*, 62 L. T. 216, 677; *Attwood* v. *Alford*, L. R. 2 Eq. 479, and other cases cited in Chap. LVII.

(*b*) *Stuart* v. *Cockerell*, L. R. 5 Ch. 713. In *Miller* v. *Chapman*, 24 L. J. Ch. 409, the language of the will was ambiguous, and no aid was afforded by the context.

at the death of his wife, and directs that if any of "such" children should die before his wife and leave issue, then the children of such his son or daughter should be entitled to his or her portion, this is an original gift to the issue of deceased children, the word "such" being disregarded (*c*).

"Or" may introduce original gift.

Again, although the general rule, as already mentioned, is that the word "or," in gifts to a person "or his issue" or the like, operates as a clause of substitution, it sometimes operates as an original gift (*d*). Thus in a gift to such of a class of persons as shall be living at a certain time, "or their issue," the effect of "or" is to include in the gift the issue of such of the class as have previously died, whether before or after the date of the will (*e*). So if a testator gives his property to "all and every his brothers and sisters or their issue," and at the date of the will he has only sisters living, his brothers being all then dead, the issue of deceased brothers and sisters will take (*f*).

Issue to take "by way of substitution."

The fact that the testator says that the issue are to take "by way of substitution" the share which their deceased parent would have taken if living, does not affect the construction (*g*).

Effect of "and."

In *Re Coulden* (*h*) a testator directed that on the happening of a certain event his property should be equally divided amongst his then surviving children and their respective issue: it was held that this was an original gift to the issue of any children then dead, and that the issue of the children then living took nothing. The decision was a bold one, for the words of the will were clear and unambiguous, but no doubt it gave effect to the testator's real (as distinguished from his expressed) intention.

Differences between original and substitutional gifts.

There are several important differences between the two kinds of gift. Where the gift (as in *Lanphier* v. *Buck*) is to A for life, and after her death to the testator's nephews and nieces then living and the issue of such of them as may be then dead, the gift to the nephews and nieces is contingent; nothing vests

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(*c*) *Giles* v. *Giles*, 8 Sim. 360; *ante*, p. 1295. *Jarvis* v. *Pond*, 9 Sim. 549, was a similar case.

(*d*) *Attwood* v. *Alford*, L. R. 2 Eq. 479. In *Re Pearce*, 56 Sol. J. 361, 686, the will was so obscure that it is no authority.

(*e*) *Re Philps' Will*, L. R. 7 Eq. 151; *King* v. *Cleaveland*, 4 De G. & J. 477; *Burt* v. *Hellyar*, L. R. 14 Eq. 160; *Wingfield* v. *Wingfield*, 9 Ch. D. 658; *Keay* v. *Boulton*, 25 Ch. D. 212. The statement of the rule attributed to Wood, V.-C., in *Re Merrick's Trusts*, L. R. 1 Eq. 551, is inaccurate: see *Re Woolley*, [1903] 2 Ch., at p. 210.

(*f*) *Gowling* v. *Thompson*, L. R. 11 Eq. 366, n., and other cases cited *post*, p. 1309.

(*g*) *Re Parsons*, 8 R. 430.

(*h*) [1908] 1 Ch. 320.

in any nephew or niece until the death of A (*i*). Where, however, the gift is substitutional—as "to A for life and after her death to my nephews and nieces or their issue"—every nephew and niece who survives the testator takes a vested interest, subject to be divested if he or she dies in A's lifetime, leaving issue (*k*).

Effect of primary legatee dying with or without issue.

Whether the gift is original or substitutional, if a nephew dies in A's lifetime, leaving issue, they take the share intended for him, in the former case by way of original gift, in the latter case by substitution. But if he dies without leaving issue, it follows from the different natures of the two gifts that where the gift to the nephew is contingent on his surviving the tenant for life (as in *Lanphier* v. *Buck*) it fails altogether on his death without issue (*l*); on the other hand, where the gift to the nephew is vested subject to be divested on his dying in A's lifetime, leaving issue (as in cases where the gift to the issue is substitutional), it is not divested if he dies without issue, and in that event his personal representatives are entitled to his share (*m*).

Issue not subject to contingency of survivorship.

Whether the gift is original or substitutional, it is not necessary, in such cases as those now under consideration, that the issue should survive the tenant for life, or as it is sometimes put, there is no implication that the gift to the issue is subject to the same contingency of survivorship as the gift to the parents. Consequently, if the gift is to A for life, and after her death to the testator's nephews then living or their issue and a nephew dies in A's lifetime, leaving issue, and they also die in A's lifetime, they nevertheless take their parent's share (*n*).

Effect of context.

But the context of the will may show that the contingency of survivorship was intended to apply to the issue (*o*).

(*i*) If the gift is to A for life, and after his death to B, C, and D, or such of them as shall be then living, and in case any of them shall be then dead, leaving children, his share to go to such children, this gives each of B, C, and D a vested interest, subject to be divested in favour of his children (if any), and if none, in favour of the survivors (if any) living at the death of A. See *Sturgess* v. *Pearson*, 4 Mad. 411, *ante*, p. 1290.

(*k*) The rule is thus stated by Kindersley, V.-C., in *Lanphier* v. *Buck*, as reported in 2 Dr. & Sm., at p. 495.

(*l*) *Per* Kindersley, V.-C., 2 Dr. & Sm., at p. 495.

(*m*) See *Salisbury* v. *Petty*, 3 Hare, 86, stated *ante*, p. 1290.

(*n*) *Lanphier* v. *Buck*, 34 L. J. Ch. 650; *Martin* v. *Holgate*, L. R. 1 H. L. 175; *Re Orton's Trusts*, L. R. 3 Eq. 375; *Re Pell's Trust*, 3 D. F. & J. 291; *Re Woolley*, [1903] 2 Ch. 206; *Banks's Trustees* v. *Banks's Trustees*, [1907] Sess. Ca. 125. Previous decisions were: *Stanley* v. *Wise*, 1 Cox, 432; *Lyon* v. *Coward*, 15 Sim. 287; *Masters* v. *Scales*, 13 Bea. 60; *Barker* v. *Barker*, 5 De G. & S. 753 (stated and commented on in the third edition of this work, Vol. II, pp. 174-5); *Bellamy* v. *Hill*, 2 Sm. & G. 328; *Re Bennett's Trust*, 3 K. & J. 280; *Crause* v. *Cooper*, 1 J. & H. 207; *Re Wildman's Trusts*, *ib.*, 299; *Harcourt* v. *Harcourt*, 26 L. J. Ch. 536 (deed).

(*o*) As in *Re Fox's Will*, 35 Bea. 163; *Re Coulden*, [1908] 1 Ch. 320. See *Bennett* v. *Merriman*, 6 Bea. 360; and *Re Kirkman's Trust*, 3 De G &

Where gift to issue is original they need not survive their parent.

It has been already mentioned that where there is a substitutional gift in favour of the children of a primary legatee, it does not take effect in favour of children who die in their parent's lifetime (*p*). This rule does not apply where the gift in favour of the children or issue of a primary legatee is original; they take whether they survive their parent or not (*q*).

"Leaving issue."

If the gift is to such of a number of persons as shall be living at the death of the tenant for life, and the issue of such of them as shall be then dead leaving issue, the better opinion is that if one of the primary legatees dies in the lifetime of the tenant for life, leaving issue and having had other issue who predeceased him, the latter take as well as the former, because the expression "leaving issue" has reference to the parent, and the gift is to "issue" generally, not "surviving issue" (*r*).

Where primary legatee predeceases testator.

Whether *Thornhill* v. *Thornhill* (*s*) was rightly decided or not, the rule laid down in it clearly does not apply where the gift is original, and not by way of substitution. As in *King* v. *Cleaveland* (*t*), where there were two life estates, followed by a gift to the children of A then living or their legal personal representatives; the next-of-kin of two children who died in the lifetime of the testator were held entitled.

Gift to issue of legatee predeceasing tenant for life.

Where the gift is to a class of children living at the death of the tenant for life, with a direction that if any of them shall die in his lifetime leaving issue, such issue shall take the share which the parent would have been entitled to if living, the issue of a child who dies before the testator in the lifetime of the tenant for life are entitled to their parent's share (*u*). But if a child survives the tenant for life and they both predecease the testator, the issue of the child cannot take (*x*).

J. 558; cited *ante*, p. 1301 n. (*p*). The decision in *Eyre* v. *Marsden*, 2 Kee. 564, was justified by the fact that the gift to the children contained a reference to the anterior gift to the parent. See also *Macgregor* v. *Macgregor*, 2 Coll. 192; *Penny* v. *Clarke*, 1 D. F. & J. 425; *Re Corrie's Will*, 32 Bea. 426, all of which may be disregarded since the decision in *Martin* v. *Holgate*.

(*p*) "Primary legatee" is here used as a convenient expression to indicate a person who would have been entitled to a share if he had survived the tenant for life.

(*q*) *Lanphier* v. *Buck*, 2 Dr. & Sm. 484; *Re Smith's Trusts*, 7 Ch. D. 665; *Re Woolley*, [1903] 2 Ch. 206. The decision in *Humfrey* v. *Humfrey*, 2 Dr. & Sm. 49, has not been followed. As to *Crause* v. *Cooper*, 1 J. & H. 207, see *Re Merrick's Trusts*, L. R. 1 Eq. 551; and as to *Harcourt* v. *Harcourt*, 26 L. J. Ch. 536, see *Lanphier* v. *Buck*, 34 L. J. Ch., at p. 659.

(*r*) *Re Smith's Trusts*, 7 Ch. D. 665, dissenting from dictum of Kindersley, V.-C., in *Lanphier* v. *Buck*, 2 Dr. & Sm., at p. 499. See also *Thompson* v. *Clive*, 23 Bea. 282.

(*s*) *Ante*, p. 1297.

(*t*) 4 De G. & J. 477. *Smith* v. *Smith*, 8 Sim. 353, is to the same effect.

(*u*) *Ashling* v. *Knowles*, 3 Dr. 593.

(*x*) *Re Kinnear*, 90 L. T. 537. Compare *Coulthurst* v. *Carter*, 15 Bea. 421.

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Where there is a clause of survivorship.

It frequently happens that there is a gift to a person for life, and after his death to children (or other descendants) of the testator then living and the issue of any then dead, and a clause of survivorship in the case of any then dead without leaving issue. The result is that the children living at the death of the tenant for life and the issue then living of deceased children take the whole (*y*).

Whether objects of primary and secondary gifts can compete.

VI.—Whether objects of Primary and Secondary Gifts take concurrently.—It follows from the nature of a substitutional gift that the object of it takes nothing unless the primary gift fails: he cannot take in competition with the object of the primary gift (*z*).

The same rule applies where the secondary gift is original (*a*).

Where primary gift is to several individuals.

Where there is a gift to a number of individuals, A, B, C and D, or their issue, and A dies before the period of distribution, leaving issue, they take one-fourth, concurrently with B, C and D, each of whom takes one-fourth (*b*).

Where primary and secondary gifts are both to classes.

Where there is a gift to a class, followed by a substitutional gift to another class (*e.g.*, "to my nephews and nieces or their children") the question sometimes arises whether members of both classes take concurrently, or whether substitution only takes place as between the two classes themselves. If all the members of the original class are living at the time of distribution, or if they are all dead, the question does not arise, for in the former case the members of the original class take, to the exclusion of the second class, and in the latter case the members of the second class take (*c*). If members of both classes are in existence at the period of distribution the following rules seem to express the result of the authorities:—

(*y*) *Eyre* v. *Marsden*, 2 Kee. 564, 4 My. & Cr. 231; *Masters* v. *Scales*, 13 Bea. 60; *Buckle* v. *Fawcett*, 4 Ha. 536. Compare those cases where the gift is to a class of persons for life in equal shares, with remainder as to each share to the issue of each dying leaving issue, and a clause of survivorship as to the share of any dying without issue: *Goodman* v. *Goodman*, 1 De G. & Sm. 695; *Cross* v. *Maltby*, L. R. 20 Eq. 378, and other cases cited *post*, pp. 2050 *seq.*

(*z*) *Whitcher* v. *Penley*, 9 Bea. 477; *Penley* v. *Penley*, 12 Bea. 547; *Margitson* v. *Hall*, 10 Jur. (N.S.) 89, and other cases cited *post*, p. 1307, n. (*f*). See *Ralph* v. *Carrick*, 11 Ch. D. 873, stated *post*, p. 1570.

(*a*) *Johnson* v. *Cope*, 17 Bea. 561; *Re Coulden*, [1908] 1 Ch. 320; *Re Rawlinson*, [1909] 2 Ch. 36.

(*b*) *Price* v. *Lockley*, 6 Bea. 180, and other cases cited *ante*, p. 1288.

(*c*) *Sparks* v. *Restal*, 24 Bea. 218; *Margitson* v. *Hall*, 10 Jur. (N.S.) 89; *Timins* v. *Stackhouse*, 27 Bea. 434; and see *per* Byrne, J., in *Re Coley*, [1901] 1 Ch. at p. 43. This was a case on a settlement, as were also *Re Cleland's Trusts*, 7 L. R. Ir. 74, and *Re Lund's Settlement*, 89 L. T. 606. In *Willis* v. *Plaskett*, 4 Bea. 208, and *Johnson* v. *Cope*, 17 Bea. 561, the gift to the children was substantive, not substitutional. As to the question whether the members of the second class take *per stirpes* or *per capita*, see *Shailer* v. *Groves*, 11 Jur. 485, and the other cases cited in Chap. XLI, Section III. The rules as to gifts to "descendants," "next-of-kin," etc., are stated in Chap. XLI.

Rules as to classes taking concurrently.

(a) If the substitutional gift is to persons standing in a certain relation to the original class, and there are words of division, equality or the like, the members of both classes take concurrently; thus where the gift is "to my nephews and nieces or their issue, in equal shares," the issue of a nephew or niece dying after the testator and before the period of distribution will take concurrently with the other nephews and nieces (*d*).

(b) Whether the same result would follow in the absence of words denoting division, equality, or the creation of a tenancy in common, does not seem to have been decided, but in some modern cases there are dicta implying that if the substitutional gift is to persons described as standing in the relation of issue, next-of-kin, or the like, to the members of the original class, the members of both classes can take concurrently (*e*).

(c) If the substitutional gift is to persons described without reference to the members of the original class, and there are no words importing a division into shares, members of the substituted class cannot take concurrently with members of the original class. Thus in *Re Coley* (*f*) there was a limitation (by deed) to the children or grandchildren of A living at a certain time, and it was held that the sons and daughters of A living at that time took as joint tenants to the exclusion of the children of deceased sons and daughters.

Re Roberts.

In *Re Roberts* (*g*) a testator gave a share of residue to each of his two daughters by name for their respective lives, and directed that after their deaths their respective shares should be equally divided "between their respective children or legal representatives": it was held that the gift to the legal representatives was not intended to take effect as a substitutional gift in the event of any child of a daughter dying in her lifetime, but only in the event of her not having any child who survived the testator or was born after his death.

(*d*) *Armstrong* v. *Stockham*, 7 Jur. 230; *Shailer* v. *Groves*, 11 Jur. 485; *Re Gilbert*, 54 L. T. 752; *Re Miles*, 61 L. T. 359; *Finlason* v. *Tatlock*, L. R. 9 Eq. 258; *Neilson* v. *Monro*, 27 W. R. 936. The decision in *Re Sibley's Trusts*, 5 Ch. D. 494, where on the special language of the will the original class was held to include nephews dead at the date of the will, is referred to *ante*, p. 1295, and *post*, p. 1309.

(*e*) *Re Sibley's Trusts*, 5 Ch. D. 494; *Re Coley*, [1901] 1 Ch. 40; *Re Roberts*, [1903] 2 Ch. 200.

(*f*) [1901] 1 Ch. 40. A similar construction seems to have been adopted in *Amson* v. *Harris*, 19 Bea. 210; *Margitson* v. *Hall*, 10 Jur. (N.S.) 89; and *Holland* v. *Wood*, L. R. 11 Eq. 91; but in *Margitson* v. *Hall* the question did not arise, as all the children were living at the period of distribution. Compare *Re Cleland's Trust*, 7 L. R. Ir. 74; *Re Lund's Settlement*, 89 L. T. 606. See *Re Alderton*, [1913] W. N. 129, where each class was the object of an alternative original gift.

(*g*) [1903] 2 Ch. 200.

VII.—Substitution in place of Person dead at date of Will.—It is obvious that substitution, in the proper sense of the word, is impossible in the case of a person who is dead at the date of the will, because a gift to a dead person is of no effect. But where a testator is not certain whether a person is dead or not, or where he wishes to divide property among several persons then living, and the issue, next-of-kin, or the like, of a deceased person, and to provide by words of substitution for the death of any of the other legatees, he may make the clause of substitution serve both purposes by including the deceased person among the original legatees and making the words of substitution apply to him. In such a case the gift to his issue or next-of-kin is really a substantive gift by reference, but it is in form substitutional, and is commonly so called (*h*).

Gift to several persons *nominatim*.

(a) *Where prior gift is to individuals.*—An instance of this occurred in *Ive* v. *King* (*i*), where there was a gift to several persons *nominatim*, with a substitutional gift to their children in the event of their death : one of the prior legatees was dead at the date of the will, and it was held that her children took by substitution.

Rule in *Christopherson* v. *Naylor*.

(b) *Where prior gift is to a class.*—Where, however, the prior gift is to a class of persons, the principle laid down in *Christopherson* v. *Naylor* (*k*) applies, unless excluded by the context or the state of facts at the date of the will. Thus in *Re Webster's Estate* (*l*), where the gift was to "all the children of H., or in event of decease to their descendants share and share alike," it was held that the issue of a child of H. who was dead at the date of the will, were not entitled to share. This rule rests on the presumption that where a testator makes a bequest to persons described as a class, such as "my nephews and nieces," he means nephews and nieces living at the date of the will or thereafter to be born, and therefore if he adds a clause of substitution he does not intend it to apply to a nephew or niece who is dead at the date of the will (*m*).

(*h*) See the remarks of Chitty, J., in *Re Parsons*, 8 R. 430; stated *post*, p. 1315.

(*i*) 16 Bea. 46; *Hobgen* v. *Neale*, L. R. 11 Eq. 48. See also *Hannam* v. *Sims*, 2 De G. & J. 151; *Tarbutt* v. *Nicholson*, 123 L. T. 638 (beneficiaries named in this clause). *Barnes* v. *Jennings*, L. R. 2 Eq. 448, was the case of a deed.

(*k*) 1 Mer. 320 : the judgment is cited *ante*, p. 1296.

(*l*) 23 Ch. D. 737. As to *Congreve* v. *Palmer*, 16 Bea. 435, see *Wingfield* v. *Wingfield*, 9 Ch. D. 658.

(*m*) *Gray* v. *Garman*, 2 Ha. 268; *Parker* v. *Tootal*, 11 H. L. C. 143; *Re Hillman*, 103 L. T. 183; *Re Hotchkiss's Trusts*, L. R. 8 Eq. 643, *ante*, p. 1299; *Haberaham* v. *Ridehalah*, L. R. 9 Eq. 395; *Hunter* v. *Cheshire*, L. R. 8 Ch. 751; *Re Chinery*, 39 Ch. D. 614; *Re Musther*, 43 Ch. D. 569. See also *West* v. *Orr*, 8 Ch. D. 60; *Re Offiler*, 83 L. T. 758; *Re Barker*, 47 L. T. 38; *Kelsey* v. *Ellis*, 38 L. T. 471; *Atkinson* v. *Atkinson*, Ir. R. 6 Eq. 184.

Presumption rebutted by state of facts.

But this presumption is rebutted if the state of facts at the date of the will shows that the testator meant to include deceased persons in the original class. Thus in *Gowling* v. *Thompson* (*n*) the testator gave his residue to his "brothers and sisters or their issue"; at the date of the will all his brothers had been dead several years: it was held that he referred to his brothers and sisters as *stirpes*, in order to show how the property was to be divided, and that the issue of such of them as were dead at the date of the will were entitled to share.

Presumption not rebutted by relationship to testator.

It is probable that in the majority of cases a testator who makes a bequest in favour of a class of his relations, with a clause of substitution in favour of their issue, has the same intention as the testator in *Gowling* v. *Thompson*, and refers to the original class in order to show how he wishes his property to be divided. And in *Re Smith's Trusts* (*o*), where the testatrix directed her property to be equally divided amongst her brothers and sisters, and should any of them be dead, their share was to be equally divided amongst their children, Jessel, M.R., declined to attribute to the testatrix "the capricious intention" of including children of a brother who died after the will, and of excluding the children of one who died before the will. Again in *Re Sibley's Trusts* (*p*) the gift was to A for life, and after her death to "all and every the children of F. or their issue in equal shares": F. had six children, four of whom were dead at the date of the will, and two survived the tenant for life, and Jessel, M.R., held that the issue of the four deceased children were entitled to share. The learned Judge thought that it was improbable, having regard to the relationship between the parties, that the testator should favour the surviving children at the expense of the issue of the deceased children; he also thought that the expression "all and every the children" conveyed the idea of more than two. The decision, however, has not been approved, and cannot be considered as establishing an exception to the general rule (*q*).

Re Sibley's Trusts.

In *Re Chinery* (*r*), Stirling, J., said: "I confess that, apart from the authorities, I should have had a strong inclination to

Re Chinery.

(*n*) L. R. 11 Eq. 366, n. Followed in *Barnaby* v. *Tassell*, L. R. 11 Eq. 363. The decision in *Re Sibley's Trusts*, *supra*, was partly based on the same ground. *Walsh* v. *Blayney*, 21 L. R. Ir. 140, in which these cases are discussed, was not a case of substitution, but of executory limitation. The principle was not applicable in *Crook* v. *Whitley*, 7 D. M. & G. 490, because the gift was to "the present nieces of A."

(*o*) 5 Ch. D. 497, n.; see *Re Brown*, 58 L. J. Ch. 420.

(*p*) 5 Ch. D. 494; see *Re Hickey*, [1917] 1 Ch. 601.

(*q*) See *Re Webster's Estate*, 23 Ch. D. 737.

(*r*) 39 Ch. D. 614. See *Re Musther*, 43 Ch. D. 569.

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follow the opinion of the late Master of the Rolls (*s*), which seems to me more likely to give effect to the testator's intention, but the weight of authority is against his view.

May be rebutted by context.

The presumption may of course be rebutted by the context, but the authorities do not afford much guidance as to the nature of the context required for the purpose. In *Phillips* v. *Phillips* (*t*) the testator gave a legacy to each and every of his cousins and directed that "if it shall happen that any of these my said cousins shall die in my lifetime and leave issue," the legacy which would have been payable to the deceased should be paid to his or her children; the testator authorised his executors to make inquiries as to the children of cousins who might have died in his lifetime; Stuart, V.-C., in deciding that the children of cousins who were dead at the date of the will were entitled to legacies, relied partly on the words referring to death in the testator's lifetime and partly on the direction to make inquiries.

"Or their descendants."

In *Re Hickey* (*u*) the testator gave a legacy to "the descendants of A or their descendants living at my death." A had six children, one of whom was dead at the date of the will leaving children and grandchildren. The other five children of A survived the testator. Neville, J., held that the words "living at my death" governed the whole gift; and that there was a direct gift of five-sixths to the five surviving children of A as tenants in common, and of the remaining one-sixth to the grandchildren of A who survived the testator as joint tenants.

Rule in *Loring* v. *Thomas*.

The most important class of cases in which the general rule is excluded by the context, is that governed by the decision in *Loring* v. *Thomas* (*x*), where a testatrix devised real estate in trust (after successive life estates) to sell, and to pay and divide one-fourth of the proceeds equally between all and every the children of her late aunt D., and the other shares between the children of her late aunts E. and M. and her uncle F.; provided that if "any child or children of the said" D., E., M. and F. "shall die in my lifetime" leaving children who should survive her and attain twenty-one, then "the child or children of each such child so dying in my lifetime shall represent and stand in the place of his, her or their deceased parent or respective parents, and shall be entitled to the same share or shares which

(*s*) Sir George Jessel, as expressed in *Re Smith's Trusts*, 5 Ch. D. 497, n.

(*t*) 10 Jur. (N.S.) 1173. The decision of the same Judge in *Parsons* v. *Gulliford*, 10 Jur. (N.S.) 231, seems to have proceeded on a misapprehension of the decision in *Loring* v. *Thomas*, *infra*.

(*u*) [1917] 1 Ch. 601.

(*x*) 1 Dr. & Sm. 497; *Re Williams*, [1914] 1 Ch. 219; [1914] 2 Ch. 61; *Re Taylor*, 56 Sol. J. 175; *Re Kirk*, 113 L. T. 1204; *Re Rayner*, 134 L. T. 141 ("shall live to attain 21").

his, her or their deceased parent or parents would have been entitled to if living at my decease." Some of the children of the aunts and uncle had died before the date of the will, leaving children who survived the testatrix and attained twenty-one. It was held by Sir R. Kindersley, V.-C., that these children of predeceased children were entitled to shares. He observed that the words were not "if any of the *said* children" (*y*), or "any *such* child," but generally "any child or children," and ("shall die" being, on the authority of *Christopherson* v. *Naylor*, construed "shall have died" (*z*)) the predeceased children of an aunt answered the hypothetical description of children who *would have been entitled* if living at the testatrix's decease as literally as children who died between the date of the will and the testatrix's death.

Explanation of rule.

The *ratio decidendi* of *Loring* v. *Thomas* was "that what the children were to have taken was not the share of their deceased parent, but the share which their deceased parent would have been entitled to on a certain hypothesis" (*a*). The rule as so explained is a definite rule of construction, and its authority has been recognised by the Court of Appeal and the House of Lords (*b*). The cases of *Re Lambert* (*c*) and *Re Metcalfe* (*d*) were decided in accordance with it.

Inconsistent decisions.

It cannot be denied that the rule in *Loring* v. *Thomas* is an artificial rule, because in applying it the Court ignores the literal meaning of the will by inferring a different intention from provisions inserted *alio intuitu*. Inasmuch as it gives effect to the meaning of the testator, it is a beneficent rule,

(*y*) As to this, see *Re Thompson's Trusts*, 2 W. R. 218, 445, and other cases cited *post*, p. 2114. The distinction was rejected by Malins, V.-C., *Re Potter's Trust*, L. R. 8 Eq. 52, and *Re Lucas's Will*, 17 Ch. D. 788, *infra*, n. (*a*).

(*z*) The V.-C. also relied on the use by the testatrix of the expression "shall live to attain twenty-one," which was obviously not meant to exclude children who had attained twenty-one before the date of the will.

(*a*) *Per* Stirling, J., in *Re Chinery*, 39 Ch. D., at p. 618. See also *Re Chapman's Will*, 32 Bea. 382. The decision in *Re Potter's Trust*, L. R. 8 Eq. 52, may possibly be sustained on this principle: see *Re Hotchkiss's Trusts*, L. R. 8 Eq. 643. The decision in *Adams* v. *Adams*, L. R. 14 Eq. 246, may be treated as overruled, at all events so far as it impugns the authority of *Christopherson* v. *Naylor*.

(*b*) *Barraclough* v. *Cooper* (decided in 1905), [1908] 2 Ch. 121, n., where Lord Macnaghten quoted with approval the principle laid down by Kindersley, V.-C., that if the testator uses language so wide and general as to be no less applicable to a predeceased child than to a child living at the date of the will, then a direction that the issue of a deceased child shall represent or be substituted for their parent and take the share which their parent would have taken if living, must be held to apply to a predeceased child as well as to a child living at the date of the will.

(*c*) [1908] 2 Ch. 117.

(*d*) [1909] 1 Ch. 424. In this case, as in *Loring* v. *Thomas*, the gift was not to children of the testator, and Joyce, J., thought the distinction of importance. See also the remarks of Romer, L.J., in *Re Gorringe*, [1906] 2 Ch. 341, *infra*.

but it strains the conscience of Judges who think that whenever the language of a will is clear it should be construed literally, however harsh or capricious the result may be.

Re Offiler.

Thus in *Re Offiler* (*e*) the gift was upon trust for "my brothers and sisters," followed by a direction for the settlement of "the share of my brother James" and a provision that "if any of my other brothers or sisters shall die in my lifetime, leaving issue, any of whom shall be living at my death, such issue so living shall take . . . the share which such other brother or sister would have taken if then living." Buckley, J., held that *Loring* v. *Thomas* did not apply, and that the children of a sister who was dead at the date of the will were not entitled to share in the residue. The learned Judge said that the expression "my brothers and sisters" must mean "my brothers and sisters living at my death," but this is a statement of the legal effect of the expression, rather than of the sense in which the testator used it (*f*). The primary meaning of "my brothers and sisters" is "my brothers and sisters now living" (*g*), and what *Loring* v. *Thomas* decided was that that meaning may be extended so as to include brothers and sisters dead at the date of the will if the testator uses a clause of substitution in a particular form. It is difficult to see any substantial difference between the will in *Loring* v. *Thomas* and that in *Re Offiler*.

Re Cope.

Again in *Re Cope* (*h*) the literal construction of words importing futurity was adopted. In that case the will contained (in addition to the quasi-substitutional clause) a proviso which obviously referred to children living at the date of the will, and this was supposed to indicate that the testator did not intend to benefit the children of any child who was dead at the date of the will. The proviso in question did no doubt create a difficulty which did not exist in *Loring* v. *Thomas*. The language of the learned Judges, however, shows a strong disinclination to follow the decision in *Loring* v. *Thomas* in cases where the language of the substitutional gift can be satisfied by confining it to children living at the date of the will.

In *Re Brown* (*i*) the literal construction was also adopted. There the testator gave legacies of £500 to each of the children of a deceased daughter specifically referring to her as being dead, so that no grandchildren were unprovided for.

(*e*) 83 L. T. 758.

(*f*) If this had been the sense in which the testator used the words, the quasi-substitutional gift would in effect have run thus: "If any of my other brothers and sisters living at my death shall die in my lifetime," etc.

(*g*) See the authorities cited *ante*, pp. 1298, 1299, especially the remarks of James, V.-C., in *Re Hotchkiss's Trusts*, L. R. 8 Eq. 643.

(*h*) [1908] 2 Ch. 1 (C. A.), distinguished in *Re Williams*, [1914] 2 Ch. 61.

(*i*) [1917] 2 Ch. 232.

Gorringe v. *Mahlstedt.*

It is hardly necessary to say that if the primary gift is confined to children living at the date of the will, or if the testator refers to the fact that one of his children is dead at the date of the will, and makes provision for his or her issue, this affords a strong presumption that whenever he refers to " my children " he means his children then living. Thus in *Gorringe* v. *Mahlstedt* (*k*), where the testator gave his residue to " all or any my children or child (other than R.) who shall be living at my death and attain twenty-one," and provided that " in case any of my children (other than R.) shall predecease me leaving any child or children living at my death, then such child or children of my deceased child (other than R.) shall take the share which his, her or their parent would have taken if such parent were living and over the age of twenty-one years at my decease "; it was held by Joyce, J., Romer, L.J., and the House of Lords, against the opinion of Vaughan Williams and Fletcher Moulton, L.JJ., that the children of a son who was dead at the date of the will were not entitled to share. The most important points of difference between this case and *Loring* v. *Thomas* are that in *Gorringe* v. *Mahlstedt* the testator began by giving legacies to four children of his deceased son and an annuity and legacy to his son R.; that the gift of residue was to children " who shall be living at my death " (words obviously inappropriate to a deceased child), and that the words " in case " by which the clause of quasi-substitution began were too purely hypothetical to be construed as referring to the death of his deceased son. Romer, L.J., also laid stress on the fact that in *Loring* v. *Thomas* the gift was not to the children of the testatrix: in such a case the general nature of the testator's language might be due to his not being sure of the state of the families which he desired to benefit. But independently of this consideration, the meaning of the will in *Gorringe* v. *Mahlstedt* was sufficiently clear to exclude the rule in *Loring* v. *Thomas*.

Where secondary class take by independent gift.

(c) *Where secondary gift is original.*—The distinction between original and substitutional gifts has been already pointed out (*l*).

Concurrent gift to two classes of descendants.

The simplest case of original gift is where two classes take concurrently under the same clause. Thus if property is given to A for life, and after his death to the children of A, who shall be living at his decease, and the issue of any child who shall be then dead, such issue to take the share which their parent would

(*k*) [1907] A. C. 225, reversing the decision of the Court of Appeal in *Re Gorringe*, [1906] 2 Ch. 341. In this case the gift was not strictly substitutional, as the original gift was confined to children living at the testator's death (*post*, p. 1305), but this does not affect the point under discussion. See a note on the case in 51 Sol. J. 493.

(*l*) *Ante*, p. 1301.

have been entitled to if then living, a child who dies in A's lifetime takes nothing, and his issue take under the substantive gift to them. In such a case the issue of a child who was dead at the date of the will are included in the gift (*m*).

Elliptic gift to two classes.

A gift " to my wife for life and after her death to my children then living or their heirs," has the same effect (*n*).

Reference to " share."

In *Tytherleigh* v. *Harbin* (*o*) the direction was that the issue were to take the share which their parent would have been entitled to " if living," but it seems that a simple reference to the parent's share does not prevent the issue of a child who was dead at the date of the will from taking. Thus in *Bebb* v. *Beckwith* (*p*) the gift was to all the children of J. B. and the issue of such of them as should be deceased, such issue to be entitled to the share of their deceased parents, and it was held that the issue of a child who was dead at the date of the will were entitled to take, Lord Langdale being of opinion that the effect of the reference to the parents' share was to limit the amount of the share to which the issue were entitled, and not to make the issue take by way of substitution. This appears to be in accordance with the principle now acted on by the Court in construing the word " share " (*q*).

Quasi-substitutional gift.

Where the gift takes the form of a bequest to a class of persons living at a certain time, as " to my brothers living at my death," followed by a proviso that " if any of my brothers shall then be dead," his issue shall stand in his place, or be entitled to his share, or words to that effect, the question whether the proviso applies to a brother dead at the date of the will is often one of difficulty, but the general rule is the same as that established with respect to strictly substitutional gifts, namely, that a gift to a class of persons, such as brothers, *prima facie*

(*m*) *Tytherleigh* v. *Harbin*, 6 Sim. 329; *Heasman* v. *Pearse*, L. R. 7 Ch. 275, and other cases cited in Chap. LVII. In *Re Thompson's Trusts* (2 W. R. 218, 445), the gift after the death of the tenant for life was to " my children then living and the child or children of such of my *said* children as shall then be dead," and it was held that the children of a child who was dead at the date of the will were not entitled. The decision is not very satisfactory, for the word " said " was obviously surplusage. The distinction drawn by Turner, L.J., between *Tytherleigh* v. *Harbin* and the case before him seems somewhat fine. As to *Etches* v. *Etches*, 3 Dr. 447, see *ante*, p. 1293. *Waugh* v. *Waugh*, 2 Myl. & K. 41, can only be supported (if at all) on the ground that the will contained a provision for the daughter of a person (dead at the date of the will) whose children would otherwise have been entitled under the rule in *Tytherleigh* v. *Harbin* (see *per* Kindersley, V.-C., 1 Dr. & Sm., at p. 521). As to this, see *Gorringe* v. *Mahlstedt*, *ante*, p. 1313.

(*n*) *Re Philps' Will*, L. R. 7 Eq. 151, and other cases cited in Chap. LVII. The same principle would probably apply to a gift to " my surviving children or their families," following an estate for life (*Burt* v. *Hellyar*, L. R. 14 Eq. 160).

(*o*) 6 Sim. 329.

(*p*) 2 Bea. 308. See also *Coulthurst* v. *Carter*, 15 Bea. 421; *Re Faulding's Trust*, 26 Bea. 263, distinguishing *Butter* v. *Ommaney*, 4 Russ. 70.

(*q*) See *Re Pinhorne*, [1894] 2 Ch. 276, and other cases cited *ante*, p. 1299.

means brothers living at the date of the will and that no one can claim as a representative of, or substitute for, a brother then dead (*r*).

West v. *Orr*.

Thus in *West* v. *Orr* (*s*) a testator gave his property to his wife for life, and after her decease to such of the children of A and B (both deceased) as should survive his wife and attain twenty-one or marry, but in case any of such children should be dead at his decease leaving issue, such issue were to take the share of their deceased parent. A child of A died before the testator, leaving issue who survived him, but it was held that they did not take, because, on the principle laid down in *Christopherson* v. *Naylor*, "the children of A and B" meant "the children now living of A and B" (*t*).

Rule in *Loring* v. *Thomas*.

The rule in *Loring* v. *Thomas* (*u*) applies to a quasi-substitutional gift (*x*). Thus in *Re Parsons* (*y*) the gift was (in effect) to "such of my children as shall be living at the death of my said wife, and such issue then living of my child or children as [*sic*] shall have died previous to the death of my said wife who [*sic*] shall either before or after the death of my said wife attain twenty-one, 'in equal shares *per stirpes*,' and so that the issue of deceased children shall take as tenants in common by way of substitution the share or respective shares only which the parent or respective parents would if living have taken." One of the sons was dead at the date of the will, leaving children for whom maintenance was provided by the will. It was held by Chitty, J., that these children took by original gift as members of a composite class.

Effect of context.

If the testator by his will expressly refers to the fact that one of the original class is dead, and gives legacies to his children, this affords a strong presumption that the principle of construction in *Loring* v. *Thomas* is not applicable (*z*).

(*r*) *Christopherson* v. *Naylor*, 1 Mer. 320; *Butter* v. *Ommaney*, 4 Russ. 73; *Smith* v. *Pepper*, 27 Bea. 86; *Re Brown*, 58 L. J. Ch. 420, and cases cited *ante*, p. 1296. There is much to be said for the view expressed by Malins, V.-C., in *Re Potter's Trust*, L. R. 8 Eq. 52, and *Hall* v. *Woolley*, 39 L. J. Ch. 106, but the authority of *Christopherson* v. *Naylor* is firmly established. See the remarks on the application of the rule to strictly substitutional gifts, *ante*, pp. 1295, 1296.

(*s*) 8 Ch. D. 60.

(*t*) The Court of Appeal held the gift to be substitutional, but it was not substitutional in the strict sense of the word, for nothing was given to any child who did not survive the tenant for life. The curious hiatus in the limitations of the will seems to have misled Baggallay, L.J.; the fact that a gift would produce an "extraordinary result" does not convert it from an original into a substitutional gift.

(*u*) *Ante*, p. 1310.

(*x*) *Re Chapman's Will*, 32 Bea. 382; *Re Woolrich*, 11 Ch. D. 663.

(*y*) 8 R. 430.

(*z*) *Gorringe* v. *Mahlstedt*, [1907] A. C. 225; *ante*, p. 1313. As there noted, this was not the case of a substitutional gift in the strict sense of the term.

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State of facts at date of will.

An intention to include the children of a person who was dead at the date of the will may appear from the state of facts at that time : as where a testator makes a gift to his " brothers," with a quasi-substitutional gift to their children, and it appears that at the date of the will he had only one brother living, two being then dead leaving children (*a*).

Legatee dead before birth of testator.

In *Wingfield* v. *Wingfield* (*b*), it was held that the next-of-kin of a person who died before the testatrix was born were not entitled to share under a gift to the testatrix's " brothers and sisters then living or their heirs."

Meaning of " gift over."

VIII.—Gifts over.—" Gift over " is not a term of art, but is a term of common use applied to certain kinds of executory devises and bequests. There is no authoritative definition, but the essential elements in a gift over are, first, that it is a gift to arise upon a future contingency, and secondly, that it operates by way of defeasance or shifting of a prior gift which would be absolute were the contingency not to occur. Thus a limitation in remainder, although it arises upon a future contingency, is not a gift over (*c*).

The effect of a gift over in divesting a prior vested interest is discussed in Chapter XXXVII. If the prior gift itself fails, the question arises whether its failure affects the gift over. This question is discussed in Chapter X, with reference to the Rule against Perpetuities, and in Chapter LVIII, with reference to the effect of the failure of a prior gift by reason of the object of it never coming into existence, or dying in the testator's lifetime.

Invalid gift over.

It is hardly necessary to say that a gift over is subject to the same rules of law as an original gift; it may therefore be void because it transgresses the Rule against Perpetuities (*d*) or because it is repugnant to the original gift (*e*), or because it is contrary to the provisions of the Settled Land Acts (*f*). In such

(*a*) *Re Jordan's Trusts*, 2 N. R. 57; *Giles* v. *Giles*, 8 Sim. 360; *Jarvis* v. *Pond*, 9 Sim. 549. Compare *Gowling* v. *Thompson*, L. R. 11 Eq. 366, n., and the other cases of strictly substitutional gifts cited *ante*, p. 1309.

(*b*) 9 Ch. D. 658.

(*c*) The distinction between a gift over and a remainder is pointed out by Wood, V.-C., in *Re Banks' Trust* (2 K. & J. 387) : " There is a gift of the funded property to Sarah for life, and then a gift over of the real estate [previously devised to her absolutely], which might well be construed to imply an estate tail in her as to that; and then there is a break, and then a gift of the funded property to Mrs. Walker absolutely, which I must hold to be a gift in remainder, for . . . the will is perfectly consistent if it is construed to give Sarah Banks a life interest in the funded property, and after her death to give the same property to Mrs. Walker absolutely."

(*d*) Chap. X.

(*e*) Chap. XVII.

(*f*) *Re Smith*, [1899] 1 Ch. 331.

a case the original gift takes effect absolutely, if it is in itself valid and effectual.

So if there is a gift over in the event of the legatee's marriage, and the gift over cannot take effect, being void, the property will devolve according to the other limitations of the will (*g*).

In *Re Ashton* (*h*), Sargant, J., says : "A gift by will which is absolute in the first instance may in general be modified by subsequent words cutting down or divesting the gift on any contingency the testator may think fit to select. But the contingency must not be so selected as to run counter to the general policy of the law. Thus gifts over on any of the following contingencies amongst others are bad—namely, (a) any contingency that is too remote, (b) the contingency of any marriage whatsover, (c) the contingency of alienation, (d) the contingency of bankruptcy, or (e) the contingency of intestacy" (*i*).

Instances of gifts over which are bad.

A provision that the interest of certain beneficiaries shall in the event of their being precluded by legislation from taking such interest go over to other persons is not void as against the public policy (*k*).

Sometimes a gift over is, on the face of the will, void for repugnancy or some other cause, and yet takes effect by reason of subsequent events. Thus in *Re Lowman* (*l*) a testator bequeathed property to H. for life, with remainder to his sons successively in tail male, with similar remainders to the sons of E., M., and F. As the property was personalty, it would have vested in the eldest son of H. absolutely, if there had been one, and the subsequent "remainders," or gifts over, would have been void. H., M., and E. survived the testator, but had no children; F. had two sons, the elder of whom predeceased the testator : it was held that the failure of the earlier gifts did not destroy, but accelerated, the gift to F.'s surviving son, and that he took absolutely. This principle was applied to freeholds in *Re Dunstan* (*m*).

Acceleration of gift over.

The effect of a gift over upon the construction of prior limitations in a will illustrates the general principle that the whole will must be looked at to determine the construction of any particular clause; but it may be convenient to consider shortly the

Effect of gift over on construction.

(*g*) *Morley* v. *Rennoldson*, [1895] 1 Ch. 449. See *Re Morgan*, 26 T. L. R. 398, and compare the cases on illegal conditions, *post*, p. 1437.

(*h*) [1920] 2 Ch. 481 (gift over on death if then mentally unfit).

(*i*) See, *e.g.*, *Re Crutchley*, [1912] 2 Ch. 335 (gift over on dying intestate or childless or under twenty-one).

(*k*) *Re Schiff*, 65 Sol. J. 174.

(*l*) [1895] 2 Ch. 348, dissenting from dictum of Knight-Bruce, V.-C., in *Harris* v. *Davis*, 1 Coll. 416. As to the decision of the same Judge in *Andrew* v. *Andrew*, 1 Coll. 686, see *ante*, p. 398.

(*m*) [1918] 2 Ch. 304.

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various ways in which a gift over may affect the construction of the other clauses in a will; these ways are in the main as follows :—

A gift over may :

(1) Imply a gift or enlarge a previous gift.
(2) Cut down or divest a vested gift.
(3) Determine vesting, and hence determine a class.
(4) Give validity to a condition.

These topics are treated of in their appropriate places in this work, and the following statement is only a summary.

Implication of estate tail.

(1) "Whether an estate be given in fee or for life, or generally without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue (*n*) the devisee will take an estate tail" (*o*). This illustrates (2) or (1) according as the prior devise is in fee or for life.

Implication of absolute interest.

A devise to A till twenty-one, with a gift over if he dies under twenty-one, gives A an estate in fee by implication defeasible upon death under twenty-one (*p*). A similar implication occurs in the case of personal estate.

Implication of cross remainders, before 1926.

Cross remainders will be implied where the testator gives over the whole of an estate upon the failure of issue of more than two tenants in common (*q*). But cross limitations are not implied so as to divest vested interests; *secus* as to contingent interests.

Duration of annuity.

The duration of an annuity may sometimes be inferred from a gift over (*r*); this is not always strictly a case of implication of estates or interests, but may be an illustration of words creating a tenancy in common being rejected by force of the context (*s*).

Fee cut down to estate tail.

(2) As already mentioned, a gift over in default of issue, if the words imply an indefinite failure of issue, would before 1926 cut down an estate in fee simple to an estate tail (*t*).

Similarly "heirs" will be held to mean heirs of the body if there is a limitation over in default of heirs to a collateral heir (*u*).

A devise to two in fee and if both die without issue then

(*n*) That is, if these words import an indefinite failure of issue; in a will made since 1837 such words standing by themselves would not have this effect (see *post*, p. 1914).
(*o*) *Machell* v. *Weeding*, 8 Sim. 4. This subject is discussed in Chap. XIX. It does not apply to wills coming into operation after 1925.
(*p*) *Cropton* v. *Davies*, L. R. 4 C. P. 159. See p. 623.
(*q*) *Doe* d. *Gorges* v. *Webb*, 1 Taunt. 234. See pp. 636 *seq.*
(*r*) *Armstrong* v. *Eldridge*, 3 B. C. C. 215; *ante*, p. 619.
(*s*) See *post*, p. 1773.
(*t*) See *ante*, p. 634.
(*u*) See *post*, p. 1808.

over, would, before 1926, give them joint estates for life with several inheritances in tail, with cross remainders between them in tail (*x*).

Estate tail not cut down.

But if there is a devise to A and the heirs of his body, with a gift over in the event of his dying without leaving issue living at his death, the gift over does not cut down the estate tail previously given to him (*y*)

Fee cut down to life estate.

A devise to A in fee, or an absolute bequest to A, may be cut down to a life estate or interest by a gift over on the death of A (*z*), but the words which cut down the absolute estate must be clear (*a*), and if the gift over is a gift of a life estate only, A will take the fee subject only to the life interest (*b*).

Effect on vesting.

(3) There seems to be no case where a gift over enlarges or diminishes a class, except where it determines vesting.

A gift over of the shares of members of a class who die under a certain age to the other members of the class has the effect of vesting the shares, because the gift over would have no effect if the shares did not vest till that age (*c*).

A gift in trust for A should he survive B, but if A does not survive B or attain twenty-one, then to C, vests the gift to A at twenty-one (*d*).

Bree v. *Perfect*.

In *Bree* v. *Perfect* (*e*), the gift was in trust to pay the interest to A for life, and at her death the principal to be equally divided "among such of her children as shall be living at the time of her death, as they respectively attain twenty-one," but if she should "die without leaving issue" over : it was held that the principal vested in the children living at the death of A (*f*). But the authority of the decision seems doubtful (*g*).

Where a legacy is charged upon land, a gift over in one event favours vesting in all other events (*h*).

A gift over is an argument for the immediate vesting of a residuary bequest (*i*).

(*x*) *Forrest* v. *Whiteway*, 3 Ex. 367.
(*y*) *Wright* v. *Pearson*, 1 Ed. 119; *post*, p. 1845.
(*z*) *Ante*, p. 1167.
(*a*) *Re Jones*, [1898] 1 Ch. 438; *Re Cobbold*, [1903] 2 Ch. 299.
(*b*) *Gatenby* v. *Morgan*, 1 Q. B. D. 685. See *post*, p. 1409.
(*c*) See *Re Edmondson's Estate*, L. R. 5 Eq. 389, *post*, p. 1328. In *Re Turney*, [1899] 2 Ch. 739, the gift over was to a person not a member of the class; the case is stated below, p. 1339.
(*d*) *Re Thomson's Trusts*, L. R. 11 Eq. 146.
(*e*) 1 Coll. 128.
(*f*) See also *Ingram* v. *Suckling*, 7 W. R. 386; *Re Bevan's Trusts*, 34 Ch. D. 716. These cases are referred to *post*, p. 1404.
(*g*) *Re Edwards*, [1906] 1 Ch. 570.
(*h*) See *Murkin* v. *Phillipson*, 3 My. & K. 257, *post*, p. 1369, n. (*n*).
(*i*) See *post*, pp. 1400 seq.

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A gift over in the event of a devisee dying under twenty-one shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being divested on a future contingency (*k*).

Where there is a gift to children after the death of their parent, and there is a gift over not in terms limited to the death before twenty-one of the children who survive that parent, the gift may be vested by the effect of the gift over (*l*).

Conditions *in terrorem*.

(4) Certain conditions annexed to gifts of personalty, though valid, are held to be ineffectual and *in terrorem* merely, unless there is a gift over (*m*). Conditions in partial restraint of marriage (*n*), or a condition not to contest the will (*o*) are instances; in the case of realty, however, they are effectual though there is no gift over (*p*).

Forfeiture on alienation or bankruptcy.

Restraints upon alienation, except where attached to the separate use of a married woman, are likewise bad (*q*), but absolute interests may be given over upon alienation before possession. A condition giving over an estate in fee on the bankruptcy of the devisee is void (*r*), but in the case of a life estate, a gift over upon bankruptcy or alienation is not necessary to make the condition effective (*s*).

If a condition subsequent is illegal or repugnant, a gift over will not make it effectual. In such a case the gift over as well as the condition is void (*t*).

Other effects of gift over.

A gift over may modify the original gift in other ways. Thus in *Hawkins* v. *Hamerton* (*u*) there was a gift to the testator's children for life, and after their death to their children in equal shares, with a gift over of the share of any son or daughter dying without leaving issue, to the survivors and their issue in equal shares : it was held that the gift over showed that the original gift was to the grandchildren *per stirpes* and not *per capita*.

(*k*) *Phipps* v. *Ackers*, 9 Cl. & Fin. 583. See *Finch* v. *Lane*, L. R. 10 Eq. 501.
(*l*) *Re Knowles*, 21 Ch. D. 806.
(*m*) Chap. XXXIX, *post*, p. 1442.
(*n*) *Ibid.*, *post*, p. 1496.
(*o*) *Ibid.*, *post*, p. 1521.
(*p*) *Ibid.*, *post*, p. 1496.
(*q*) *Ibid.*, *post*, p. 1490.
(*r*) *Ibid.*, *post*, p. 1475.
(*s*) *Ibid.*, *post*, p. 1480.
(*t*) *Ibid.*, *post*, p. 1437.
(*u*) 16 Sim. 410. See *Re Corbett's Trusts*, Johns. 591; and *Auger* v. *Beaudry*, [1920] A. C. 1010.

So a gift over may show that the testator, in framing the original gift, uses the word "vested" as meaning "payable" or "indefeasible" (*r*), or uses the word "issue" as meaning "children" (*s*).

Construction of gifts over.

Many of the rules as to the construction of contingent gifts have especial reference to gifts over; such, for example, are the rules as to the construction of gifts to take effect on the death of a prior legatee, whether the words refer to death simply (*t*), or to the event of the death of the prior legatee in some contingency (*u*): gifts to take effect in default of the issue of a certain person (*x*): gifts to survivors (*y*): these rules are discussed in other parts of this work, and it is here proposed to refer shortly to some miscellaneous questions arising on the construction of gifts over.

Literal construction.

If the language of a gift over is clear, it will be construed literally. Thus, suppose the gift is to A and B for life, and on their death to their children, and in the event of either one dying without children, his share to go to the other; in such a case, if both die without children, the survivor takes the whole (*z*). So if there is a gift to A, and in the event of his predeceasing the testator to B, and A and the testator die at the same instant, the gift over does not take effect (*a*). *Amherst* v. *Lytton* (*b*) was decided on this principle.

Wide construction.

But in *Avelyn* v. *Ward* (*c*) the testator devised land to A and his heirs on condition of his executing a release, and if he should neglect to give such release, the testator devised the land to B: A died in the testator's lifetime, and it was held that the gift over took effect. Lord Hardwicke construed it as a conditional limitation, and said (in effect) that in the case of such a limitation it is not necessary that every particular fact shall take place, but the limitation is to be construed according to the sense and intention of the testator, which was, in substance, that if no release was executed, the estate should go over.

This liberal canon of construction is frequently applied (*d*).

(*r*) *Re Baxter's Trusts*, 10 Jur. (N.S.) 845, and other cases cited *post*, p. 1328; see Chap. LVII, *post*, p, 2117.

(*s*) *Post*, p. 1568.

(*t*) Discussed in Chap. LVI.

(*u*) Discussed in Chap. LVII.

(*x*) Discussed in Chap. LII.

(*y*) Discussed in Chap. LV.

(*z*) *Drennan* v. *Andrew*, 36 L. J. Ch. 1.

(*a*) *Elliott* v. *Smith*, 22 Ch. D. 236. See *Wing* v. *Angrave*, 8 H. L. C. 183; and now section 184 of the Law of Property Act, 1925.

(*b*) 5 Br. P. C. 254; Fearne, C. R. 238, stated p. 1334, *s. n. Amherst* v. *Darnelly*.

(*c*) 1 Ves. sen. 420. Followed in *Re Sheppard's Trust*, 1 K. & J. 269.

(*d*) See *Luxford* v. *Cheeke*, 3 Lev. 125, and other cases cited *post*, pp. 1334 *seq.*; *Darrel* v. *Molesworth*, 2 Vern. 378, and other cases cited

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Discrepancy between original gift and gift over.

Difficulty in construing gifts over arises where the original gift is subject to one contingency, and the gift over is to take effect on another contingency, or for some other reason the gift over does not " fit " the original gift.

In some cases the gift over is read strictly. Thus in *Re Edwards* (*e*) a testatrix gave property in trust for her children who attained twenty-one or married, with a gift over to other persons in the event of her death " without leaving any children surviving me " : she only had one child, who survived her and died in infancy : it was held that the gift over did not take effect, and that there was an intestacy.

In some cases, however, the gift over will be modified. Thus if property is given to A for life, and after his death to his children, with a gift over in the event of his dying " without leaving any child," and he has children who take vested interests and die before him, the gift over will be read as if it had been " without having had any child," in order not to defeat the vested interests (*f*).

This principle of construction will not readily be applied where the subject-matter of gift is an annuity, which necessarily involves the notion of personal enjoyment (*g*).

Where a testator gives property to A for life, and after his death to his children, " and if he shall die unmarried and without leaving a child," then over : here " unmarried " will, as a general rule, be read " not leaving a widow," because the word " unmarried " would be senseless (*h*).

Another example of a gift over being modified occurred in *Home* v. *Pillans* (*i*), where a gift over in the event of the legatee's death, leaving children, was held to mean death under twenty-one, the original gift being contingent on the legatee (a female) attaining that age. But this construction is not, it seems, one

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post, pp. 2089 seq.; *Jones* v. *Westcomb*, Pre. Ch. 316; *Scatterwood* v. *Edge*, 1 Salk. 229, and other cases cited *post*, pp. 2131 *seq.*

(*e*) [1906] 1 Ch. 570. *Re Hamlet*, 39 Ch. D. 426, was the converse case. The decision of Malins, V.-C., to the contrary in *Kidman* v. *Kidman*, 40 L. J. Ch. 359, is founded on a misapprehension of the decision in *Re Wrangham's Trust*, 1 Dr. & Sm. 358 : *per* Romer, L.J., in *Re Edwards*, *supra*.

(*f*) *Re Thompson's Trusts*, 5 De G. & S. 667; *Maitland* v. *Chalie*, 6 Madd. 243; *Casamajor* v. *Strode*, 8 Jur. 14; *Ex p. Hooper*, 1 Drew. 264; *Marshall* v. *Hill*, 2 Man. & Sel. 608; *Kennedy* v. *Sedgwick*, 3 K. & J. 540; *Treharne* v. *Layton*, L. R. 10 Q. B. 459. *Re Cobbold*, [1903] 2 Ch. 299 (see correction in *Re Davey*, [1915] 1 Ch. at p. 847).

(*g*) *Re Hemingway*, 45 Ch. D. 453.

(*h*) *Doe* d. *Everett* v. *Cooke*, 7 East, 269; *Re Sanders' Trust*, L. R. 1 Eq. 675; *Re King*, 62 L. T. 789; *Re Chant*, [1900] 2 Ch. 345. As to the meaning of " unmarried," see Chap. XXXV, *ante*, p. 1251.

(*i*) 2 Myl. & K. 15, stated and commented on, *post*, p. 2107. Other examples are *Grimshawe* v. *Pickup*, 9 Sim. 591; *Thackeray* v. *Hampson*, 2 S. & St. 214; *Desbody* v. *Boyville*, 2 P. W. 547. See also *Doe* d. *Everett* v. *Cooke*, 7 East, 269, and other cases cited in Chap. XVIII, p. 592.

generally applicable, and in *Re Schnadhorst* (*k*), where the gift was to A for life and then to the testator's children who should attain twenty-one or (in the case of daughters) marry, with a gift over as to the share of any child dying leaving issue, it was held that this meant death at any time.

Alteration of "or" into "and"; and conversely.

Cases sometimes occur where the Court goes so far as to change the wording of a gift over in order to give effect to the testator's intention. Thus, where property is given upon the happening of either of two events, such as the legatee attaining twenty-one or marrying, and there is a gift over on his death under twenty-one or unmarried, "or" in the gift over will be read "and," so as to make it consistent with the prior gift (*l*). So if property is given to A absolutely with a gift over in the event of his "dying without children," this will be read as "dying without issue" (*m*).

"Children" read "issue."

Double event.

Ormerod v. *Riley*.

In *Ormerod* v. *Riley* (*n*) the testator, who was entitled to certain freehold and copyhold estates for life, with remainder to his children, gave his residuary real and personal estate equally to his four children, and directed that each of his three younger children should sell and convey a certain part of the estates to which he was entitled for life to his eldest son; and in case any of the three should refuse so to do he directed that such child's share in his (the testator's) real and personal estate should go over to his said eldest son, and that the child so refusing should take no benefit under his will; and he declared that the share of his daughter A (one of the three younger children) should be settled for her separate use for life, and after her death for her children equally; and he willed and desired that his said daughter and her husband should settle and assure the said property to which he himself was entitled for life upon trusts corresponding with those already declared concerning her share of his own estate; and in case she and her husband should refuse to make such settlement then that the property given by his will should go over to his other three children in equal shares. A and her husband refused to sell the share and refused to make the settlement directed. It was held that as the testator had

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(*k*) [1902] 2 Ch. 234, following the general principal laid down in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, *post*, p. 2103.

(*l*) See *Grant* v. *Dyer*, 2 Dow. 73, and other cases cited *ante*, p. 583. Where the question of changing "or" into "and" in a gift over on death under twenty-one or without issue, or the like, following an absolute gift (as in *Soulle* v. *Gerrard*, Cro. Eliz. 525) is also discussed.

(*m*) *Parker* v. *Birks*, 1 K. & J. 156 (where the earlier cases are cited); *Re Synge's Trust*, 3 Ir. Ch. 379. As to *Doe* v. *Webber*, 1 B. & Ald. 713, and *Doe* v. *Simpson*, 5 Scott, 770, see *post*, p. 1881.

(*n*) 13 L. T. (N.S.) 571.

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not provided for the double refusal both gifts over were nugatory and void.

Similarly where the original gift is subject to two contingencies a gift over to take effect on one of them is inoperative (*o*).

And where the original gift is subject to a condition, with a gift over by way of defeasance which does not fit the condition, the effect sometimes is that the gift over is void and the original gift becomes absolute (*p*).

A gift over may also be inoperative where the original gift is absolute, although, read literally, the event on which the gift over is to take effect has happened. Thus in *McCormick* v. *Simpson* (*q*) the gift was to J. C. or his eldest son, "and in case of the death of the said J. C. without such issue male as aforesaid," then over; J. C. had a son, and they both survived the testator, but the son predeceased J. C.: it was held that the gift over did not take effect.

Gifts in default of appointment.

Gifts in default of appointment under powers bear a superficial resemblance to gifts over, but they are essentially different in substance. A gift in default of appointment is *prima facie* vested, subject to be divested by an exercise of the power (*r*). Therefore a gift in default of appointment may take effect, although the power itself is void for remoteness, or cannot be exercised, or fails by the death of the donee in the lifetime of the testator (*s*).

The question whether a gift in default of appointment is subject to a qualification applying to the objects of the power, is discussed elsewhere (*t*).

(*o*) See Chap. XXXVII.

(*p*) *Re Catt's Trusts*, 2 H. & M. 46; *Musgrave* v. *Brooke*, 26 Ch. D. 792, see *post*, p. 1461.

(*q*) [1907] A. C. 494.

(*r*) *Ante*, p. 762. As to the effect of the death, in the testator's lifetime, of one of several persons to whom the property is given in default of appointment, see *post*, p. 1778.

(*s*) *Ante*, pp. 283, 823; *Nichols* v. *Haviland*, 1 K. & J. 504. If a gift over is expressed to take effect in an event which implies the existence of a certain person, and that person never comes into existence, or predeceases the testator, the Court will, if possible, give effect to the gift over. But these cases rest on a different principle, namely, that of an implied intention. See Chap. LVIII.

(*t*) *Ante*, p. 823.

CHAPTER XXXVII.

DEVISES AND BEQUESTS, WHETHER VESTED OR CONTINGENT.

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I.—Preliminary.—In this chapter Mr. Jarman deals with some general principles on which the Court proceeds in deciding whether a devise or bequest is vested or contingent. There are numerous rules of construction applicable to certain limitations of frequent occurrence in practice, especially those referring to death simply, or to death coupled with some contingency, or to survivorship, etc. These are considered in later chapters (*a*).

Meaning of "vested" and "contingent."

(i) *Meaning of "vested" and "contingent."*—The word "vested" has several meanings which are liable to be confused (*b*). As applied to land, when a person has an actual estate it is said to be vested in him: thus if land is devised to A for life and after his death to B, here A has a vested estate in possession and B has a vested estate in remainder (*c*): while if the devise is to A for life and if C shall be living at A's death then to B, here B has no estate, but a contingent remainder, which is merely the prospect or possibility of a future estate, and liable to be defeated by the death of C in A's lifetime. So

(*a*) Chaps. LVI, LVII, LV.

(*b*) See Hawkins on Wills (3rd ed.), p. 264, where the division of legacies according to the rules of the civil law is shown to be inapplicable to English law; Challis, R. P. (2nd ed.), p. 64.

(*c*) As to the estate of trustees to preserve contingent remainders, see *Smith* d. *Dormer* v. *Parkhurst*, 18 Vin. Abr. 413, 6 Br. P. C. 351; Fearne, C. R. 220; Challis, R. P. (2nd ed.) p. 133.

if land is devised to two persons for life, remainder to the survivor of them in fee, the remainder is contingent, for it is uncertain who will be the survivor (*d*).

Remainders are therefore divided into two classes, vested and contingent, and hence "vested" has come to have the meaning of certain, as opposed to something which is conditional or uncertain. Using the term in this sense, Mr. Fearne (*e*) divides vested estate into (i) estates vested in possession, where there exists a right of present enjoyment, and (ii) estates vested in interest, where there is a present fixed right of future enjoyment. This classification is also applicable to equitable interests in real and personal property.

Contingent interest, when transmissible.

(ii) *Contingent Interest, when transmissible.*—Mr. Jarman points out (*f*), that "a contingent interest will or will not be transmissible to the personal representatives of the legatee, according to the nature of the contingency on which it is dependent. If the gift is to children who shall live to attain a certain age, or shall survive a given period or event, the death of any child pending the contingency has obviously the effect of striking the name of such deceased child out of the class of presumptive objects; and, consequently, such an interest can never devolve to representatives, as it becomes vested and transmissible at the same instant of time (*g*). Where, however, the contingency on which the vesting depends is a collateral event, irrespective of attainment to a given age and surviving a given period, the death of any child pending the contingency works no such exclusion; but simply substitutes and lets in the legatee's representative for himself.

"Thus, where (*h*) a testator bequeathed his personal estate to A, and if he shall die without leaving issue, then over to B; in the event of B surviving the testator, and afterwards dying in the lifetime of A, testate or intestate, his contingent or executory interest will devolve to his executor or administrator (as the case may be)."

Leeming v. *Sherratt.*

So, in *Leeming* v. *Sherratt* (*i*), where a testator gave his

(*d*) Fearne, C. R. 9; *Whitby* v. *Von Luedecke*, [1906] 1 Ch. 783; and see *Re Barbre's Settlement*, 115 L. T. 294.

(*e*) C. R. 1.

(*f*) First ed., p. 777.

(*g*) "As far as I can discover, the only case in which a contingent future interest is not transmissible is where the being in existence when the contingency happens is an essential part of the description of the person who is to take": *per* Kay, J., in *Re Cresswell*, 24 Ch. D. at p. 107.

(*h*) *Pinbury* v. *Elkin*, 2 Vern. 758, 766; *King* v. *Withers*, Cas. t. Talb. 117, 3 B. P. C. Toml. 135; *Wilson* v. *Bayly*, *ib.* 195; *Barnes* v. *Allen*, 1 B. C. C. 181; *Taylor* v. *Graham*, 3 A. C. 1287; *Re Cresswell*, 24 Ch. D. 102.

(*i*) 2 Hare, 14. See also *Stanley* v. *Wise*, 1 Cox, 432; *Brocklebank* v. *Johnson*, 20 Bea. 205; *Re Smith's Will*, *ib.* 197.

freehold and the residue of his personal property to trustees, upon trust to sell the freehold and get in the personal property, and to pay and divide the money arising therefrom, so soon as his youngest child should attain the age of twenty-one, unto and equally amongst his children, and in case of the death of any of the children leaving issue, such issue were to take the share which the parent so dying would have been entitled to have; Wigram, V.-C., held that a child who attained his majority, but died before the youngest attained twenty-one, was, nevertheless, entitled to a share of the fund. The trustees, he said, are trustees of the residue for all the testator's children upon the happening of an event, which in fact has happened, namely, the youngest child attaining twenty-one. He added, that if there was any case which decided, as an abstract proposition, that a gift of a residue to a testator's children, upon an event which afterwards happened, did not confer upon those children an interest transmissible to their representatives, merely because they died before the event happened, he was satisfied that case must be at variance with other authorities.

On the same principle, where property is given to the children of A in the event of his leaving a child or children surviving him, and he has several children, some of whom die in his lifetime, and others survive him, the interests of all the children become vested on his death, so that the representatives of the deceased children take their shares (*j*). But, of course, the principle does not apply where the contingency of survivorship is expressly attached to the class who are to take (*k*).

Effect of an express direction when gift is to "vest."

(iii) *Construction of an express Direction as to Vesting.*—The strict and ordinary meaning of "vested" is "vested in interest" (*l*), and consequently if in a devise or bequest the testator has himself subjoined to the gift a declaration that it shall vest at a stated period, and if there be nothing in the context to show that the word "vest" is to be taken otherwise than in its strictly legal sense, all discussion is of course precluded; for a gift cannot vest at two different periods (*m*). But

(*j*) *Boulton* v. *Beard*, 3 D. M. & G. 608; *Bythesea* v. *Bythesea*, 23 L. J. Ch. 1004, and other cases cited *post*, p. 1702.

(*k*) *Sheffield* v. *Kennett*, 4 De G. & J. 593.

(*l*) *Per* Wood, V.-C., in *Re Baxter's Trusts*, 10 Jur. (N.S.) at p. 847. The dicta to the contrary in *Young* v. *Robertson*, 8 Jur. (N.S.) 825, are erroneous. See *Richardson* v. *Power*, 19 C. B. (N.S.) 780, and other cases cited *post*, pp. 2117 *seq.*

(*m*) The cases of *Russel* v. *Buchanan*, 7 Sim. 628, and *Glanvill* v. *Glanvill*, 2 Mer. 38, are referred to *post*, pp. 1252-3. See also *Comport* v. *Austen*, 12 Sim. 218; *Wakefield* v. *Dyott*, 4 Jur. (N.S.) 1098; *Selby* v. *Whittaker*, 6 Ch. D. 239, *post*, p. 1339; *Creeth* v. *Wilson*, 9 L. R. Ir. 216; *Armytage* v. *Wilkinson*, 3 A. C. 355, *post*, p. 1339.

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In what cases "vested" means "indefeasible."

a question generally arises in these cases as to the real meaning to be attributed to the word. If the testator has in other parts of the will treated the property devised or bequeathed as belonging to the devisee or legatee, and spoken of his share therein before the specified period (*n*), or if he has given over the property in case the devisee or legatee dies before the time named without issue, from which it is to be inferred that he is to retain it in every other case (*o*), the natural conclusion is, that the word is to be read as meaning "vested in possession," or "indefeasibly vested," and that the gift is vested, liable only to be divested on a particular contingency (*p*). An accruer clause (*q*), or gift over, to take effect in the event of death before the time named, or before attaining "a vested interest," *simpliciter*, although indecisive perhaps by itself (*r*), tends strongly to the same conclusion (*s*). The possibility of the devisee or legatee so dying, and of his leaving issue, who, if the gift is strictly contingent and does not devolve to them from their parent, are otherwise altogether (*t*) or in some probable event (*u*) unprovided for by the will, has in these, as in many other cases, furnished a powerful motive for adopting a more liberal interpretation. Where, upon the parent so dying, the property is expressly given to his issue, this motive is wanting, and the Court will be slow to depart from the primary meaning of the word "vest," and of associated expressions the natural import of which is contingency (*v*). So, if the will gives the issue the chance of taking through their parent, as if the property is directed to vest in the devisee or legatee on his attaining a specified age, or dying leaving issue (*w*). A gift of the interest until the arrival of the time named, also favours

In what cases literally construed.

(*n*) *Berkeley* v. *Swinburne*, 16 Sim. 275 (residue); *Poole* v. *Bott*, 11 Hare, 33 (separate gifts of real and personal estate); *Walker* v. *Simpson*, 1 K. & J. 713; *Barnet* v. *Barnet*, 29 Bea. 239.

(*o*) *Taylor* v. *Frobisher*, 5 De G. & S. 191. Lord Hardwicke seems to have used the word in this sense in *Haughton* v. *Harrison*, 2 Atk. 329.

(*p*) See *Young* v. *Robertson*, 8 Jur. (N.S.) 825, *supra*, n. (*l*). As to interests vested subject to be divested, see *post*, pp. 1337 *seq.*

(*q*) *Re Edmondson's Estate*, L. R. 5 Eq. 389.

(*r*) *Glanvill* v. *Glanvill*, 2 Mer. 38; *Re Blakemore's Settlement*, 20 Bea. 214; *Re Morse's Settlement*, 21 Bea. 174. The last two cases were upon deeds, and moreover proceeded upon the questionable distinction drawn by Leach, M.R., 3 My. & K. 411, between a gift over under age, and a gift over under age and without issue. See *post*, p. 1369, n. (*n*).

(*s*) *Re Baxter's Trusts*, 10 Jur. (N.S.) 845; *Re Morris*, 26 L. J. Ch. 688; *Best* v. *Williams*, [1890] W. N. 189. Cf. *Pickford* v. *Brown*, 2 K. & J. 426, where the gift over itself contained expressions favouring the suspension of vesting, as in *Russel* v. *Buchanan*, 7 Sim. 628, *post*, p. 1352. See also *Re Wrightson*, [1904] 2 Ch. 95, *post*, p. 1421.

(*t*) *Taylor* v. *Frobisher*, 5 De G. & S. 191.

(*u*) *Re Edmondson's Estate*, L. R. 5 Eq. 389.

(*v*) *Rowland* v. *Tawney*, 26 Bea. 67; and see *Comport* v. *Austen*, 12 Sim. 218; *Selby* v. *Whittaker*, 6 Ch. D. 239.

(*w*) *Re Thatcher's Trusts*, 26 Bea. 365.

the less strict construction, upon principles already explained (*x*). But if the interest is to be accumulated and paid at the same time as the principal fund (*y*); or if by the context a distinction is drawn between the terms "vested" and "payable" (*z*), the word "vest" must have its proper meaning (*a*).

Class may be enlarged by direction as to vesting.

Where the gift is in the first instance to a restricted class, as to children who shall survive A, a direction that the property shall vest, say, at the age of twenty-one, will not generally enlarge the class, but only impose a further condition of enjoyment on the class already defined (*b*). But where the direction was that the property should vest in "the children," thus giving a new description without the previous restriction, the restriction was held to be neutralised (*c*). So, where the gift was to such of the children as should attain twenty-five, and it was declared that if any child attained twenty-one and died before twenty-five his share should vest at his death, the shares were held to vest at twenty-one (*d*). In *Williams* v. *Russell* (*e*), a testator gave property in trust for A for life with remainder to her children who should be living at her death and attain twenty-one; by a subsequent proviso he declared that the children of A who had attained or should attain twenty-one or die before that age leaving issue, should be deemed to have attained a vested interest: it was held that this proviso operated as a new and additional gift, and that children of A who attained twenty-one and predeceased her, were entitled to share.

Reference to possession.

A direction that members of a class shall become "beneficially interested" at a certain time does not prevent them

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(*x*) *Simpson* v. *Peach*, L. R. 16 Eq. 208 ("payable" and "vested" exchanged meanings).

(*y*) *Re Thruston*, 17 Sim. 21; see also *Griffith* v. *Blunt*, 4 Bea. 248.

(*z*) *Ellis* v. *Maxwell*, 12 Bea. 104; see also *Parkin* v. *Hodgkinson*, 15 Sim. 293; *Re Thatcher's Trusts*, 26 Bea. 365; *Re Colley's Trusts*, L. R. 1 Eq. 496, where the strict construction was assumed. In *Sillick* v. *Booth*, 1 Y. & C. C. C. 121, and *King* v. *Cullen*, 2 De G. & S. 252, the context gave to the word "vested" in a gift over upon death before vesting a sense corresponding to the word "payable" used in the primary gift. "Paid" was held to mean "vested" in *Martineau* v. *Rogers*, 8 D. M. & G. 328. And sometimes where both words occur, they are held to be used indiscriminately: *Re Baxter's Trusts*, 10 Jur. (N.S.) 845; *Darley* v. *Percival*, [1900] 1 Ir. R. 129 (deed). See further on the meaning of "vested" in gifts over in case of the legatee dying before attaining a "vested" interest, *post*, p. 2117.

(*a*) In *Bythesea* v. *Bythesea*, 23 L. J. Ch. 1004, the will contained a declaration as to vesting which appears to have had little or no influence on the construction, *post*, p. 1701.

(*b*) *Re Payne*, 25 Bea. 556; *Re Parr's Trusts*, 41 L. J. Ch. 170; *Bickford* v. *Chalker*, 2 Drew. 327; *Draycott* v. *Wood*, 5 W. R. 158; *Williams* v. *Haythorne*, L. R. 6 Ch. 782 (though it was residue and another clause became surplusage).

(*c*) *Jackson* v. *Dover*, 2 H. & M. 209 (residue).

(*d*) *Mappin* v. *Mappin*, [1877] W. N. p. 207 (residue). See also *Dalton* v. *Hill*, 10 W. R. 396.

(*e*) 10 Jur. (N.S.) 168.

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from taking vested interests at an early period (*f*). But a direction deferring possession may throw light on the meaning of the word "vested" (*g*).

Fluctuating class.

It may here be noted that where property is given to a class, the members of which may be increased between the time of creating the remainder and the termination of the particular estate, although the interest of each member as he comes into existence is treated as vested, yet in some respects it is contingent, that is, the interest is not vested indefeasibly; for until the particular estate comes to an end, the share of each member is liable to be diminished by the addition of new members. This is why such gifts are liable to fail for contravening the Rule against Perpetuities, although interests which are vested in the proper sense of the word (that is, indefeasibly) are not within the Rule (*h*).

General rule as to vesting.

II.—General Rule in regard to Vesting.—"The law," says Mr. Jarman (*i*), "is said to favour the vesting of estates (*j*); the effect of which principle seems to be, that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As, therefore, a will takes effect at the death of the testator, it follows that any devise or bequest in favour of a person *in esse* simply (*i.e.*, without any intimation of a desire to suspend or postpone its operation), confers an immediately vested interest.

"If words of futurity are introduced into the gift, the question arises whether the expressions are inserted for the purpose of protracting the vesting, or point merely to the deferred possession or enjoyment."

Direction to transfer property in future.

A simple illustration of this question occurs in those cases where property is given to a person, followed by a direction that

(*f*) *M'Lachlan* v. *Taitt*, 28 Bea. 407; 2 D. F. & J. 449.

(*g*) *Re Wrightson*, [1904] 2 Ch. 95.

(*h*) Gray on Perpetuities, §§ 110, 110a.

(*i*) First ed. p. 726. See *Duffield* v. *Duffield*, 3 Bli. (N.S.) 260; *Re Wrightson*, [1904] 2 Ch. 95. The general principle is also referred to *post*, p. 1371, with especial reference to gifts of personal property.

(*j*) In addition to the general principle stated by Mr. Jarman, it may be mentioned that there are classes of cases in which vesting is specially favoured: namely (1) gifts to children by way of portion (*Re Knowles*, 21 Ch. D. 806, *post*, p. 1394); (2) Gifts of residue (*post*, p. 1394); (3) In *Re Gossling* ([1902] 1 Ch. 945), Swinfen Eady, J., seemed to accede to the argument that vesting is more favoured in gifts to individuals than in gifts to a class. Stuart, V.-C., appears to have thought that the rule was the other way (*King* v. *Isaacson*, 1 Sm. & G. 371).

The general principle in favour of vesting prevails in the law of Scotland: *Carlton* v. *Thompson*, L. R. 1 Sc. Ap. 232; *Taylor* v. *Graham*, 3 A. C. 1287. The Court will not supply words to prevent vesting: *Re Litchfield*, 104 L. T. 631.

it shall be paid or transferred to him on his attaining a certain age, or on some other event. Thus in *Farmer* v. *Francis* a testator gave his real and personal estate, subject to certain life interests, to the children of A living at her death, "to be divided share and share alike when and as they shall respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators and assigns." It was held, both as to the realty (*k*), and as to the personalty (*l*), that all the children (the youngest of whom was four years old) took vested interests at A's death. But the gift and the direction must be independent, for if the only gift is in the form of a direction to pay or transfer on the happening of a future event, the principle does not apply (*m*). So a simple gift to A "if" or "when" he attains a certain age, confers on him a contingent and not a vested interest (*n*). The question arises most frequently with reference to gifts of personalty (*o*).

Estates in possession and remainder.

Mr. Jarman continues (*p*): "It may be stated as a general rule, that where a testator creates a particular estate, and then goes on to dispose of the ulterior interest, expressly in an event which will determine the prior estate, the words descriptive of such event, occurring in the latter devise, will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting. Thus, where a testator devises lands to A for life, and after his decease to B in fee, the respective estates of A and B (between whom the entire fee simple is parcelled out) are both vested at the instant of the death of the testator, the only difference between the devisees being, that the estate of the one is in possession, and that of the other is in remainder (*q*).

Devises of reversions and remainders.

"On the same principle, where a person who is entitled to a reversion or remainder in fee, expectant on an estate tail in himself, or in any other person, by his will devises the property in question, in the event of the person who is tenant in tail dying without issue, this is construed as an immediate disposition of the testator's reversion or remainder; though, upon the face of the will, the devise presents the aspect of an executory

(*k*) 2 Bing. 151.
(*l*) 2 S. & St. 505.
(*m*) *Leake* v. *Robinson*, 2 Mer. 363, stated *post*, p. 1376.
(*n*) *Grant's Case* and other authorities cited, *post*, p. 1345.
(*o*) *Post*, p. 1375.
(*p*) First ed. p. 726.
(*q*) Ambiguous words are not enough to prevent this contruction: *Re Venn*, [1904] 2 Ch. 52.

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gift, to arise on a general failure of issue, which would clearly be void (*r*), unless, indeed, the will were subject to the newly enacted rules of testamentary construction, in which case the words would refer to issue living at the death (*s*). If the contingency described corresponds precisely with the event which determines the existing estate tail, no difficulty exists in applying this rule of construction; but it frequently happens that the terms used by the testator do not completely answer to the event in question; as, for instance, where the reference is to issue generally, and the subsisting estate is restricted to issue of a particular marriage or sex. In such cases, the reasonable conclusion would seem to be, that the discrepancy arises merely from an inaccuracy in the description of the reversion or remainder, and that it does not show a different interest to have been in the testator's contemplation; and such, accordingly, seems to have been the prevailing doctrine of the cases (*t*).

Words "in default," or "for want of," object of prior estates, how construed.

"It is to be observed, also, that where a remainder is limited *in default* or *for want* of the object or objects of the preceding limitation, these words mean, on the failure or determination of the prior estate or estates, and do not (as literally construed they would) render the ulterior estate contingent on the event of such prior object or objects not coming into existence. In short, they signify all that is comprehended in the word 'remainder,' being merely an expression employed by the testator in carrying on the series of limitations (*u*). The ulterior

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(*r*) *Ante*, p. 294.

(*s*) It will of course be remembered that Mr. Jarman wrote in 1844.

(*t*) *Wellington* v. *Wellington*, 1 W. Bl. 645, 4 Burr. 2165, *post*; *French* v. *Caddell*, 3 B. P. C. Toml. 257, *post*; *Jones* v. *Morgan*, Butl. Fea. C. R. App. 577. *Lytton* v. *Lytton*, 4 B. C. C. 441; *Egerton* v. *Jones*, 3 Sim. 409. Mr. Jarman adds, "The case of *Bankes* v. *Holme*, 1 Russ. 394, n, indeed, favours a more rigid construction; but Lord Eldon's strictures upon this case, in *Morse* v. *Lord Ormonde*, 1 Russ. at p. 405, afford ground to infer that it did not coincide with his own opinion. The strict rule there adopted certainly exacts from testators more of technical correctness than it has been usual to require, and clearly would not now be followed." See further as to the above cases, Chapter LII, and *Lewis* v. *Templer*, 33 Bea. 625.

(*u*) "In a former publication, the writer contented himself with simply stating this position, and a single case in support and illustration of it, conceiving that the rule of construction was too well established to be called in question; but subsequent experience taught him that it has not obtained so ready and unanimous an assent in the profession as, from the state of the authorities, was to have been expected. Indeed, even so recently as the case of *Ashley* v. *Ashley*, 6 Sim. 358, the Master reported that, under a devise to A for life, with remainder to her children, and, for want of such issue to B, the devise to B failed on A having a child—a conclusion which the V.-C. appears to have regarded as too plainly untenable for serious refutation. The reluctance to acquiesce in a construction at once so reasonable and so well sustained by authority, is remarkable, but probably is to be ascribed to the yet lingering influence of the long-exploded case of *Keene* v. *Dickson*, 1 B. & P. 254, n, where a contrary construction prevailed; and serves to show that the uncertainty produced by contradictory decisions is not easily dispelled." (Note by Mr. Jarman.)

estate, therefore, is a vested remainder, absolutely expectant on the failure or determination of the prior estate (*v*).

"Thus, it has been decided (*w*) that, where lands are devised to the first and other sons of A successively in tail, *and, in default of such sons*, to the daughters of A in tail, although it should happen that A has a son or sons, yet on his or their subsequently dying without issue, the devise in remainder to the daughters takes effect.

"So, where (*x*) a testator devised to E. for life, and, after her decease, to the first and every other son of her body lawfully to be begotten, the elder to be preferred to the younger, and, for want of such sons, to the daughter or daughters of E., share and share alike, *and in default of such issue of E.*, then to M.; it was held, that the devise to M. was a vested remainder, expectant on the determination of the prior successive life estates of E. and her sons and daughters, (the will being subject to the old law,) and those estates having expired *by the death of E.'s only daughter*, M.'s remainder fell into possession.

"Again, where (*y*) A. devised certain lands to D. for life; remainder to a trustee, to preserve contingent remainders; remainder to the first and other sons of D. and their heirs, *and for want of such issue*, to J. for life with remainders over; it was held that the sons of D. took successive estates tail, with a vested remainder.

"It is clear too, that where real estate is devised to A. in tail, and, in case he shall die without issue, then to B. in fee, and it happens that A. dies in the testator's lifetime, leaving issue, the ulterior devise to B. is held to take effect, although, literally, the contingency on which such devise is made dependent has not occurred; the intention being, it is considered, that the ulterior devise shall confer a vested remainder on B., which is *absolutely to take effect in possession on any event which removes the prior estate out of the way* (*z*). The case just suggested, however, cannot now arise under a will made or republished since 1837, as a devise in tail contained in such a will does not, by the recently enacted law, lapse by the death of the devisee in the testator's lifetime, leaving issue.

"Where, however, the ulterior estate is expressed to arise on a contingent determination of the preceding interest, and the

Rule where prior estate takes effect, but is determined in a different manner.

(*v*) Mr. Jarman's statement of the rule was adopted by Parker, J., in *White* v. *Summers*, [1908] 2 Ch. 256.

(*w*) *Doe* v. *Dacre*, 1 B. & P. 250, 8 T. R. 112; Hayes' Principles, p. 35.

(*x*) *Goodright* v. *Jones*, 4 M. & Sel. 88.

(*y*) *Lewis* v. *Waters*, 6 East, 336. See also *Hennessey* v. *Bray*, 33 Bea. 96; *Honywood* v. *Honywood*, 89 L. T. 378, 92 L. T. 814.

(*z*) *Hutton* v. *Simpson*, 2 Vern. 722; *Hodgson* v. *Ambrose*, Doug. 337.

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prior gift does in event take effect, but is afterwards determined in a mode different from that which is so expressed by the testator, the ulterior gift fails.

"As where (*a*) the devise was to A. for life, remainder to his first and other sons in tail, on condition that he and his issue male should assume a particular name, and in case he or they refused, then that devise to be void, and in such case the testator devised the lands over. A. survived the testator, complied with the condition, and then died without issue; and it was held in B. R., on a case from Chancery, and ultimately in the House of Lords, that the limitation over did not arise (*b*).

Devise during widowhood, with devise over on marriage.

"An exception to this rule, however, may seem to exist in a case which deserves especial attention, on account of the frequency of its occurrence, namely, where a testator makes a devise to his widow for life, if she shall so long continue a widow, *and if she shall marry*, then over; in which the established construction is, that the devise over is not dependent on the contingency of the widow's marrying again, but takes effect, at all events, on the determination of her estate, whether by marriage or death.

Devise over extended by implication to determination by death.

"In *Luxford* v. *Cheeke* (*c*), which is a leading authority for this doctrine, the testator devised to his wife for life, *if she should not marry again, but if she did*, then that his son H. should presently after his mother's marriage enjoy the premises, to him and the heirs of his body, with remainders over. The widow died without marrying again; but it was held, that the remainder took effect.

"*Gordon* v. *Adolphus* (*d*) was a case of the same kind. The bequest was to the testator's wife 'during her natural life, that is to say, so long as she shall continue unmarried; *but in case she shall choose to marry*, then and in that case' it was to be for the immediate use of the testator's daughter, and in case she should die without leaving issue, then over; and it was considered by Lord Camden, and afterwards in the House of

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(*a*) *Amhurst* v. *Darnelly*, 8 Vin. Ab. 221, pl. 21, 5 B. P. C. Toml. 254; see also *Sheffield* v. *Lord Orrery*, 3 Atk. 282, *post*, p. 1335.

(*b*) "Compare this case with *Avelyn* v. *Ward*, 1 Ves. sen. 420, and *Doe* v. *Scott*, 3 M. & Sel. 300, in which the lapse of a prior estate, on whose contingent determination the subsequent estate was to arise, was held not to defeat the subsequent estate. In order to reconcile these cases with *Amhurst* v. *Darnelly*, we must infer, that, in the latter case, had the estate of A. and his sons failed by lapse, the devise over would have taken effect. *Pari ratione*, it must be concluded, that had the prior devisee in those cases survived the testator and performed the condition, the devise over (if the whole interest had not been absorbed as it was by the first devisee) would not have taken effect." (Note by Mr. Jarman.)

(*c*) 3 Lev. 125; *Walpole* v. *Laslett*, 7 L. T. (N.S.) 526; *Re Martin*, 53 L. T. 34; *Re Cane*, 63 L. T. 746; *Re Seaton*, [1913] 2 Ch. 614, *post*, p. 1337.

(*d*) 3 B. P. C. Toml. 306; see also *Brown* v. *Cutter*, T. Ray. 427.

Lords, that the bequest over was not contingent on the event of the marriage of the wife.

"In these cases, therefore, the widow takes an estate *durante viduitate*, and the gifts over are vested remainders absolutely expectant on that estate, being to take effect, at all events, on its determination, and not conditional limitations dependent on the contingent determination of a prior estate for life.

"In *Lady Fry's Case* (*e*), Lord Hale said, it was all one as if the estate had been devised to the widow for life, and if she married, then to remain, which had been but an estate *quamdiu sola vixerit*. If, however, the devise had been framed in the manner suggested by this eminent and excellent Judge, the case would have been brought into very close resemblance to the case of *Sheffield* v. *Lord Orrery* (*f*), where a different construction prevailed. There A. devised his house, etc., to his wife for life, upon this express condition only, that *if she should marry again*, then the house, etc., should go forthwith to his eldest son and his issue. Lord Hardwicke held, that it was a contingent limitation to the son, to take effect only on the wife's marrying again. In *Luxford* v. *Cheeke*, he said, the penning was different; there, after the devise, were added these words, 'if she do not marry again,' which restrained the original limitation, and were the same as if they had been to the wife for life, 'if she so long continued a widow.' Here there were no such words in the original limitation; and though his Lordship added, 'but I do not lay much weight on this,' and proceeded to comment on other grounds for the construction, yet the remarks above quoted have always been considered as pointing out the true principle of the decision.

Devise over on marriage again, strictly construed.

"On the whole, then, the distinction would seem to be, that where the circumstance of not marrying again is interwoven into the original gift, the testator, having thus, in the first instance, created an estate *durante viduitate*, must generally be considered, when he subsequently refers to the marriage, to describe the determination *by any means* of that estate, and, consequently, the gift over is a vested remainder expectant thereon (*g*). On the other hand, where a testator first gives an absolute estate for life, and then engrafts thereon a devise

General conclusion from the cases.

(*e*) 1 Vent. 199; see also *Jordan* v. *Holkham*, Amb. 209, where Lord Hardwicke took a distinction between a devise during widowhood, and if she married again within a limited time.

(*f*) 3 Atk. 282.

(*g*) See acc. *Browne* v. *Hammond*, Johns. pp. 210, 213; *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184; *Underhill* v. *Roden*, 2 Ch. D. 494. In *Re Tredwell*, [1891] 2 Ch. 640, the principle here stated was treated by the C. A. as an application of the principle of construction established by *Jones* v. *Westcomb*, *post*, Chap. LVIII.

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over to take effect on the marriage of such devisee for life, the conclusion is, that the devise over is not to take effect unless the contingency happens" (*h*).

The construction in the former class of cases being that the limitations over take effect, at all events, on the determination of the widow's estate, whether by marriage or death, it is not displaced by the circumstance that some of those limitations (*e.g.*, a provision for the widow during the remainder of her life, expressly in case she marries,) can only take effect in the event of her marrying: although she should not marry, the other limitations will still take effect as vested remainders expectant upon her death (*i*).

Converse case.

Conversely, where a testator gives property to his wife so long as she remains unmarried, and directs that "at her death" it shall be divided among certain persons, this gift over takes effect on her remarriage (*j*).

When class ascertained.

Bainbridge v. *Cream.*

The general principle was extended in the case of *Bainbridge* v. *Cream* (*k*), where a testator gave lands to his wife for life, but if she married again he revoked them, and at her death or second marriage gave the lands to trustees for sale, the produce to be divided among certain persons (naming them), or such of them as should be living at the decease of his wife; the wife

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(*h*) The question whether the event of not marrying is or is not interwoven in the original gift (see *Chia Khwee Eng* v. *Chia Poh Choon*, [1923] A. C. 424) may be difficult of solution. In *Meeds* v. *Wood*, 19 Bea. 215, a testator gave real estate to his executor in trust for E. for her life, and directed the executor to pay her the rents every six months, "provided that if E. should marry," then over. The M.R. admitted the distinction taken in the text, but thought the direction to the executor to pay E. the rents limited the previous gift to so long as she remained a spinster, since "it was obvious the testator intended the rents to be paid to her herself," and if she married, she would no longer be entitled to receive them, except by the intervention of a trust for her separate use, which was inconsistent with the intention; he therefore held that the gift over took effect on the death of E., though she had never been married.

"In one case a devise which, in express terms, extended to widowhood only, was held to be enlarged by implication to the period of the vesting in possession of a remainder limited thereon. The devise was to the testator's wife for her life, provided she remained a widow; but if she married a second husband to I., *when he should attain his age of twenty-three years*; and it was held, that the widow had an estate till I. attained twenty-three, though she married again, *Doe* d. *Dean and Chapter of Westminster* v. *Freeman*, 1 T. R. 389, 2 Chitty's Cas. temp. Lord Mansfield, 498." (Note by Mr. Jarman.) See *Re Cabburn*, 46 L. T. 848.

(*i*) *Underhill* v. *Roden*, 2 Ch. D. 494. See also *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184; *Wardroper* v. *Cutfield*, 33 L. J. Ch. 605; *In b. Griffiths*, [1917] P. 59. In *Pile* v. *Salter*, 5 Sim. 411, it was held that a gift to the widow of one-third of the corpus "if she married again" following a life interest in the whole during widowhood, was necessarily contingent; "it would be absurd to give her one-third of the property in the event of her death." But this was disapproved and the absurdity denied by Jessel, M.R., in *Underhill* v. *Roden*. See also *Scarborough* v. *Scarborough*, 58 L. T. 851.

(*j*) *Stanford* v. *Stanford*, 34 Ch. D. 362; *Re Dear*, 61 L. T. 432.

(*k*) 16 Bea. 25. *Walpole* v. *Laslett*, 7 L. T. (N.S.) 526, is to the same effect.

married again, and the trustees sold; and it was held by Romilly, M.R., that the proceeds were divisible immediately notwithstanding the widow was still living. This decision was treated as a binding authority by Chitty, J., in *Stanford* v. *Stanford* (*l*) and was followed, though apparently with some doubt, by Stirling, J., in *Re Tucker* (*m*), and by Sargant, J., in *Re Warner* (*n*).

Other applications of the principle.

The general principle is not confined to gifts *durante viduitate*, but applies where the life estate of the widow is determinable on the happening of other events besides those of death and remarriage (*o*). It also applies where the prior gift is to a spinster until marriage (*p*), or to a person until he becomes bankrupt (*q*), with a gift over in case of marriage or bankruptcy. In these (marriage) cases also the remainder will generally take effect at all events on the determination of the prior estate.

Re Seaton.

The principle of *Luxford* v. *Cheeke* was applied in *Re Seaton* (*r*), where the testator gave a share of his residue in trust to pay the income to E. for life or until she should receive a legacy left to her by D. (who was dead), and then that the share should fall into residue. E. died without receiving the legacy. Parker, J., held that the gift over took effect.

Cases to which principle does not apply.

The principle does not, of course, apply where the original gift is not one for life, but is an absolute gift with a gift over on remarriage (*s*).

Nor does it apply where there is no express gift over. Thus where a testator gave the income of his residuary estate to his wife during widowhood, and bequeathed to her an annuity in the event of her remarriage, and directed that after her death certain legacies should be raised and paid, it was held that these legacies were not payable on her remarriage (*t*).

Vested subject to be divested.

III.—Interests vested subject to be divested.—The inclination of the Courts to hold interests to be vested is shown in many cases in which a gift, in terms apparently contingent, has been held to confer an interest absolute in the first instance, but subject to be divested on the happening of the contingency.

(*l*) 36 Ch. D. 362.
(*m*) 56 L. J. Ch. 449. See *Re Dear*, 58 L. J. Ch. 659; 61 L. T. 432.
(*n*) [1918] 1 Ch. 368.
(*o*) *Re Cane*, 60 L. J. Ch. 36.
(*p*) *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184; *Walpole* v. *Laslett*, 7 L. T. (N.S.) 526; *Wardroper* v. *Cutfield*, 33 L. J. Ch. 605; *Meeds* v. *Wood*, 19 Bea. 215, *ante*, p. 1336, n. (*h*).
(*q*) *Etches* v. *Etches*, 3 Drew. 441.
(*r*) [1913] 2 Ch. 614.
(*s*) *M'Culloch* v. *M'Culloch*, 3 Giff. 606.
(*t*) *Re Tredwell*, [1891] 2 Ch. 640, explained in *Re Akeroyd's Settlement*, [1893] 3 Ch. 363 (deed). See *O'Donoghue* v. *O'Donoghue*, [1906] 1 Ir. R. 482.

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"There are three ways in which a legacy may be given. The first case is where it is given to A B absolutely, the second case is where it is given to A B contingently on his attaining twenty-one, or on some event happening or not happening, and the third case is where the gift is absolute in the first instance, but liable to be defeated on the legatee not attaining twenty-one, or on the happening or not happening of some future event" (*u*). And the classification applies to devises of land. Examples of gifts construed to give a vested interest subject to be divested will be found in a subsequent part of this chapter (*x*).

A gift may be liable to be divested in one of three ways.

Rule in *Doe* v. *Eyre*.

First, property may be given to A, subject to a proviso that in a certain event A's interest shall be defeated or cease, without regard to the ultimate destination of the property. In such a case, if there is no valid gift over or the gift over does not take effect, the property is undisposed of, and falls into residue, or goes to the testator's heir or next-of-kin, according to circumstances (*y*).

Partial gift over.

Secondly, property may be given to A subject to a proviso of defeasance or cesser by way of gift over in favour of other persons, in partial derogation of the prior gift; in such a case the prior gift is only affected to the extent required to give effect to the gift over, and if the latter gift fails the prior gift becomes absolute (*z*).

Prior gift not divested unless gift over takes effect.

Thirdly, property may be given to A subject to a proviso showing the testator's intention to be that in a certain event A's interest shall cease or be defeated in favour of B; in such a case if the gift over to B is invalid, or does not take effect, A's interest becomes absolute.

This last construction is frequently adopted in the case of substitutional gifts to the issue of a person in the event of his death leaving issue before a certain time (*a*), and in the case of gifts to survivors (*b*).

(*u*) *Per* Fry, J., in *Re Buckley's Trusts*, 22 Ch. D. at p. 583.

(*x*) See *Edwards* v. *Hammond*, 3 Lev. 132, and other cases cited, *post*, pp. 1349 *seq.* See *Re Crother's Trusts*, [1917] 1 Ir. R. 356, where the legacy was liable to be divested if the legatee's mother predeceased the testator's widow.

(*y*) *Doe* d. *Blomfield* v. *Eyre*, 5 C. B. 713; *Hurst* v. *Hurst*, 21 Ch. D. 278, and other cases cited *post*, p. 1409. In most of these cases it is expressly or impliedly admitted by the Judges that the rule in *Doe* v. *Eyre* frequently defeats the intention of testators.

(*z*) *Gatenby* v. *Morgan*, 1 Q. B. D. 685; *Re Jones*, [1915] 1 Ch. 246; and *Hanbury* v. *Cockrell*, Fea. C. R. 396; cited *post*, p. 1408. See *M'Cutcheon* v. *Allen*, 5 L. R. Ir. 268, where the testator failed to provide for a contingency of probable occurrence.

(*a*) See *Salisbury* v. *Petty*, 3 Ha. 86; *Masters* v. *Scales*, 13 Bea. 60.

(*b*) *Post*, Chap. LV.

The case of property being given to A subject to a power of appointment or disposition given to B, may also be treated as belonging to this class (*c*).

Power of appointment.

In *Re Turney* (*d*) a testator gave a fund upon trust for his daughter during her life, and after her death upon trust for all her children when they should attain the age of twenty-five, but not before, and in case there should not be any such child, the fund was to form part of the residue. The testator also provided for payment to the children of interest "on their respective portions." By a codicil, he gave a moiety of the residue in trust for a son during his life, and after his death for his child or children absolutely upon their attaining twenty-five, with a gift over of the "share" of any child dying before attaining twenty-five. It was held that under both gifts the grandchildren took immediate vested interests subject to their being divested in case they did not attain twenty-five.

Examples of gifts vested liable to be divested.

The construction turned to a considerable extent on the use of the words "portions" and "share," the importance of which latter word, in cases where the testator has directed that the property shall "vest" at a certain time, has already been pointed out (*e*). But the use of the word "portion" or "share" is not essential. Thus in *Armytage* v. *Wilkinson* (*f*), where a testator gave a fund in trust for his children "so that the interest of a son or sons shall be absolutely vested at the age of twenty-one years, and of a daughter or daughters at that age or marriage," it was held that the children took vested interests subject to be divested.

Reference to "share" important,

but not essential.

The cases in which a devise of land, in terms which import contingency, has been held to confer a vested interest subject to be divested, are referred to in a subsequent part of this chapter (*g*).

Devise of land.

As a general rule, divesting clauses are strictly construed. The principle is thus laid down by Mr. Jarman (*h*): "As a devise (*i*) expressly made to take effect on a contingency will not arise unless such contingency happen, it follows *a fortiori* that an estate once vested will not be divested, unless all the events which are to precede the vesting of a substituted devise

Divesting clauses strictly construed.

Vested gift not divested, unless all the events happen.

(*c*) *Ante*, Chap. XXIII.
(*d*) [1899] 2 Ch. 739.
(*e*) *Ante*, p. 1328.
(*f*) 3 A. C. 355 (P. C.).
(*g*) *Post*, p. 1344.
(*h*) First ed., p. 750.
(*i*) "Devise" is here used by Mr. Jarman in the old-fashioned sense, which includes a bequest of personalty.

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happen (*k*). And this, it is to be observed, applies as well in regard to events which respect the personal qualification of the substituted devisee, as those which are collateral to him. In every case the original devise remains in force, until the title of the substituted devisee is complete. Thus, if a devise be made to A, to be divested on a given event in favour of persons unborn or unascertained, it will not be affected by the happening of the event described, unless, also, the object of the substituted gift come *in esse*, and answer the qualification which the testator has annexed thereto (*l*).

"Thus, in *Harrison* v. *Foreman* (*m*), where a fund was bequeathed to A. for life, and after her decease to P. and S. in equal moieties; and in case of the death of either of them in the lifetime of A., then the whole to the survivor *living at her decease*. Both died in her lifetime; and Sir R. P. Arden, M.R., held, that the original gift was not defeated.

"So, in *Sturgess* v. *Pearson* (*n*), it was held, that a gift to a person for life, and after his death to his three children, *or such of them as should be living at the time of his death*, conferred a vested interest on the children, subject to be divested only in favour of those (*o*) who should be living at the prescribed period; so that if all the children died in the lifetime of the tenant for life, the shares of the whole devolved to their respective representatives.

"And the same construction has sometimes been applied in cases, where the intention that the survivors (in whose favour the original gift was divested) should be living at the time of distribution, was less clearly marked.

Devise not divested by contingent clause which failed.

"As, in *Browne* v. *Lord Kenyon* (*p*), where the testatrix gave £1,000 to which she was entitled by virtue of a deed of settlement (and which it seems was charged upon land), upon trust for several persons successively for life, and after the death of the survivor, upon trust to pay the principal to C.; but if he

(*k*) Co. Lit. 219 b; *Doe* v. *Cooke*, 7 East 269, *ante*, p. 592; *Doe* v. *Rawding*, 2 B. & Ald. 441, *ante*, p. 593; see also *Doe* d. *Usher* v. *Jessep*, 12 East, 288; *Wall* v. *Tomlinson*, 16 Ves. 413; *Vulliamy* v. *Huskisson*, 3 Y. & C. 80; *Aspinall* v. *Audus*, 7 M. & Gr. 912.

(*l*) Mr. Jarman states the general principle somewhat too broadly. Since he wrote, the decision in *Doe* v. *Eyre* has established a rule of construction which in many cases defeats the intention of testators. See *ante*, p. 1338, n. (*y*).

(*m*) 5 Ves. 207.

(*n*) 4 Mad. 411; *Kimberly* v. *Tew*, 4 D. & War. 139; *Masters* v. *Scales*, 13 Bea. 60; *Peters* v. *Dipple*, 12 Sim. 101; *Clarke* v. *Lubbock*, 1 Y. & C. C. C. 492; *Eaton* v. *Barker*, 2 Coll. 124; *Benn* v. *Dixon*, 16 Sim. 21; *Walker* v. *Simpson*, 1 K. & J. 713; *Marriott* v. *Abell*, L. R. 7 Eq. 478; *Jones* v. *Davies*, 28 W. R. 455; *Penny* v. *Comm. for Railways*, [1900] A. C. 628 (realty); *Monck* v. *Croker*, [1900] 1 Ir. R. 56; *Re Deacon's Trusts*, 95 L. T. 701; and see *Hulme* v. *Hulme*, 9 Sim. 644.

(*o*) *Re Clark's Trusts*, L. R. 9 Eq. 378.

(*p*) 3 Mad. 410.

were then dead (which event happened), then to his two brothers in equal shares, *or the whole to the survivor of them*. Both the brothers survived the testator, and died pending the prior life interests. Sir J. Leach, V.-C., held, that they took vested interests at the death of the testator, subject to be divested *if one only should survive the tenants for life*; though he intimated a doubt, whether the testatrix did mean that either brother should take any interest without surviving the tenants for life; but his Honor said, the force of the expression was otherwise.

"So, in *Belk* v. *Slack* (*q*), where a testator gave the residue of his real and personal estate to trustees, upon trust for A for life, and after the decease of A and B he gave the same to C and D, to be equally divided between them, share and share alike, *or to the survivor or survivors of them*. C and D both died in the lifetime of A and B; and it was held that their respective representatives were entitled to the several moieties of the residue."

Benefit of survivorship.

So, where the gift, after a life interest, is to A, B and C, "with benefit of survivorship between them" (*r*).

In all these cases the intention of the testator is assumed to be, that the survivorship of the donee under the gift over is part of the contingency on which divesting is to take place (*s*).

White v. *Baker*.

Where by the word "survivor" is denoted, not one who shall be living at a defined point of time, but only one of several devisees who outlives the other or others, the construction is of course inapplicable. Thus, in *White* v. *Baker* (*t*), where the gift was to A for life, and after his death to B and C equally, and in case of the death of either of them in the lifetime of A, the whole to the survivor of them: it was held that the word "survivor" referred to the event of one of the two persons, B

(*q*) 1 Kee. 238. "See also *Bromhead* v. *Hunt*, 2 Jac. & W. 459, and *Jackson* v. *Noble*, 2 Kee. 590, *post*. These cases seem to overrule *Scurfield* v. *Howes*, 3 B. C. C. 90, where a testator bequeathed £500 to A for life, and after her decease to the two children of A, share and share alike; but if either of them should die before the decease of their mother, the whole *to the survivor*. Both having died in A's lifetime, it was held that the legacy belonged to the representatives of the survivor." (Note by Mr. Jarman, 1st ed., p. 752.) But the question in *Scurfield* v. *Howes* was whether "survivor" meant survivorship as between the children, or survivorship as regards the tenant for life. This question is discussed in Chap. LV, where the later cases of *White* v. *Baker*, 2 D. F. & J. 55, below, and *Re Pickworth*, [1899] 1 Ch. 642, are referred to. Other cases on the effect of a divesting clause in favour of "survivors" are *Littlejohns* v. *Household*, 21 Bea. 29; *Page* v. *May*, 24 Bea. 323 (correcting *M'Donald* v. *Bryce*, 16 Bea. 581); *Cambridge* v. *Rous*, 25 Bea. 415; and see and consider *Gibson* v. *Hale*, 17 Sim. 129.

(*r*) *Wiley* v. *Chanteperdrix*, [1894] 1 Ir. R. 209.

(*s*) See *per* Jessel, M.R., in *Jones* v. *Davies*, 28 W. R. at p. 455.

(*t*) 2 D. F. & J. 55. See this case cited again, *post*, p. 2069, where gifts to "survivors" are treated at large.

and C, surviving the other, and consequently that on the death of B in the lifetime of A, the whole vested indefeasibly in C, although the latter also died before A.

Other examples of divesting clauses being construed strictly.

The strictness of construction put upon a gift divesting a previous vested interest is further exemplified by *Templeman* v. *Warrington* (*u*), where a testatrix bequeathed her residue in trust for A for life, and after her death in trust for her children; but in case there should be but one child at A's death then to go to that one, and on failure of issue, as A should appoint. A had eleven children, three of whom died in her lifetime; and it was held that as there were more children than one living at A's death, the deceased children were not divested of the interests which they took under the primary gift.

Re Firth.

So in *Re Firth* (*x*) the gift was to M. for life and then to her children, and, if there should be no children of M. living at her death, then to the children of W. equally, or the whole to one child, if there should be only one child living of W. M. died a spinster. W. died having had 11 children, 10 of whom survived him. Held that all 11 took vested interests, and were not divested as the event of one child only surviving had not happened.

Strother v. *Dutton.*

And in *Strother* v. *Dutton* (*y*), where a testator gave to his daughter R. £1,000 to be invested and the interest to be paid to her for her life, and at her death to be called in and distributed equally amongst her children; "in case any lawful children are living from son or daughter being dead, the issue of their marriage, that such child or children shall be equally entitled to the part or share their parent would be entitled to if they had been living." R. had several children, of whom four died in her lifetime, without issue; and it was held that the shares which vested in them on their births, were not divested; for the gift in favour of the issue of the children who had issue, did not affect the shares of the children who died without leaving issue.

Again, in *Desbody* v. *Boyville* (*z*), a gift over in the event of the legatee marrying without consent, was held to mean marrying

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(*u*) 13 Sim. 267; see also *Bromhead* v. *Hunt*, 2 J. & W. 459; *Gordon* v. *Hope*, 3 De G. & S. 351; and *Terrell* v. *Cooke*, 5 L. J. Ch. (N.S.) 68; *Re Minor's Trusts*, 28 Bea. 50 (settlement); *Corneck* v. *Wadman*, L. R. 7 Eq. 80. See also *Skey* v. *Barnes*, 3 Mer. 335; *Hope* v. *Potter*, 3 K. & J. 206; *Malcolm* v. *Malcolm*, 21 Bea. 225.

(*x*) [1914] 2 Ch. 386; *Re Stephens*, [1927] 1 Ch. 1; *Re Walker*, [1917] 1 Ch. 38.

(*y*) 1 De G. & J. 675. See also *Baldwin* v. *Rogers*, 3 D. M. & G. 649; *Etches* v. *Etches*, 3 Drew. 447, 2nd point; *Re Bennett's Trust*, 3 K. & J. 280; *Re Searle*, [1905] W. N. 86; but cf. *Stuart* v. *Cockerell*, L. R. 5 Ch. 713; *Read* v. *Gooding*, 21 Bea. 478.

(*z*) 2 P. W. 547.

without consent during minority, in order not to defeat the prior gift.

The principle of the foregoing authorities prevails not only where the original gift is vested, but also where it is contingent, provided the contingency be not such as to prevent the contingent interest from being transmissible (*a*).

To the principle above stated may also be referred those cases in which it is held that where there is a gift over in the event of the tenant for life dying "without leaving issue," these words are to be construed "without having had issue," in order not to defeat the vested interests of children who predecease the tenant for life (*b*).

Gift over of annuity fund.

It seems that the principle laid down in the foregoing authorities does not apply to the case of trustees being directed to buy an annuity and to pay it to the annuitant, with a gift over in the event of his assigning it : if the annuitant dies before the annuity is purchased the gift fails (*c*).

Gift over defeated by disentailing deed.

In *Richards* v. *Davies* (*d*) a testator devised land to A. J. for life and after her death in trust for her children or their issue as she should appoint, and in default of appointment in trust for her children and the heirs of their bodies, with a gift over in the event of her dying without leaving any child her surviving, and in the event of such child or children her surviving and dying without issue : A. J. had a son who died in her lifetime having previously joined with her in executing a disentailing deed : it was held that the son took a vested estate tail, and that the gift over was defeated by the disentailing deed.

Alternative limitations.

Where a gift to several persons or such of them as shall be living at a certain time, is followed by limitations over in case of their dying under alternative circumstances (for instance, under twenty-one leaving issue, and under twenty-one without issue), these executory gifts are held to apply only to the shares of objects who are living at the prescribed period; to decide otherwise would be to reduce the words, "or such of them as shall be then living," to silence (*e*).

Mr. Jarman adds (*f*) : "The rule that estates vested are not

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(*a*) *Wagstaff* v. *Crosby*, 2 Coll. 746; *Re Sanders' Trusts*, L. R. 1 Eq. 675 (dissenting from *Willis* v. *Plaskett*, 4 Bea. 208). When contingent interests are transmissible, and when not, is pointed out *ante*, p. 1326.

(*b*) *Maitland* v. *Chalie*, 6 Madd. 243; *Treharne* v. *Layton*, L. R. 10 Q. B. 459; *Re Roberts*, [1903] 2 Ch. 200; *Re Cobbold*, *ib.*, 299; *Re Davy*, [1915] 1 Ch. 837. *Post*, pp. 1699 *seq.*

(*c*) *Power* v. *Hayne*, L. R. 8 Eq. 262; *Re Draper*, 57 L. J. Ch. 942. Kindersley, V.-C., decided otherwise in *Day* v. *Day*, 22 L. J. Ch. 878. These cases are referred to *ante*, p. 1109.

(*d*) 13 C. B. (N.S.) 69, 861.

(*e*) *Howes* v. *Herring*, 1 M'Cl. & Y. 295.

(*f*) First ed., 752, note.

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to be divested, unless all the events upon which the property is given over happen, seems to have been generally adhered to, although an absurd and whimsical intention be thereby imputed to the testator," for which he cites *Graves* v. *Bainbrigge* (*g*). But where the original gift is in ambiguous terms which may import contingency, the conclusion that this is their true import is aided by the improbability of the testator intending to make the vesting or indefeasibility of a legacy to a class depend on whether one or two only of the class survive a given period (*h*).

Leaning against divesting clauses.

An example of the reluctance of the Courts to allow a vested interest to be divested, is to be found in the case of gifts to children (*i*). So in *Re Bogle* (*k*), where a testator bequeathed a fund to trustees upon trust for A for life, and after his decease, if he should have three or more children who should attain twenty-one, for his executors or administrators, and if he should have two such children, as to a moiety for his executors or administrators, and as to the other moiety for X; and if he should die leaving no child or only one child who should attain twenty-one, then as to the whole fund upon trust for X. A had two children who attained twenty-one; it was held that he was absolutely entitled to a moiety of the fund "leaving" being construed "having had."

Several cases have been decided on gifts over to take effect in the event of the prior legatee dying unmarried, but in most of them no question of divesting arose, as the prior legatee had merely a life interest (*l*).

Devises vested, notwithstanding expressions of seeming contingency.

IV.—Devises construed to be vested, notwithstanding Expressions importing Contingency. — Mr. Jarman continues (*m*): "The construction which reads words that are seemingly creative of a future interest, as referring merely to the futurity of possession occasioned by the carving out of a prior interest, and as pointing to the determination of that interest, and not as designed to postpone the vesting, has obtained, in some instances, where the terms in which the posterior gift is framed import contingency, and would,

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(*g*) 1 Ves. jun. 562.

(*h*) *Shum* v. *Hobbs*, 3 Drew. 93; *Daniel* v. *Gosset*, 19 Bea. 478 (as to which, however, see L. R. 7 Eq. at p. 82); *Selby* v. *Whittaker*, 6 Ch. D. 239. See also *post*, p. 1403.

(*i*) See *Maitland* v. *Chalie*, 6 Mad. 243, *post*, p. 1699; *Home* v. *Pillans*, 2 Myl. & K. 15, stated *post*, p. 2107.

(*k*) 78 L. T. 457.

(*l*) *Doe* d. *Everett* v. *Cooke*, 7 East, 269; *Re Sanders' Trusts*, L. R. 1 Eq. 675; *Crosthwaite* v. *Dean*, L. R. 5 Eq. 245; *Re King*, 62 L. T. 789; *Re Chant*, [1900] 2 Ch. 345. See Chap. XXXV, *ante*, p. 1251 (as to the meaning of "unmarried"), and Chap. XXXVI.

(*m*) First ed., p. 733.

unconnected with and unexplained by the prior gift, clearly postpone the vesting. Thus, where a testator devises lands to trustees until A shall attain the age of twenty-one years, and if or when he shall attain that age, then to him in fee, this is construed as conferring on A a vested estate in fee-simple, subject to the prior chattel-interest given to the trustees, and, consequently, on A's death, under the prescribed age, the property descends to his heir-at-law; though it is quite clear that a devise to A, if or when he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only (*n*).

Boraston's Case.

" A leading authority for this construction is *Boraston's Case* (*o*), which was as follows : A testator devised land to A and B for eight years, and after the said term, the land to remain to his executors, for the performance of his will, till such time as H should accomplish his age of twenty-one years; and *when* the said H should come to his age of twenty-one, then to him, his heirs and assigns for ever. H died under twenty-one. It was contended, that the remainder was not to vest in him, unless he attained the prescribed age; but the Court held it to be vested immediately, the case being, it was said, nothing else in effect than a devise to the executors, till H attained the age of twenty-one, remainder to H in fee; and that the adverbs of time, *when*, etc., do not make any thing necessary to precede the settling (*i.e.*, the vesting) of the remainder, but merely expressed the time when it shall take effect in possession.

Word " when " referred to determination of prior estate.

" The most recent case of this class is *Doe* d. *Cadogan* v. *Ewart* (*p*), where a testator devised his real estate to trustees,

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(*n*) *Grant's Case*, cited 10 Rep. 50; Sugd. Law of Prop. 291; *Alexander* v. *Alexander*, 16 C. B. 59; *Love* v. *Love*, 7 L. R. Ir. 306; *Re Francis*, [1905] 2 Ch. 295; *Re Blackwell*, [1926] 1 Ch. 223 (" upon his attaining the age of twenty-one years "); and *per* James, L.J., *Andrew* v. *Andrew*, 1 Ch. D., at p. 417. However, the decision of this last point was expressly avoided by the Judges in *Phipps* v. *Ackers*, 9 Cl. & F. 583; and see *Tapscott* v. *Newcombe*, 6 Jur. 755; and *Simmonds* v. *Cock*, 29 Bea. 455 (stated below). As to gifts to classes, see *Browne* v. *Browne*, 3 Sm. & G., at p. 587; *Judd* v. *Judd*, 3 Sim. 525; *Bull* v. *Pritchard*, 1 Russ. 213, and other cases cited *post*, pp. 1397 *seq.*

(*o*) 3 Rep. 16, 19; see also *Manfield* v. *Dugard*, 1 Eq. Ca. Ab. 195, pl. 4, Gilb. Eq. Rep. 36; *Taylor* v. *Biddall*, 2 Mod. 289; *Doe* d. *Morris* v. *Underdown*, Willes, 293; *Goodtitle* d. *Hayward* v. *Whitby*, 1 Burr. 228; *Denn* d. *Satterthwaite* v. *Satterthwaite*, 1 W. Bl. 519; *Doe* d. *Wheedon* v. *Lea*, 3 T. R. 41; *Doe* d. *Wight* v. *Cundall*, 9 East, 400; *Edwards* v. *Symons*, 6 Taunt. 213; *Goodright* d. *Revell* v. *Parker*, 1 M. & Sel. 692 (leaseholds); *Warter* v. *Hutchinson*, 5 Moore, 143, 2 B. & Bing. 349, 3 D. & Ry. 58, 1 B. & Cr. 721; *Jackson* v. *Marjoribanks*, 12 Sim. 93; *Milroy* v. *Milroy*, 14 *ib.* 48; *Parkin* v. *Knight*, 15 *ib.* 83; *James* v. *Lord Wynford*, 1 Sm. & Gif. 40; *Re Mottram*, 10 Jur. (N.S.) 915; *Smith* v. *Spencer*, 6 D. M. & G. 631; *Re Radford*, 62 Sol. J. 604; but see *Bastin* v. *Watts*, 3 Bea. 97, where, however, the point was not argued; *Blagrove* v. *Hancock*, 16 Sim. 371, where the V.-C. did not notice the question.

(*p*) 7 Ad. & El. 636.

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upon trust for his wife during widowhood, and after her decease or marriage again, upon trust to apply the rents towards the maintenance of his daughter, *until she should attain the age of twenty-five years, and from and after her attaining that age*, then upon trust for his said daughter, her heirs and assigns for ever; but in case his said daughter should depart this life without leaving issue, then the testator devised the said real estate over. The daughter, after the decease of the widow, and before she attained the age of twenty-five years, suffered a common recovery; and it was held, that such recovery was effectual to acquire the equitable fee simple, she having a *vested* estate tail in equity at the time.

Words "from and after" similarly construed.

Remark on preceding cases.

"It is observable, that in the greater number of the cited cases, the prior interest was created for the benefit of the ulterior devisee; but this circumstance does not seem to vary the principle, for the material fact, and that which constitutes the special characteristic of this class of cases, is, that there is a prior interest extending over the whole period for which the devise in question is postponed. It is therefore in effect a devise of the whole estate *instanter* to B, with the exception of a partial interest carved out for some (no matter what) purpose."

Remainder where freehold may be in abeyance.

Mr. Fearne points out, as an exception to the general rules relating to contingent remainders, the case of land being limited to A for eighty years, if B so long live, with remainder over after the death of B to C in fee: here it is possible that B may not die until after the expiration of the term, but this event is so improbable that the remainder to C is considered as vested (*q*). If, however, the term is a short one, as for twenty-one years, it seems that the remainder is contingent (*r*).

Words of apparent contingency referred to the possession merely.

Mr. Jarman continues (*s*): "Another exemplification of the principle in question occurs in those cases where a testator, after giving an estate or interest for life, proceeds to dispose of the ulterior interest in terms which, literally construed, would seem to make such ulterior interest depend on the fact of the prior life interest taking effect; in such cases, it is considered, that the testator merely uses these expressions of apparent contingency, as descriptive of the state of events, under which he conceives the ulterior gift will fall into possession; (the supposition being, that the successive interests will take effect in the order in which they are expressed), and not with the design of making the

(*q*) Fearne, C. R. 21, citing *Napper* v. *Sanders*, Hutt. 118; *Lord Derby's Case*, Lit. Rep. 370.

(*r*) *Ib.*; *Weale* v. *Lower*, Pollex. at p. 67; *Beverley* v. *Beverley*, 2 Vern. 131.

(*s*) First ed., p. 735.

vesting of the posterior gift depend on the fact of the prior tenant for life happening to live to become entitled in possession.

"Thus, in the case of *Webb* v. *Hearing* (*t*), where a testator devised to his son F. after the death of his wife; *and if his three daughters, or either of them, should overlive their mother and F., their brother, and his heirs* (which was construed to mean heirs of his body), they to enjoy the same houses for the term of their lives, remainder to R. and J.; it was held, that the remainder to R. and J. was not contingent on the event of the daughters surviving their mother and brother; the words only showed when it should commence."

There are other authorities illustrating the same principle (*u*).

Franks v. *Price*.

The case of *Franks* v. *Price* (*x*) presents an instance both of an apparent and of a real contingency in the same will. There a testator devised to A, B, etc., for their lives, with remainder to M and N for their lives, share and share alike; "and in case either of them should, after the deaths of A, B, etc., die without issue," then to the survivor for life; and if M "should, after the deaths of A, B, etc., die before N, leaving issue male of his body," then one moiety of the estates was to go as therein mentioned; "and in case of such death in manner aforesaid of M before N, and M's leaving issue male," the testator gave one moiety of his personal estate to be laid out in land, to be conveyed and settled to the uses thereinbefore directed of his real estates, "on the issue of M on the contingency aforesaid." The testator made a similar disposition, *mutatis mutandis*, of the other moiety, in case of the death of N after the deaths of A, B, etc., leaving issue male. Lord Langdale thought that the words "after the deaths of A, B, etc.," did not import contingency, but were merely words of reference, showing that the gifts then in course of expression were subject to the prior gifts, and were not to have effect in possession till those prior gifts became satisfied or inoperative; but from the words

(*t*) Cro. Jac. 415. "According to the facts represented, it does not appear that the remainder, if contingent, was defeated, as only two of the daughters are stated to have died in the lifetime of their brother." (Note by Mr. Jarman.)

(*u*) *Anon.*, 2 Vent. 363; *Pearsall* v. *Simpson*, 15 Ves. 29; *Massey* v. *Hudson*, 2 Mer. 130, all stated and commented on by Mr. Jarman (see the 5th and earlier editions of this work). See also *Key* v. *Key*, 4 D. M. & G. 73; *Wright* v. *Wright*, 21 L. J. Ch. 775; *Walmsley* v. *Vaughan*, 1 De G. & J. 114; *Tuer* v. *Turner*, 18 Bea. 185; *Re Betty Smith's Trusts*, L. R. 1 Eq. 79; *Bolton* v. *Bolton*, L. R. 5 Ex. 145; *Edgeworth* v. *Edgeworth*, L. R. 4 H. L. 35; *Leadbeater* v. *Cross*, 2 Q. B. D. 18; *Re Dundalk, etc., Railway*, [1898] 1 Ir. R. 219. In *M'Lachlan* v. *Taitt*, 2 D. F. & J. 449, the *posterior* gift was held to vest immediately, notwithstanding a direction that the objects should "become beneficially entitled" at the death of the tenant for life. Compare these and the preceding cases with *Holmes* v. *Cradock*, 3 Ves. 317, stated *post*, p. 1359; and see *Davis* v. *Norton*, 2 P. W. 390, first point.

(*x*) 3 Bea. 182, 5 Bing. N. C. 37, 6 Scott, 710.

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used with reference to the event of M dying before N, leaving issue male, and with reference to the event of N dying before M, leaving issue male, and even from the care taken to repeat the words as applied to the case of M and N respectively, it appeared to him that the words must have their natural meaning, and be taken to provide only for the precise cases which were expressly described.

Maddison v. *Chapman.*

The result of the authorities is thus summed up by Sir W. P. Wood, V.-C. (*y*): "Where there is a limitation over, which, though expressed in the form of a contingent limitation, is, in fact, dependent upon a condition essential to the determination of the interests previously limited, the Court is at liberty to hold that, notwithstanding the words in form import contingency, they mean no more, in fact, than that the person to take under the limitation over is to take subject to the interests so previously limited. I apprehend the true way of testing limitations of that nature is this: Can the words, which in form import contingency, be read as equivalent to 'subject to the interests previously limited'? Take the simplest case: a limitation to A for life, remainder to B for life, and upon the decease of B, 'if A be dead,' then to C in fee. There the limitation to C is apparently made contingent upon the event of A's dying in the lifetime of B. Nevertheless, inasmuch as the condition of A's death is an event essential to the determination of the interest previously limited to him, the Court reads the devise as if it were to A for life, remainder to B for life, and on B's death, *subject to A's life interest* (*if any*), to C in fee. That is an intelligible principle of construction; but in order to its application, the condition upon which the limitation over is made dependent must involve no incident but what is essential to the determination of the interests previously limited. For instance, if the limitation be to A for life, remainder to B for life, 'and if, at the death of B, A shall have died under the age of twenty-one,' or 'and if, at the death of B, A shall have died without leaving children, then to C in fee,' here in either case room is left for contingency. The condition of A's dying in the first case under twenty-one, and in the second, without leaving children, is an event which may or may not have happened when the life-estates in A and B are determined; and until it has happened, the limitation over is contingent, not merely in appearance, but actually. To these cases, therefore, the principle of construction I have referred to would obviously not

(*y*) *Maddison* v. *Chapman*, 4 K. & J. 709; 3 De G. & J. 536; *Chellew* v. *Martin*, 21 W. R. 671 (leaseholds).

apply." The principle thus laid down was applied in *Re Shuckburgh's Settlement* (*z*).

Devise, if A shall attain twenty-one, contingent;

—otherwise, if a limitation over in alternative event.

Mr. Jarman continues (*a*): "Although (as already hinted) there is no doubt that a devise to a person, if he shall live to attain a particular age, standing alone, would be contingent; yet if it be followed by a limitation over in case he die under such age, the devise over is considered as explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, namely, that at that age it should become absolute and indefeasible; the interest in question, therefore, is construed to vest *instanter* (*b*).

Edwards v. *Hammond*.

"Thus, in *Edwards* v. *Hammond* (*c*), where A. surrendered the reversion in fee in customary lands to the use of himself for life, and, after his decease, to the use of his son H. and his heirs and assigns for ever, *if it should happen that he should live until he attained the age of twenty-one years*, provided always, and under the condition, nevertheless, that *if H. died before he attained that age*, then the premises to remain to A. in fee; it was held, that though upon the first words this seemed to be a condition precedent, yet upon all the words taken together it was an immediate devise to H., subject to be defeated upon a condition subsequent, if he did not attain the age of twenty-one years.

To A when he attains twenty-one, and if he die before, then over.

"The same construction prevailed in the case of *Doe* d. *Hunt* v. *Moore* (*d*), where the devise was to M., '*when* he attains the age of twenty-one years,' to hold to him, his heirs and assigns for ever; *but in case he should die before he attained* the age of *twenty-one* years, then over; Lord Ellenborough observed, that this being an immediate devise, and not, as in some of the other cases, a remainder, formed no substantial ground of distinction. The estate vested immediately, whether there was any particular interest carved out of it to take effect in possession in the meantime or not."

So a legacy to the testator's son A when he attains twenty-

(*z*) [1901] 2 Ch. 794.

(*a*) First ed., p. 738.

(*b*) "Even independently of this particular rule, it is obvious that a limitation over disposing of the property to another, in case of the prior devisee dying under certain circumstances, always supplies an argument in favour of the prior devisee taking an immediately vested interest: *Smither* v. *Willock*, 9 Ves 233; *Peyton* v. *Bury*, 2 P. W. 626; *Murkin* v. *Phillipson*, 3 My. & K. 257; though the contrary is sometimes contended." (Note by Mr. Jarman.) See *per* Wood, V.-C., L. R. 3 Eq., at p. 322.

(*c*) 3 Lev. 132, 2 Show. 398, and stated from the record, 1 B. & P. N. R. 324, n.

(*d*) 14 East, 601. See also *Greene* v. *Potter*, 2 Y. & C. C. C. 517; *L'Estrange* v. *L'Estrange*, 25 L. R. Ir. 399.

five with a gift over if he dies before attaining twenty-one is vested on A attaining twenty-one (*e*).

Devise to a class.

The rule applies where the devise is to a class (*f*).

Effect where another event is associated.

The rule, it seems, applies not only where the devise over is limited, so as to take effect simply and exclusively on the failure of the event on which the prior devise is apparently made contingent, but also where some other event is associated.

Thus, in *Bromfield* v. *Crowder* (*g*), the devise was to certain persons for life, and at the decease of them or the longer liver of them to J. if he should live to attain the age of twenty-one years; and in case he died before he attained that age, and his brother C. should survive him, then over. On case from the Rolls, the Court of Common Pleas certified that J. took a vested fee. Sir J. Mansfield, C.J., relied much on the authority of *Edwards* v. *Hammond*, which he said was on all fours with this. So that, if either event happens, the prior devise becomes absolute (*h*).

Doctrine of preceding cases applicable to executory trusts.

The construction also obtains where the lands are devised to trustees, upon trust to convey to limitations of the nature of those under consideration. Thus, in *Phipps* v. *Ackers* (*i*), where a testator devised his real estates to trustees, upon trust to convey certain lands to his godson A when and so soon as he should attain his age of twenty-one years; but in case he should depart this life before he should attain the said age of twenty-one years without leaving issue of his body, then the lands in question were to go accordingly to the disposition of his residuary estate. It was held by the House of Lords (affirming the decision of Shadwell, V.-C.), on the authority of the preceding cases, that A took an immediate interest under this devise, subject to being divested in the event of his dying under twenty-one without leaving issue.

Rule as laid down in *Phipps* v. *Ackers*.

This decision is generally treated as the leading case on the question; the principle on which it was decided is, that the gift over in the event of the devisee dying under twenty-one shows the meaning of the testator to have been, that the first devisee should take whatever interest the party claiming under the gift over is not entitled to, which gives the first devisee the immediate

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(*e*) *Re Gunning's Estate*, 13 L. R. Ir. 203.

(*f*) *Doe* d. *Roake* v. *Nowell*, 1 M. & Sel. 327, 5 Dow. 202; see also *Doe* d. *Dolley* v. *Ward*, 9 Ad. & El. 582, 1 P. & Dav. 568.

(*g*) 1 B. & P. N. R. 313; affirmed in D. P., see 14 East, 601, Sugd. Law of Prop. 286.

(*h*) *Re Thomson's Trusts*, L. R. 11 Eq. 146 (legacy). Cf. *Malcolm* v. *O'Callaghan*, 2 Mad. 349.

(*i*) 5 Sim. 44, 9 Cl. & F. 583; *Stanley* v. *Stanley*, 16 Ves. 491. So, where personal estate is directed to be invested in the purchase of land: *Jackson* v. *Marjoribanks*, 12 Sim. 93.

interest, subject only to the chance of its being divested on a future contingency (*k*).

Personal property.

The rule applies to personal property and to residuary gifts (*l*).

Whether it is applicable where the event is unconnected with the age of the devisee.

In *Finch* v. *Lane* (*m*) the rule was applied to a case where the apparent contingency was, not the devisee attaining a particular age, but his surviving the person to whom a prior life estate was devised. The devise was to the testator's wife for life, with remainder, as to part, to his brother for life, and from and immediately after the death of the wife, subject to the brother's interest in the part, to M. in fee if she should be living at the death of the wife, but if M. should die before the wife without leaving issue, then to other persons : M. died before the widow, but left issue; and it was held by Lord Romilly, that the case was governed by *Phipps* v. *Ackers*, and that M. took a vested remainder.

On the other hand, in *Doe* d. *Planner* v. *Scudamore* (*n*), where a testator devised to his brother A for life, and after the death of A, to B in fee, in case she should survive A, but not otherwise, and in case B should die before A, then to A in fee; it was held in C. P. that the remainder to B was contingent, and that it had been destroyed by a fine levied by A. *Edwards* v. *Hammond* (which was the only case of this class then decided) was held not to be applicable, on the ground, stated by Lord Eldon, C.J., that it was there "matter of necessary implication that the estate should vest in the eldest son during his infancy, for whatever might be the construction of the prior words it was clearly expressed that, unless the son died before twenty-one, the estate should not remain to the surrenderor" (*o*).

But in *Bromfield* v. *Crowder* it was expressly declared that the circumstance of the devise over being in that case to a stranger made no difference (*p*); for it was clear that the testator meant no one to take his estate unless in the event of J. dying under twenty-one. And this opinion is borne out by the other decisions. At all events, the distinction taken by Lord Eldon was independent of the nature of the contingency; and the rule of construction appears to be as reasonably applicable where the contingency is that of the devisee being alive when the remainder naturally falls into possession, as

(*k*) See *Bull* v. *Pritchard*, 5 Ha. 567.
(*l*) *Whitter* v. *Bremridge*, L. R. 2 Eq. 736.
(*m*) L. R. 10 Eq. 501.
(*n*) 2 B. & P. 289.
(*o*) *Vide ante*, p. 1350. But this ground, or a nearly identical one, would have existed also in *Doe* v. *Scudamore*, if A, who was the testator's heir was heir presumptive at the date of the will.
(*p*) 1 B. & P. N. R., at p. 325.

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where it is the attainment by him of the age which presumably in the testator's mind qualifies him for the possession and legal control.

It will have been seen, however, that in *Finch* v. *Lane* the devisee was an ascertained individual. Where this is not the case, and the contingency does not exactly fit on to the prior interest, there is greater difficulty in applying the rule. Thus in *Price* v. *Hall* (*q*) where after a life estate to A the remainder was to the children of B if he (B) should leave any, and if he left none, over: A died before B; and it was held by Sir W. P. Wood, V.-C., that the case was not within the rule, but rather within that exemplified by *Festing* v. *Allen* (*r*). The result was that the remainder was contingent, and failed for want of a particular estate to support it.

To return to the general doctrine laid down in *Edwards* v. *Hammond* and other cases above cited (*s*).

"It is impossible," as Mr. Jarman points out (*t*), "to hold the devise to vest immediately, by the application of the doctrine in question, in opposition to an express declaration that the devisees shall not take vested interests until a certain age, especially if even the devise over, which supplies the argument for neutralising this clause, is itself not without expressions which favour the suspension of the vesting.

Construction controlled by express declaration that devisees shall take vested interests.

"Thus, where (*u*) a testator devised a certain estate to his wife during her widowhood, remainder to A (his nephew) for life, remainder to the children of A in fee, as tenants in common, and if there should be no child of A living at his wife's death or second marriage, then over; and, by a codicil of even date, the testator directed that neither A nor any issue of A should, *by virtue of his will, take or be considered as entitled to a vested interest, unless they should respectively attain the age of twenty-one years*; and that, in case of the death of any of such children under such age, then the share of such child or children so dying should go to the surviving brothers and sisters, or brother or sister, their, his or her heirs and assigns, *upon their respectively attaining the age of twenty-one years*. It was contended that the testator, by the clause respecting the vesting, intended not to postpone the vesting, but merely to declare when the shares should become absolute and indefeasible, as was shown by the survivorship clause, which otherwise was superfluous, and,

(*q*) L. R. 5 Eq. 399.
(*r*) *Post*, p. 1356.
(*s*) *Ante*, p. 1349.
(*t*) First ed., p. 741.
(*u*) *Russel* v. *Buchanan*, 7 Sim. 628; 2 Cr. & Mee. 561; compare *Bland* v. *Williams*, 3 My. & K. 411, stated *post*, p. 1401.

accordingly, that the children took vested interests, subject to be divested on their dying under twenty-one. The Court of Exchequer, however (on a case from Chancery), certified an opinion that the vesting was postponed until the age of twenty-one. Sir L. Shadwell, V.-C., on confirming the certificate, observed that the concluding words showed that the testator had the same intention at the end as at the beginning of the instrument (*x*).

Declaration postponing earlier vesting, by fixing a future period.

"The rule of construction under consideration, is also excluded by a declaration, that the devisee shall take a vested interest at the future period, as such a declaration obviously carries with it an implied negation of an earlier period of vesting (*y*).

Rule of preceding cases not applicable where condition is to be performed by devisee.

"Nor, it seems, does the rule apply where the attainment of the prescribed age is not the only circumstance by which the testator marks the time at which it shall be determined whether the estate shall vest or finally become liable to be divested; but there is a preliminary act to be done by the devisee, in the nature of a condition precedent before his title accrues." In support of this contention, Mr. Jarman cites *Phipps* v. *Williams* (*z*); in that case the residue of the real estate was devised to trustees, upon trust to accumulate the rents until C should attain the age of twenty-four years, and then to convey unto C, upon his securing certain annuities (therein bequeathed) to the satisfaction of the trustees, the legal estate in the testator's freehold, copyhold and leasehold hereditaments; but in case the said C should depart this life before he attained the age of twenty-four years, without leaving issue, then upon certain other trusts. Sir L. Shadwell, V.-C., held, upon the principle above suggested, that the devisee derived no interest under the trust, until the attainment of the prescribed age, and the performance of the condition. Upon appeal, Lord Brougham held, that as the terms of the devise involved no more than the law would have implied, namely, that the devisee must take subject to the annuities, there was no condition precedent, or indeed subsequent either: he admitted, however, that, if there had been, it would have made a great difference in the argument (*a*).

Whether there need be an express gift over.

But though the devise over has been generally considered as the characteristic of these cases, yet the construction was adopted in *Snow* v. *Poulden* (*b*), where there was no such devise, the

(*x*) Compare *Re Wrightson*, [1904] 2 Ch. 95, referred to *post*, p. 1421.

(*y*) *Glanvill* v. *Glanvill*, 2 Mer. 38. In *M'Lachlan* v. *Taitt*, 2 D. F. & J. 449, a declaration that children should "become beneficially entitled" on the death of their parent, was construed to refer to possession only and not so as to postpone vesting. See also on this point, *ante*, p. 1327.

(*z*) 5 Sim. 44.

(*a*) *Ackers* v. *Phipps*, 3 Cl. & F. 665.

(*b*) 1 Kee. 186.

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words of the will being, "The rest of my property to be invested in land, and given to my grandson; when of age, to have a commission in the army regulars at twenty-one; to remain in the army seven years, and not to be of age to receive this until he attains his twenty-fifth year, and to be entitled to him and his male heirs, bearing the name of F. for ever." Lord Langdale, M.R., held, that the grandson took an immediate vested interest as tenant in tail in the land to be purchased, subject to be divested if he should not attain twenty-five; and, consequently, that the rents were applicable to his benefit during his minority.

No reasons are reported; but the express direction that the property should be "given to" the grandson may well have been taken to constitute an immediate devise independently of the subsequent clause postponing the right of "receipt." But in the two cases next stated there was no such independent gift, nor any express gift over on death before the prescribed age (*c*).

Simmonds v. *Cock.*

Thus, in *Simmonds* v. *Cock* (*d*) the testator gave the rents and income of his real and personal estate to his wife for life, and after her death he gave all his real and personal estate unto and to the use of his sons A, B, and C and his granddaughter D, provided she lived to attain the age of twenty-one years, their respective heirs, etc., absolutely. It was held that the share of D vested in her immediately, to be divested if she died under age. A devise to A "provided she marries my nephew on or before attaining twenty-one," or "provided she goes to Rome before she attains twenty-one," would, said the M.R., give a vested interest, subject to a condition subsequent: why a devise to A "provided she lived to attain twenty-one" should not also be a condition subsequent he could not understand.

Andrew v. *Andrew.*

Again, in *Andrew* v. *Andrew* (*e*), where a testator devised lands to his son T. for life, "and from and after his decease unto his eldest son if he shall have arrived at the age of twenty-one, or so soon as he shall arrive at that age; and in default of his having a son, then to the eldest son of the testator's son H. for ever"; it was held by Sir C. Hall, V.-C., that nothing vested in the eldest son of T. until he attained the prescribed age, because there was no express gift over on his dying under that age. The intermediate rents therefore were undisposed of. But this was reversed by the L.JJ., who held that T.'s eldest son took an estate in fee subject to being divested if he died under twenty-one. The decision seems to have turned partly on the intention

(*c*) And see *Peard* v. *Kekewich*, 15 Bea. 166; *Attwater* v. *Attwater*, 18 Bea. 330.

(*d*) 29 Bea. 455.

(*e*) 1 Ch. D. 410. See also *Jull* v. *Jacobs*, 3 Ch. D. 703, 713.

of the testator to make a complete settlement of the property, and partly on the use of the expression "from and after the death" (*f*). *Alexander* v. *Alexander* (*g*) was not cited. There, a testator by will, in 1813, devised his "freehold estate at V." to his son T. for life, "and from and immediately after his decease" the testator devised "the same unto the second son of the body of my son T. on his attaining the age of twenty-one years, but in default of there being a second son of the body of my son T., then I devise them to the second son of the body of my son C. on his attaining twenty-one, but in default of there being a second son of the body of my son C. then I devise the same to the second daughter of my son C. on her attaining the age of twenty-one, but in default of there being a second daughter of my son C., then to the right heirs of my son T." Here the limitations appear as plainly as in *Andrew* v. *Andrew* to have been intended to make a complete settlement of the property, and the gift to the second son was expressed to be, "from and after" the death of the tenant for life. But it was held that the devise to the second son of T. was a contingent remainder, not a vested estate in fee defeasible on his death under the prescribed age.

Re Jobson.

In *Re Jobson* (*h*) there was a devise to trustees upon trust to permit E. to receive the rents during her life, and from and after her decease, upon trust for her children equally "on their respectively attaining the age of twenty-one years"; the will contained no direction as to the application of rents after the death of E., and during the minorities of the children: it was held by North, J., that the children did not take vested interests till they attained the prescribed age.

Distinction between gift to children "at" twenty-one, and one to children "who attain" twenty-one.

On the whole, it may be said that the more recent cases show little of the indisposition to extend the doctrine of *Doe* v. *Moore* which has sometimes been professed (*i*), and which had in the meantime led to the establishment of a very material distinction between a devise to an individual or to a class, if or when he or they attain twenty-one, with a gift over on death under that age, and a devise to "such of the children of A as shall attain twenty-one," or "to the first son of A who shall attain twenty-one" (*k*), or the like, with a corresponding

(*f*) As to the force of these words, see *Long* v. *Ovenden*, 16 Ch. D. 691; *Re Jobson*, 44 Ch. D. 154, where *Andrew* v. *Andrew* was commented on by North, J.

(*g*) 16 C. B. 59.

(*h*) 44 Ch. D. 154. The property was leasehold.

(*i*) 9 Cl. & Fin. at p. 592.

(*k*) See *Stephens* v. *Stephens*, Ca. t. Talbot, 228; *Duffield* v. *Duffield*, 3 Bli. (N.S.) 260.

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Festing v. *Allen.*

gift over. Thus in *Festing* v. *Allen* (*l*), where there was a devise to the use of the testator's granddaughter for life, and from and after her decease to the use of her children who should attain the age of twenty-one years, if more than one, in equal shares as tenants in common in fee, and if but one, then to that one in fee; and for want of such issue, over. It was contended, on the authority of *Phipps* v. *Ackers*, that the children took vested estates in fee, subject only to be divested partially in case of other children coming into being, or wholly in case of death under twenty-one. But Rolfe, B., who delivered the judgment of the Court, said that in *Phipps* v. *Ackers*, and the cases there referred to, there was an absolute gift to some ascertained person or persons, and the Courts held that words accompanying the gift, though apparently importing a contingency or contingencies, did in reality only indicate certain circumstances on the happening or not happening of which the estate previously vested should be divested, and pass from the first devisee into some other channel; but that here there was no gift to any person who did not answer the whole of the requisite description, and no one who had not attained twenty-one was an object of the testator's bounty, any more than a person who was not a child of the granddaughter. Even if there were no authority establishing this to be a substantial distinction, the Court would not feel inclined to extend the doctrine of *Doe* v. *Moore* and *Phipps* v. *Ackers* to cases not precisely similar. But in fact this distinction in a great measure formed the ground of the decision of *Duffield* v. *Duffield* (*m*) in the House of Lords, and *Russel* v. *Buchanan* (*n*). It was therefore decided that, as no child of the granddaughter had attained twenty-one when her estate determined, the remainder was defeated for want of a particular estate to support it (*o*).

Bull v. *Pritchard.*

Again, in *Bull* v. *Pritchard* (*p*), where a testator devised his freehold estates to trustees, in trust for his daughter M. during

(*l*) 12 M. & Wels. 279, 5 Hare, 573.

(*m*) 1 D. & Cl. 268, 314, 3 Bli. (N.S.) 260. See also *Newman* v. *Newman*, 10 Sim. 51; *Wills* v. *Wills*, 1 D. & War. 439; and *Re Astor*, [1922] 1 Ch. 364; stated *post*, p. 1357.

(*n*) 7 Sim. 628.

(*o*) But as there were infant children who might attain twenty-one, the event on which the alternative remainder was limited had not happened, so that this remainder also failed. See *Astley* v. *Micklethwait*, 15 Ch. D. 59. See now 40 & 41 Vict. c. 33, stated *post*, p. 1418.

(*p*) 5 Hare, 567. See also *per* Sir W. Grant, *Leake* v. *Robinson*, 2 Mer., at p. 386; and *Stead* v. *Platt*, 18 Bea. 50; *Holmes* v. *Prescott*, 33 L. J. Ch. 264; 10 Jur. (N.S.) 507 (in which Wood, V.-C., examined the authorities); *Perceval* v. *Perceval*, L. R. 9 Eq. 386 (same will); *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; *Price* v. *Hall*, L. R. 5 Eq. 399; *Patching* v. *Barnett*, 28 W. R. 886; *Re Eddels' Trusts*, L. R. 11 Eq. 559. As to *Brackenbury* v. *Gibbons*, 2 Ch. D. 417, see next chapter. These cases have virtually overruled *Browne* v. *Browne*, 3 Sm. & Gif. 568; and *Riley* v. *Garnett*, 3 De G. & S. 629.

her life, for her separate use, and after her decease, he directed his trustees to convey the said estates " unto and equally between and among all and every the child and children of his said daughter M. who should live to attain the age of twenty-three years," in fee as tenants in common; " and, if there should be but one such child, then to such one child " in fee; " but, in case there should be no such child or children, or, being such, all of them should die under the age of twenty-three years without lawful issue, then upon trust " to convey to the persons therein named : Sir J. Wigram, V.-C., said there were two classes of cases; one, where the devise was to a party at a given age, and the property was given over if he died under that age; the other, where the description of the devisee was such as to make the given age part of that description; and he held that this case fell under the second class.

Re Astor.

In *Re Astor* (*q*) the devise was in trust " for such son (living at my death) of my son W. A. as first or alone attain the age of twenty-one years." It was held that attaining twenty-one was an essential part of the description.

Muskett v. *Eaton.*

But there are no words so plain but they may be controlled by the context (*r*): and in *Muskett* v. *Eaton* (*s*), where a testatrix devised a farm to A for life, and in the event of his leaving a lawful son born, or to be born in due time after his decease, who should live to attain the age of twenty-one years, unto such son and his heirs if he should live to attain the age of twenty-one years; but if A should die without leaving a son who should live to attain the age of twenty-one years, then, after the death of A, to B and his heirs. A died, leaving an infant son; and Sir G. Jessel, M.R., held that the case was not within the rule in *Festing* v. *Allen*. He said, " The testatrix must be taken to have known the course of nature, and if the child had been born within nine months after the death of the tenant for life, he could not have been twenty-one at the time when the particular estate determined. It is quite impossible that she could have intended the attainment of the age of twenty-one to be part of the description of the person to take. Therefore, in my opinion, the son takes a vested estate subject to be divested in the event of his dying under twenty-one."

Devises after payment of debts.

It was at one period doubted whether a devise to a person *after* payment of debts was not contingent until the debts were paid; but it is now well established that such a devise confers

(*q*) [1922] 1 Ch. 364.
(*r*) *Per* Wood, V.-C., *Holmes* v. *Prescott*, 33 L. J. Ch., at p. 271.
(*s*) 1 Ch. D. 435; *Sulley* v. *Barber*, 59 L. T. 824.

an immediately vested interest, the words of apparent postponement being considered only as creating a charge (*t*).

General remark on preceding cases.

Mr. Jarman remarks (*y*): "The several preceding classes of cases clearly demonstrate that the Courts will not construe a remainder to be contingent, merely on account of the inaccurate and inartificial use of expressions importing contingency, if the nature of the limitations affords ground for concluding that they were not used with a view to suspend the vesting. Such cases may be considered, however, as exceptions to the general rule; and, agreeably to the maxim, *exceptio probat regulam*, they confirm, rather than oppose, the doctrine that devises limited in clear and express terms of contingency do not take effect, unless the events upon which they are made dependent happen, which cases we now proceed to consider."

Estates limited in clear terms of contingency.

V.—Devises contingent by express Terms, notwithstanding absurd Consequences.—"The first remark suggested by this class of cases," as Mr. Jarman points out (*z*), "is, that an estate will be construed to be contingent, if clearly so expressed, however absurd and inconvenient may be the consequences to which such a construction may lead, and however inconsistent with what it may be *conjectured* would have been the testator's actual meaning, if his attention had been drawn to those consequences.

Denn v. *Bagshaw.*

"Thus, in *Denn* d. *Radclyffe* v. *Bagshaw* (*a*), where the devise was to the testator's only daughter M. for life, and after her decease to the first son of her body, *if living at the time of her death*, and the heirs male of such first son, remainder to the other sons successively in tail, in like manner, remainder to testator's nephew in tail. M. had issue an only son, *who died in her lifetime*, leaving issue. Whether such issue was entitled under the devise in tail (*b*) to this first son, was the question. It was contended for him, that the testator must have intended that the nephew, who was otherwise amply provided for by him, should not take until failure of all the descendants of his daughter; and that to accomplish this intention, the Court would either construe the estate of the daughter to be an estate tail, or hold that an estate tail vested in the son on his birth; and that

(*t*) *Barnardiston* v. *Carter*, 1 P. W. 505, 509; 3 B. P. C. Toml. 64; *Hathorn* v. *Foster*, 9 T. L. R. 497; 10 T. L. R. 64; see also *Bagshaw* v. *Spencer*, 1 Ves. sen. 142; and some very able opinions stated 1 Coll. Jur. 214. Those of Lord Eldon (then Sir John Scott), and Mr. Fearne, are particularly worthy of attention.

(*y*) First ed., p. 743.

(*z*) First ed., p. 744.

(*a*) 6 T. R. 512; see also *Wingrave* v. *Palgrave*, 1 P. W. 401 (arising on the limitation of a term in a settlement).

(*b*) For such it clearly would have been. See *infra*.

the words, 'if living at the time of her death,' merely marked the period when the remainder should commence in possession, as in the cases before discussed. But the Court (reluctantly, on account of the hardship of the case (*c*)), decided, that the son not having survived his mother, his estate never arose. Lord Kenyon observed, that the cases cited for him proceeded on informal words; whereas here correct and technical expressions were used throughout (*d*).

Devises held to be contingent, notwithstanding absurd consequence,

"So, in *Holmes* v. *Cradock* (*e*), where a testator devised freehold, copyhold, and leasehold estates to F., his heirs, &c., upon trust to pay testator's wife an annuity of £100 for her life, and to pay the residue of the annual profits to testator's son W. during the life of his mother; and if his son should happen to die before his mother, without leaving a widow or child, then in trust to pay all such profits to her for life, and subject to the said trusts, that the said F. should stand seised to the use of the testator's said son, his heirs and assigns, for ever, subject and chargeable with the legacies thereinafter given. In a subsequent clause he proceeded thus:—'And if my son shall die, *leaving my wife*, without leaving a wife or any child, after his death *and my wife's*, I give and bequeath,' certain legacies, 'which I charge upon my real estate, hereinbefore limited to my son and his heirs.' The son survived his mother, and died without leaving wife or child; and Sir R. P. Arden, M.R., held that the legacies did not arise, on the ground that he was not warranted in totally rejecting words, unless they were repugnant to the clear intention manifested in other parts of the will (*f*)."

Mr. Jarman cites *Shuldham* v. *Smith* (*g*), as another illustration of the rule.

(*c*) "Persons taking instructions for wills, in which the vesting is to depend on the devisee or legatee attaining a particular age or living to a given period, should carefully ascertain that the possibility of his dying in the meantime, *leaving issue*, is in the testator's contemplation. It is probable that in general this event is overlooked; and that if the testator's attention were drawn to the circumstance, he would either make the interest vest in the legatee, in case of his dying leaving issue before the prescribed age or period, or else substitute the issue in such event." (Note by Mr. Jarman.)

(*d*) Compare *Re Dundalk and Enniskillen Ry., ex p. Roebuck*, [1898] 1 Ir. 219, where the decision turned on the words "if alive."

(*e*) 3 Ves. 317; see also *Vick* v. *Suetér*, 3 Ell. & Bl. 219.

(*f*) "But was there not ground to contend, on the principle of *Pearsall* v. *Simpson*, and that class of cases (*ante*, p. 1347), that the devise might be read 'if my son shall die without leaving a wife or child, then after his decease, *and after my wife's decease, if he shall die leaving my wife*'? There can be little doubt that Sir W. Grant would so have construed it. It is observable, that neither *Webb* v. *Hearing*, nor the anonymous case in Ventris, 363, was cited to Sir R. P. Arden, who relied much on *Calthorpe* v. *Gough*, cit. 3 B. C. C. 395, and *Doo* v. *Brabant*, 3 B. C. C. 393; 4 T. R. 706." (Note by Mr. Jarman.)

(*g*) 6 Dow, 22; Sug. Law of Prop. 416; see also *Parsons* v. *Parsons*, 5 Ves.

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—or testator's erroneous belief.

Where holding the devise to be contingent, will defeat the declared object of the testator.

Bradford v. *Foley*.

The same rigid rule of construction prevails, where a testator has disposed of an estate in a certain event only, under the erroneous impression that his power of disposition is confined to such contingency (*h*).

"Still, however," says Mr. Jarman (*i*), "where the construing of the devise to be contingent, in accordance with the letter of the will, would have the effect of rendering nugatory a purpose clearly expressed by the testator, the Court will struggle to avoid such a construction.

"Thus, in *Bradford* v. *Foley* (*j*), where the devise was in trust for the testator's son for life, and after his decease unto the first and every other son which he (the son) should have by any future wife in tail; remainder to the daughters of such future marriage in fee; with a proviso, that if his son should thereafter marry with any woman related in blood to M. his then wife, all the above uses, so far as they related to the issue of such future marriage, should cease and determine, it being the testator's steadfast resolution, to hinder that no person any ways of kin to her in blood, or born or descended from any such person, should inherit any part of the said estate; and *in such case*, notwithstanding there should be issue of his said son by such future marriage, living at the time of his (testator's) decease it was his will that neither they, nor either of them should take any thing under his will; *but that* the trustees should stand seised to the use of his (the testator's) brother's children, living at his decease, and their heirs; and in case they should all die in his lifetime, or after his decease, without issue, then he devised his said real estate to his own right heirs: he meant such heirs only as should be in no ways related in blood to the said M., all of whom he thereby excluded from any right, title, or benefit, from his estate (*k*). The son died without marrying again. It was contended, that in this event the ulterior estates never arose; but the Court held, that the testator's brother's children were tenants in tail. Lord Mansfield said nothing could be clearer than that the testator meant that no child of M.

578; *Dicken* v. *Clarke*, 2 Y. & C. 572; *Clarke* v. *Butler*, 13 Sim. 401; *Lenox* v. *Lenox*, 10 Sim. 400.

(*h*) *Doe* d. *Vessey* v. *Wilkinson*, 2 T. R. 209; *Archbold* v. *Austin-Gourlay*, 5 L. R. Ir. 214.

(*i*) First ed., p. 748.

(*j*) Doug. 63. This case seems to be exactly the converse of *Driver* d. *Frank* v. *Frank*, 3 M. & Sel. 25.

(*k*) "It seems that these words would not have amounted to a devise to the persons next in descent, *Goodtitle* d. *Bailey* v. *Pugh*, 3 B. P. C. Toml. 454. Consequently, a son or other relation of M, being the testator's heir, would have taken the reversion by descent, notwithstanding this clause. Nothing will exclude the heir, but an actual disposition to some other person." (Note by Mr. Jarman), *ante*, p. 752.

should take in any event; and yet, according to that argument, such child, if there had been one, must have taken (as heir-at-law).

Remark on *Bradford* v. *Foley*.

"The words in this case were certainly very strong, and to a Judge less disposed than Lord Mansfield to relax the strict rules of construction, they probably would have appeared to present an insuperable difficulty to holding the testator's brother's children to take in any other event than that of the son's future marriage, especially as this construction extended the devise beyond what was absolutely necessary to effectuate the testator's professed object, namely, the exclusion of the obnoxious persons. He might have intended the devise in question to take effect only in case such persons came *in esse*. The case, however, stands distinguished from the others before noticed, in the fact, that the devise in its literal terms was inconsistent with a scheme, not merely conjectured, but avowed by the testator (*l*)."

The cases of *Doe* d. *Bills* v. *Hopkinson* (*m*), and *Quicke* v. *Leach* (*n*) seem to have been decided on the same principle.

In *Lightfoot* v. *Maybery* (*o*) a clause at the end of the will relating to the personal estate was used to determine the vesting of the real estate.

Gift to a class.

VI.—Implication of Contingency.—The question whether a contingency can be implied arises most frequently in gifts to classes. The implication will of course not be made where the language is clear (*p*), but it will be made if it appears necessary in order to give effect to the testator's intention. Thus in *Leeming* v. *Sherratt* (*q*) a testator gave his residuary real and personal estate upon trust to sell and divide the proceeds equally among his children so soon as the youngest should attain twenty-one: Wigram, V.C., said: "The testator having postponed the division of the residue until his youngest child attained that age [twenty-one], I think no child, who did not attain that age, could have been intended to take a share therein." This dictum was followed by Kindersley, V.-C., in *Parker* v. *Sowerby* (*r*), and by Wood, V.-C., in *Lloyd* v. *Lloyd* (*s*). But

(*l*) This case is given by Fearne (C. R. 234), as an example of a limitation after a preceding estate, which preceding estate depends on a contingency which never happens, taking effect notwithstanding.

(*m*) 5 Q. B. 223; see *Sulley* v. *Barber*, 59 L. T. 824.

(*n*) 13 M. & W. 218.

(*o*) [1914] A. C. 782, 797.

(*p*) As in *Boulton* v. *Beard*, and other cases cited *post*, p. 1363.

(*q*) 2 Ha. 14. *Ante*, p. 1326.

(*r*) 1 Drew. 488, more fully reported 17 Jur. 752.

(*s*) 3 K. & J. 20. Apparently also by Hall, V.-C., in *Coldicott* v. *Best*. [1881] W. N. 150. The decision in *Ford* v. *Rawlins*, 1 S. & St. 328, may

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Contingency not implied. *Re Lodwig.*

it was disapproved in *Re Lodwig* (*t*), where the testator directed that after the youngest of his grandchildren (children of K.) should attain the age of thirty, the trust funds should be divided between K. and her said children. It was held that the interest of the grandchildren was not contingent upon their attaining the age of thirty years.

The implication does not arise where the testator has expressly made all the children the objects of his bounty (*u*); or (it seems) where the gift is to named individuals, and the testator shows that each is intended to have a share (*x*). And if the intermediate income of each child's share were made applicable for its maintenance, no doubt that would have the effect of vesting the share (*y*). But a direction to apply the income of the whole property as a common fund for the maintenances of all the children, does not have this effect (*z*).

In such a case as *Leeming* v. *Sherratt*, each child takes a vested interest on attaining twenty-one, and if he dies before the time of division, his share passes to his representatives. The same rule seems to apply where the gift is to individuals (*a*). But the testator may, by a clause of accruer or gift over, show an intention that only those legatees who are living at the time of division are to take vested interests (*b*).

Construction of original gift affected by subsequent words.

Closely akin to cases of this kind, are those cases in which the original gift is ambiguous in regard to the period of vesting, and it is held to be contingent by reference to a subsequent clause in the will. Thus if property is given to the children of A to be transferred to them on their attaining twenty-five, but in case A shall leave but one child, then the whole to go to that child on his attaining twenty-five, with a gift over in the event of A not leaving a child who attains twenty-five, the gift to all the children is contingent on their attaining twenty-five, and is consequently void for remoteness (*c*).

Gift to several children contingent; gift to one child vested.

But the converse proposition does not hold good. Thus in *Walker* v. *Mower* (*d*) property was given upon trust for A for

be supported on this ground, but Leach, V.-C., seems to have thought that only those children who were living when the youngest attained twenty-one were entitled; but the trust was in the nature of a power of distribution. In *Sansbury* v. *Read*, 12 Ves. 75, the will was obscure.

(*t*) [1916] 2 Ch. 26.

(*u*) *Re Grove's Trusts*, 3 Giff. 575; *Boulton* v. *Pilcher*, 29 Bea. 633.

(*x*) *Cooper* v. *Cooper*, 29 Bea. 229.

(*y*) On the principle stated below, p. 1380.

(*z*) *Lloyd* v. *Lloyd*, 3 K. & J. 20; *Re Hunter's Trusts*, L. R. 1 Eq. 295. In *Boulton* v. *Pilcher*, 29 Bea. 633, Romilly, M.R., seems to have thought otherwise.

(*a*) *Re Smith's Will*, 20 Bea. 197.

(*b*) *Re Hunter's Trusts*, L. R. 1 Eq. 295.

(*c*) *Judd* v. *Judd*, 3 Sim. 525; *Hunter* v. *Judd*, 4 Sim. 455, and other cases cited *post*, p. 1397. See now section 163 of the Law of Property Act, 1925.

(*d*) 16 Bea. 365; *Johnson* v. *Foulds*, L. R. 5 Eq. 268.

life, and after her death upon trust for her children on their attaining twenty-one, and if there should be but one child, then upon trust for such only child; A died leaving an only child, who died an infant: it was held by Romilly, M.R., that the child took a vested interest. In that case there was a gift over in the event of A dying without leaving any child. In *Re Fletcher* (*e*) there was a similar gift to children attaining twenty-one or marrying, and if only one child then to that child, with a gift over in the event of there being no child "who shall live to attain a vested interest"; it was held that this made the interest of an only child (a daughter) contingent on her attaining twenty-one or marrying.

Contingency implied by gift over.

Where there is a gift to a class of persons in remainder, the general rule that all members of the class who come into existence during the particular estate, take vested interests, may be displaced by the context (*f*). For example, if the gift is to A for life and after his death to his children in equal shares, followed by a proviso that if A shall leave only one child, then the whole shall go to that child, this may have the effect of making the gift to all the children contingent on their surviving A (*g*).

Gift to class in remainder.

In *Kimberly* v. *Tew* (*h*), however, Sir E. Sugden thought that in such a case the children take vested interests, subject to be divested if one child, and only one child, survives the tenant for life; but he did not decide the point. Sir E. Sugden's view was adopted in *Re Firth* (*i*), *Re Walker* (*k*) and *Re Stephens* (*l*), so that the question is now settled.

In the case of a gift to a class upon a contingency, the general rule is that the contingency is not imported by implication into the description of the class, so as to confine the gift to those members of the class who survive the contingency. Thus, in *Boulton* v. *Beard* (*m*), the testatrix bequeathed a fund upon trust for A for life, and after her death upon trust for C. R. for life, and if C. R. died during A's lifetime, leaving issue, then upon trust for C. R.'s children as they attained twenty-one; C. R. had several children, one of whom attained twenty-one

Contingent gift to class.

Boulton v. *Beard.*

(*e*) 53 L. T. 813.
(*f*) Quoted in *Re Stephens*, [1927] 1 Ch., at p. 18.
(*g*) *Smith* v. *Vaughan*, Vin. Abr., Devise Z. c. pl. 32; *Spencer* v. *Bullock*, 2 Ves. jun. 687; *Pearce* v. *Edmeades*, 3 Y. & C. 246; *Madden* v. *Ikin*, 2 Dr. & Sm. 207; *Lewis* v. *Templer*, 33 Bea. 625; *Cooper* v. *Macdonald*, L. R. 16 Eq. 258.
(*h*) 4 Dr. & W. 139.
(*i*) [1914] 2 Ch. 386.
(*k*) [1917] 1 Ch. 38.
(*l*) [1927] 1 Ch. 1.
(*m*) 3 D. M. & G. 608. Approved in *Hickling* v. *Fair*, [1899] A. C. 15.

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and died in C. R.'s lifetime : it was held that the deceased child had attained a vested interest. But the language of the will may show that only those members of the class who survive the contingency are entitled to take. Thus, in *Selby* v. *Whittaker* (*n*), the testator gave a fund upon trust for his two daughters for life in moieties, and after the death of a daughter leaving lawful issue or other lineal descendants her surviving, upon trust to pay, assign and transfer her moiety to her children or other lineal descendants in equal shares *per stirpes*, to be paid, assigned and transferred to them at twenty-one, " but nevertheless the said parts or shares of the said child or children shall be absolute vested interests in him, her or them immediately on the decease of his, her or their respective parent or parents, and transmissible to his, her or their executors or administrators respectively "; there was a gift over in the event of a daughter dying " without leaving any lawful issue or other lineal descendants her surviving." It was held by the Court of Appeal that children of a daughter who predeceased her did not take.

Selby v. *Whittaker.*

VII.—Whether Contingency applies to one or all of several Limitations.—Mr. Jarman continues (*o*) : " When a contingent particular estate is followed by other limitations, a question frequently arises, whether the contingency affects such estate only, or extends to the whole series. The rule in these cases seems to be, that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitations.

Question, whether contingency confined to particular estate, or extends to a series of limitations.

" Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event, for want of something in the will to authorise a distinction between them (*p*).

" In *Moody* v. *Walters* (*q*) the limitations in a marriage

Contingency held to extend to whole line of limitations.

(*n*) 6 Ch. D. 239.

(*o*) First ed. p. 752.

(*p*) *Davis* v. *Norton*, 2 P. W. 390; *Doe* d. *Watson* v. *Shipphard*, Doug. 75, stated Fea. C. R. 236; *Toldervy* v. *Colt*, 1 Y. & C. 240, 621; 1 M. & Wels. 250; the same rule applies to personalty, *Lett* v. *Randall*, 10 Sim. 112; *Fitzhenry* v. *Bonner*, 2 Drew. 36; *Cattley* v. *Vincent*, 15 Bea. 198; *Gray* v. *Colding*, 6 Jur. (N.S.) 474.

(*q*) 16 Ves. 283.

settlement were to the husband and wife successively for life, remainder to the first and other sons in tail male; with remainder, *in case he* (*the husband*) *should die without leaving any issue male then born, and alive, and leaving his wife with child*, to such after-born child or children, if a son or sons : remainder to the brother of the settlor for 120 years, if he should so long live; remainder to trustees for preserving contingent remainders; remainder to his first and other sons in tail male, with reversion to the settlor in fee. Lord Eldon expressed a strong opinion (though the case was not decided on the point), that the husband having died, leaving a son, the limitation to the posthumous son would not (if there had been one) have arisen, and that the ulterior limitations failed with it. Such, his Lordship thought, would have been the construction, had it been a will.

Contingency confined to particular estate.

"Instances in which a contingency has been restricted to the immediate estate are of two kinds. First, where the words of contingency are referable to, and evidently spring from, an intention which the testator has expressed in regard to that estate, by way of distinction from the others.

Where the words are referable to particular estate only.

"As in *Horton* v. *Whittaker* (*r*), where A, by his will, declared his desire to provide for his sisters; but considering that his sister M., wife of W., was already well provided for during the life of her husband, and therefore would not, *unless she happened to survive him*, want any assistance to enable her to live in the world, he devised his estates to trustees, in trust during the life of M., to pay the rents to his (the testator's) sisters T. and B.; and after the decease of W., *in case his* (*the testator's*) *sister M. should be then living*, in trust as to one-third, to the use of the said M. for life; and as to the other two-thirds, to the other two sisters respectively for life; remainder, as to each third, to the respective sons of each successively in tail, with remainders over. M. died in the lifetime of her husband; and the question was, whether the remainders did not fail by this event; but it was held, that the contingency affected her own life estate only, and did not extend to the ulterior limitations.

Where the limitations of ulterior estates stand as independent gifts.

"Secondly. The contingency is restricted to the particular estate with which it stands associated, where the ulterior limitations do not follow such contingent estate in one uninterrupted series, in the nature of remainders, but assume the form of

(*r*) 1 T. R. 346; see also *Napper* v. *Sanders*, Hutt. 118; *Bradford* v. *Foley*, Doug. 63, stated *ante*, p. 1360; *Doe* d. *Lees* v. *Ford*, 2 Ell. & Bl. 970; *Doutty* v. *Laver*, 14 Jur. 188; *Darby* v. *Darby*, 18 Bea. 412; *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184. See also *Re Blight*, 13 Ch. D. 858.

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substantive independent gifts. As, in *Lethieullier* v. *Tracy* (*s*), where A devised land to his daughter for life, remainder to her first and other sons in tail; and, if she should depart this life without issue of her body *living at her death*, then he devised the land to trustees and their heirs, until N. should attain twenty-one, upon certain trusts. *Item—the testator gave and devised* the land in question to N., after he should have attained his age of twenty-one years, for his life, with remainders over. Lord Hardwicke held, that the contingency of the daughter dying without issue *living at her death* affected only the estate limited to the trustees until N. attained twenty-one, and not the subsequent limitations. His Lordship said, he took the words, 'Item —I give and devise,' etc., as a substantive devise, and not at all relative to the former devise to the trustees, on the contingency of the daughter dying without issue at her death."

The same principle was applied in *Pearson* v. *Rutter* (*t*), (where the ultimate trust commenced with the words "and subject to the trusts hereinbefore declared,") and in *Boosey* v. *Gardener* (*u*), where the ultimate disposition of one half of a fund, although literally contingent on the prior dispositions taking effect, was held to be an independent gift, being connected with the disposition of the other half, which commenced with the word "likewise" and was clearly an independent gift, on the principle above stated.

Observations on words "item," "likewise," etc.

It is not, however, to be assumed that whenever the word "item," or "likewise," begins a sentence, it creates a complete severance of all that follows from the previously expressed contingency. It cannot be put higher than this, that such expressions make a *prima facie* case for the disconnection, which the context of the will may either maintain or rebut (*x*).

On the other hand, a limitation may be construed as a separate and independent gift, although not introduced by any special word of severance. Thus in *Re Blight* (*y*) there were several clauses directing the payment of an annuity, all connected by the word "and," some of which were subject to a

(*s*) 3 Atk. 774, Amb. 204; and see *Aislabie* v. *Rice*, 3 Mad. 256, 2 J. B. Moo. 358, 8 Taunt. 459, stated *post*, p. 1448; but see *Doe* v. *Wilkinson*, 2 T. R. 209, *ante*, p. 1360.

(*t*) 3 D. M. & G. 398; approved by Lord St. Leonards, and not appealed on this point, *Grey* v. *Pearson*, 6 H. L. C. 61 at p. 103.

(*u*) 5 D. M. & G. 122. See also *Quicke* v. *Leach*, 13 M. & Wels. 218; *Sheffield* v. *Earl of Coventry*, 2 D. M. & G. 551; *Partridge* v. *Foster*, 35 Bea. 545.

(*x*) *Paylor* v. *Pegg*, 24 Bea. 105. See the remarks of Lord Hardwicke in *Lethieullier* v. *Tracy*, *supra*; see also *Gordon* v. *Gordon*, L. R. 5 H. L. at p. 282, where several clauses began each with the words "as to"; and *Rhodes* v. *Rhodes*, 7 A. C. at pp. 208, 209.

(*y*) 13 Ch. D. 858.

contingency; it was held that the last clause was a separate and independent gift, and that it was not subject to the contingency.

In *Duffield* v. *McMaster* (*z*) a testator gave property upon certain trusts for the benefit of his son G. and G.'s wife, and provided that in case there should be any child of G. living at the death of the survivor of G. and his wife, the property should be held in trust for G.'s children as he should appoint, and in default of appointment in trust for G.'s children who should attain twenty-one : G. had one son who attained twenty-one and died in G.'s lifetime leaving children : it was held that the son took an absolute interest.

VIII.—Vesting of Legacies charged on Land.—A pecuniary legacy, whether charged on land or not, given to a person *in esse* simply, *i.e.*, without any postponement of payment, vests immediately on the testator's decease (*a*). But if payment is postponed, there are differences between ordinary legacies and legacies charged on land. Mr. Jarman lays it down as a general rule (*b*) that : " Pecuniary legacies charged on land are, so far as they come out of the real estate, to be considered as dispositions *pro tanto* of that species of property." It may be remarked that leaseholds are not land for this purpose, so that a legacy charged on realty and leaseholds may fail as to the realty and take effect as to the leaseholds (*c*). Money to arise from the sale of land is also not land for the purposes of the rule (*d*).

Failure of legacies charged on land.

Mr. Jarman continues (*e*) : " In regard to sums payable out of land *in futuro*, the old rule was, that, whether charged on the real estate primarily, or in aid of the personalty, they could not be raised out of the land if the devisee [or, as we should now say, the legatee] died before the time of payment (*f*); but this doctrine has undergone some modification; and the established distinction now is, that, if the payment be postponed *with reference to the circumstances of the devisee of the money*, as in the case of a legacy to A, to be paid to him at his age of twenty-one

Distinction where payment is postponed with reference to circumstances personal to devisee, and where for convenience of the estate.

(*z*) [1906] 1 Ir. 333.

(*a*) As to interest on legacies charged on land, see Chap. XXX, p. 1074.

(*b*) First ed. p. 756.

(*c*) *Re Hudsons*, Dru. t. Sug. 6.

(*d*) *Re Hart's Trust*, 3 De G. & J. 195. Conversely, a legacy charged on land directed to be purchased follows the general rule : *Harrison* v. *Naylor*, 2 Cox. 247.

(*e*) First ed. p. 756.

(*f*) In support of this statement of the doctrine Mr. Jarman cites *Bruen* v. *Bruen*, 2 Vern. 439; Pre. Ch. 195; 1 Eq. Ca. Ab. 267, pl. 2; *Att.-Gen.* v. *Milner*, 3 Atk. 112; *Prowse* v. *Abingdon*, 1 Atk. 482, and adds : " The ground of this rule, it should seem, was that the inheritance might not be unnecessarily burthened." See also *Poulet* v. *Poulet*, 1 Vern. 204; *Jennings* v. *Looks*, 2 P. W. 276; *Duke of Chandos* v. *Talbot*, 2 P. W. 601.

years (*g*), the charge fails, as formerly, unless the devisee lives to the time of payment (*h*); and that too, though interest in the meantime be given for maintenance (*i*). But, on the other hand, if the postponement of payment appear to have *reference to the situation or convenience of the estate*, as, if land be devised to A for life, remainder to B in fee, charged with a legacy to C, payable at the death of A, the legacy will vest *instanter*; and consequently, if C die before the day of payment, his representatives will be entitled; the raising of the money being evidently deferred until the decease of A, in order that he may in the meantime enjoy the land free from the burthen (*k*). But either of these rules of construction, of course, will yield to an expression of a contrary intention. Thus, even where the payment is made to depend on a contingency, which might, abstractedly viewed, appear to spring from considerations personal to the legatee, as in the case of a sum of money directed to be raised for a person at the age of twenty-one; yet the vesting will take place immediately on the testator's decease, if such be

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(*g*) It makes no difference whether the legacy is given to the legatee "at twenty-one," or "when he attains twenty-one," or "provided he attains twenty-one," or is simply made "payable at twenty-one": *Parker* v. *Hodgson*, 1 Dr. & Sm. 568, where the old cases are referred to.

(*h*) *Gawler* v. *Standerwicke*, 1 B. C. C. 105, n., 2 Cox, 15; *Harrison* v. *Naylor*, 3 B. B. C. 108, 2 Cox, 247; *Phipps* v. *Lord Mulgrave*, 3 Ves. 613; but see *Jackson* v. *Farrand*, 2 Vern. 424, 1 Eq. Ca. Ab. 268, pl. 8; this case is said to have been termed anomalous by Lord Hardwicke, *Cotton* v. *Cotton*, *ib.* n., 1 Atk. 486.

(*i*) *Pearce* v. *Loman*, 3 Ves. 135; *Gawler* v. *Standerwicke*, *ubi sup.*; *Parker* v. *Hodgson*, 1 Dr. & Sm. 568.

(*k*) *King* v. *Withers*, 3 P. W. 414; Cas. t. Talb. 117; 1 Eq. Ca. Ab. 112, pl. 10; Com. Rep. 716; *Lowther* v. *Condon*, 2 Atk. 127; *Emes* v. *Hancock*, 2 Atk. 507; *Sherman* v. *Collins*, 3 Atk. 319; 1 Ves. sen. 44; Amb. 167, 230, 266, 575; 1 B. C. C. 119, n., 124, n., 192, n.; Dick. 529; 1 B. C. C. 119; *ib.* 191; 9 Ves. 6; 4 Sim. 294; 2 Y. & C. 539; 2 Y. & C. C. C. 134; 3 Hare, 86; 7 *ib.* 334; 1 M. D. & D. 418; 2 *ib.* 177; *Evans* v. *Scott*, 1 H. L. C. pp. 43, 57; and see *Remnant* v. *Hood*, 2 D. F. & J. 396. *Re Neary's Estate*, 7 L. R. Ir. 311; *Haverty* v. *Curtis*, [1895] 1 Ir. 23. "In *Oakeley* v. *Kichener*, in Chancery, March, 1827 (with a MS. note of which the writer has been favoured), a testator devised to his wife an annuity for her life out of his real estate, and, subject thereto, devised his real estate to trustees for 500 years to raise his debts and legacies. He gave a legacy of £1,000 to each of his four younger children, payable at twenty-one, as to sons, and twenty-one or marriage, as to a daughter with interest in the meantime, to be applied for their maintenance. He also gave them a further legacy of £1,000 each to be paid *within six months after the death of the wife*, payable at twenty-one, or marriage, as before, with interest from her death. There was (though the fact does not appear to be very material) a gift over of the respective legacies on the death of the sons before twenty-one without issue, or the daughter unmarried, to the survivors. It was held, that the vesting of the second series of legacies was not postponed until the decease of the wife, and, therefore, did not fail by the decease of the children during her life.

"This case, it will be perceived, agrees with the general distinction stated in the text, as the charge was evidently postponed until the death of the annuitant for the convenience of the estate." (Note by Mr. Jarman.) See also *Brown* v. *Wooler*, 2 Y. & C. C. C. 134. Of course it makes no difference in the construction, that the remainderman, whose interest is charged with the legacy, dies before the tenant for life. The interest passes, *cum onere*, to the heir, *Morgan* v. *Gardiner*, 1 B. C. C. 193 n.

the declared intention (*l*). And if such intention, though not expressly intimated, can be collected from the context, the exclusion of either rule will be no less complete (*m*).

Gift over in one event favours vesting in all other events.

"And here it may be observed, that it is a circumstance always in favour of the immediate vesting, that the testator has expressly given over the legacy to another in the event of the legatee dying under certain circumstances; the inference being in such case, that the legacy is meant to be raised out of the land for the benefit of the original legatee, in every event, except that on which it was expressly given to the substituted legatee (*n*).

"On the same principle, where a testator provides that, in the event of his legatee, or one of the legatees, if more than one, dying in his own lifetime, the legacies should not sink into the land, but be raised for the benefit of some other persons,—a strong argument is naturally suggested, that the testator must intend the legacies to be raised for the benefit of the legatee absolutely, or, in other words, that he should take a vested interest in case he does survive the testator" (*o*).

And, on the other hand, although the time of payment may appear to be fixed with a view to the convenience of the estate, for instance, six months after the death of an annuitant, yet, if the direction be to pay at that time to the legatees, "or such of them as shall be then living," it is clear that the representatives of one who dies before the annuitant cannot claim a share in the fund (*p*). So, in *Taylor* v. *Lambert* (*q*), a legacy charged

(*l*) *Watkins* v. *Cheek*, 2 S. & St. 199.

(*m*) Thus it may appear to be the intention that only those children who survive their parent shall be entitled to portions: *per* Turner, L.J., in *Remnant* v. *Hood*, 2 D. F. & J. at p. 411, citing *Bradley* v. *Powell*, Ca. t. Talb. 193, and *Whatford* v. *Moore*, 3 My & C. 270. See also *Re Brabazon*, 13 Ir. Eq. R. 156.

(*n*) *Murkin* v. *Phillipson*, 3 My. & K. 257, where A bequeathed to his six grandchildren the sum of £50 each, when the youngest should come of age, they to receive the interest in the meantime, when a certain estate should be sold, adding, "if either of those children should not live to come of age, nor have an heir born in wedlock, the said £50 to be equally divided among the surviving children." One of the grandchildren attained twenty-one, married, and afterwards died, during the minority of the youngest grandchild, leaving a child. Sir J. Leach, M.R., thought that though there was, in terms, no gift until the youngest grandchild attained twenty-one, yet as interest was given in the meantime, and payment was postponed for the convenience of the estate, the interests were vested; and his Honour assented to the argument (which had been strongly urged at the bar), that as the ulterior gift showed that the legacy was intended not to sink into the land, if the legatee died under age, leaving a child, *a fortiori* it could not be meant that the legacy should sink into the land in the event of the legatee attaining twenty-one, and afterwards dying, leaving a child.

(*o*) *Lowther* v. *Condon*, 2 Atk. pp. 127, 130.

(*p*) *Goodman* v. *Drury*, 21 L. J. Ch. 680; see *Bruce* v. *Charlton*, 13 Sim. 65, and cases cited *supra*, note (*m*).

(*q*) 2 Ch. D. 177. In *Re Cartledge*, 29 Bea. 583, a bequest "from and after the death of" an annuitant was held to be contingent on the legatee surviving the annuitant; *sed quære.*

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on land devised to A in fee, but not to be raised "until A come into actual possession of the M. estate," of which A was then tenant for life in remainder, failed through A dying before the tenant for life in possession of that estate.

In the case of a strict settlement, whether by deed or will, where portions are charged on the estate for younger children, it seems that only those younger children who attain twenty-one, or (being daughters) marry, are entitled to portions (*r*).

When payable, no time of payment being fixed.

"Sometimes," as Mr. Jarman points out (*s*), "a difficulty occurs in determining at what period a sum of money charged on land is to be raised, from the absence of expressions fixing the time of payment. The cases on this subject are not all reconcileable (*t*), but it seems that, generally, in such a case, the devisee would be entitled to have the money raised immediately. In *Cowper* v. *Scott* (*u*), £1,500 was to be raised, *within* six years after the testator's decease, out of the rents and profits, and interest at 4 per cent. in the meantime, for his two youngest daughters, one of whom dying under age, and within the six years, it was held to belong to her representative, on the ground that there was no precise appointment when it should be paid; the six years being mentioned as the ultimate time, and it was to be paid as much sooner as it could. But, if the testator have only a reversion in the lands charged, it is probable that the money would be held not to be raiseable until the reversion fell into possession. This principle has prevailed in several cases in regard to annuities" (*x*).

Charges on reversions.

Legacy charged on both real and personal estate.

Where a legacy is charged both on real and personal estate, then, so far as the personal estate will extend to pay it, the case is governed by the rules regulating the vesting of gifts of personal property, and as if the legacy were to come out of the personal estate only; and, so far as the real estate is applicable to make up the deficiency in the personal, the case is governed

(*r*) *Remnant* v. *Hood*, 2 D. F. & J. 396; *Davies* v. *Huguenin*, 1 H. & M. 730. See *Henty* v. *Wrey*, 21 Ch. D. 332, where *Lord Hinchinbroke* v. *Seymour*, 1 Br. C. C. 395 is discussed; *Haverty* v. *Curtis*, [1895] 1 Ir. 23.

(*s*) First ed. p. 758.

(*t*) "See Mr. Cox's note to *Duke of Chandos* v. *Talbot*, 2 P. W. at p. 612; but it is observable that the cases cited by the learned editor, as decided on the principle that portions 'do not vest if the children die before they want them,' arose in reference to portions under settlements, where the effect of holding the portions to vest *instanter* would have been to give them to the father, in the event of the children dying at a very early age, contrary to the obvious spirit and design of such provisions." (Note by Mr. Jarman). And see Butler's note IV to Fearne, C. R. 557.

(*u*) 3 P. W. 119; see also *Wilson* v. *Spencer*, 3 P. W. 172; *Emes* v. *Hancock*, 2 Atk. 507; *Hodgson* v. *Rawson*, 1 Ves. sen. 44. *Norfolk* v. *Gifford*, 2 Vern. 208, as explained in Raithby's note, went on a different ground.

(*x*) *Ager* v. *Pool*, Dyer, 371 b; *Turner* v. *Probyn*, 1 Anstr. 66.

by the same rules as if the legacy were charged on the realty alone (*y*).

Vesting of bequests of personal estate.

IX.—Vesting of Bequests of Personalty.—Mr. Jarman says (*z*): "The same general principles which regulate the vesting of devises of real estate apply, to a considerable extent, to gifts of personalty (*a*). Whatever difference exists between them, has arisen from the application to the latter of certain doctrines borrowed from the civil law, which have not obtained in regard to real estate, having been introduced by the Ecclesiastical Courts, who possessed, and still possess (*b*), in common with Courts of Equity, a jurisdiction for the recovery of legacies and distributive shares of personal estate" (*c*).

Vesting favoured by law.

It has been already mentioned (*d*) that the law is said to favour the vesting of estates, and that consequently an immediate devise of realty, or a bequest of personalty (including, of course, pecuniary legacies (*e*)), to a person *in esse*, gives him a vested interest on the death of the testator, and the principle is said especially to apply to gifts to children (*f*). But the principle is at best a vague one, and, as in devises of realty (*g*), so in bequests of personalty, the Court will not do violence to plain words in order to convert a contingent interest into a vested one; it is only where the words of the will are ambiguous that they are to be read so as to give the legatees a vested rather than a contingent interest (*h*). Thus a gift to the testator's children who attain twenty-one is contingent, and it is not made a vested gift by a gift over to take effect in the event of the testator dying "without leaving any children surviving me" (*i*). But if property is bequeathed to the children of A, "as and when" they attain twenty-one, with a gift over in case A dies without issue, this may have the effect of giving the children vested interests (*k*). So if a gift to A and B when they attain the age

(*y*) *Duke of Chandos* v. *Talbot*, 2 P. W. 601; *Jennings* v. *Looks*, *ib.* 276; *Prowse* v. *Abingdon*, 1 Atk. 482; *Re Hudsons*, Dru. 6.

(*z*) First ed. p. 755.

(*a*) Including leaseholds and money to arise from the sale of land: *Re Hudsons*, Dru. t. Sugd. 6; *Re Hart's Trusts*, 3 De G. & J. 195.

(*b*) Since Mr. Jarman wrote, this jurisdiction has been abolished: Stat. 20 & 21 Vict. c. 77, s. 23.

(*c*) As to the division of legacies, according to the rules of the civil law, into *transmissible* and *conditional*, see Hawkins on Wills (3rd ed.), 264.

(*d*) *Ante*, p. 1330.

(*e*) *Ante*, p. 1367.

(*f*) *Howgrave* v. *Cartier*, 3 V. & B. 79; *Re Roberts*, [1903] 2 Ch. 200, and other cases cited *post*, p. 2111.

(*g*) *Ante*, p. 1358.

(*h*) *Re Hamlet*, 39 Ch. D. 426; *Whatford* v. *Moore*, 3 My. & Cr. 270.

(*i*) *Re Edwards*, [1906] 1 Ch. 570, where *Kidman* v. *Kidman*, 40 L. J. Ch. 359, is commented on.

(*k*) *Post*, p. 1401.

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of twenty-one years, is followed by the appointment of a trustee for them during minority, this may have the effect of making the gift vested (*l*).

Words of contingency disregarded.

An instance of the inclination of the Courts to construe a gift as vested rather than contingent, occurs in *Partridge* v. *Foster* (*m*). There a testator bequeathed certain leaseholds to trustees in trust to pay an annuity to X, and directed that if the testator's son A should within five years make his claim to the trustees, he should be entitled to one moiety of the leaseholds, "subject, however, together with the other moiety thereof in favour of my son B to the annuity and trusts before mentioned"; it was held that the gift to B was not contingent on A's making his claim.

Bequest to A for life and after his death to B.

It may be convenient to refer to some of the general rules, stated above as applicable to devises, which apply also to bequests of personalty. A bequest of stock to A for life and after his death to B, gives B a vested interest, subject only to A's life interest, so that if B dies before A, B's interest passes to his personal representatives (*n*). And if the gift to A fails to take effect, by lapse or otherwise, or is determined during his lifetime, B's interest is accelerated (*o*). This construction is not necessarily affected by the addition of words which, taken literally, make the bequest to B contingent on his surviving A (*p*).

Effect of gift over.

The rule in *Phipps* v. *Ackers* (*q*), as to the effect of a gift over, applies to bequests of personalty (*r*), as does the rule as to the effect of a gift over following a gift during widowhood, or until marriage, etc. (*s*).

Rule in *Maddison* v. *Chapman*.

The rule as to vesting, which is best known by the statement of it in *Maddison* v. *Chapman* (*t*), applies to personalty (*u*).

Vested subject to be divested.

Some of the cases cited above (*x*) as illustrations of the rule that a vested gift will not be divested, unless the exact event specified in the gift over happens, were gifts of personal estate.

(*l*) *Branstrom* v. *Wilkinson*, 7 Ves. 421. The bequest seems to have been subject to be divested if both died under age.

(*m*) 35 Bea. 545. The decision in *Re Smith's Will*, 20 Bea. 197, cannot be treated as laying down any general principle.

(*n*) *Monkhouse* v. *Holme*, 1 Br. C. C. 298; *Blamire* v. *Geldart*, 16 Ves. 314; *Benyon* v. *Maddison*, 2 Br. C. C. 75.

(*o*) *Evestaff* v. *Austin*, 19 Bea. 591; *Jull* v. *Jacobs*, 3 Ch. D. 703.

(*p*) See *Pearsall* v. *Simpson*, *Massey* v. *Hudson*, and the other cases cited above, p. 1347; *Bradley* v. *Barlow*, 5 Ha. 589.

(*q*) *Ante*, p. 1350.

(*r*) *Whitter* v. *Bremridge*, L. R. 2 Eq. 736. This was a case of residue, but nothing seems to have turned on that point. See *Fox* v. *Fox*, L. R. 19 Eq. 286, *post*, p. 1384.

(*s*) *Stanford* v. *Stanford*, 34 Ch. D. 362, and other cases cited *ante*, p. 1337, including *Re Tredwell*, [1891] 2 Ch. 640.

(*t*) *Ante*, p. 1348.

(*u*) *Pearsall* v. *Simpson*, 15 Ves. 29; *Re Shuckburgh's Settlement*, [1901] 2 Ch. 794.

(*x*) *Ante*, p. 1344.

It seems that a rule analogous to that established by the decision in *Boraston's Case* (*y*), applies to bequests of personalty (*z*).

Rule in *Boraston's Case.*

With regard to the vesting of personal legacies (*a*), the payment of which is postponed to a period subsequent to the death of the testator, Mr. Jarman states the general rule as follows (*b*): "A leading distinction is, that if futurity is annexed to the *substance* of the gift, the vesting is suspended; but if it appears to relate to the time of payment only, the legacy vests *instanter*. Thus, where a sum of money is bequeathed to a person at the age of twenty-one years (*c*), or at the expiration of a definite period (say ten years) from the decease of the testator (*d*), the vesting, not the payment merely, is deferred; and, consequently, if the legatee dies before the period in question, the legacy fails. But if the legacy is, in the first instance, given to the legatee, and is then directed *to be paid* at the age of twenty-one years, or at the end of ten years after the testator's decease, the legacy vests immediately, so that, in the event of the legatee dying before the time of payment, it devolves to his representative (*e*). As, in *Sidney* v. *Vaughan* (*f*), where a testatrix bequeathed to A £100, to be paid to him within six months after he should have served his apprenticeship to which he was then bound. A did not serve out his apprenticeship, but ran away from his master, and, after the expiration of the term, died intestate. It was held, by the House of Lords, that A's administratrix was entitled to the legacy, with interest from the expiration of six months.

Vesting of personal legacies.

Distinction where time is annexed to substance of gift, and where to time of payment only.

"So, in *Chaffers* v. *Abell* (*g*), where a testator bequeathed

Chaffers v. *Abell.*

(*y*) *Ante*, p. 1345.

(*z*) *Post*, p. 1379.

(*a*) Residuary bequests are considered in the next section, but some of the cases cited by Mr. Jarman in this section deal with residuary bequests.

(*b*) First ed., p. 759.

(*c*) *Onslow* v. *South*, 1 Eq. Ca. Abr. 295, pl. 6; *Cruse* v. *Barley*, 3 P. W. 20; *Re Wrangham's Trust*, 1 Dr. & Sm. 358.

(*d*) *Smell* v. *Dee*, 2 Salk. 415. See also *Re Eve*, 93 L. T. 235; *Bruce* v. *Charlton*, 13 Sim. 65. Compare *Bromley* v. *Wright*, 7 Hare, 334; *post*, p. 1378.

(*e*) *Cloberry* v. *Lampen*, 2 Freem. 24; 2 Ch. Cas. 155; *Stapleton* v. *Cheele*, 2 Vern. 673, Pre. Ch. 317; *Harvey* v. *Harvey*, 2 P. W. 21; *Jackson* v. *Jackson*, 1 Ves. sen. 217.

(*f*) 2 B. P. C. Toml. 254. "It seems that if no interest were made payable on the legacy, the representative must wait until the legatee, if living, would have attained his majority; but if it carried interest, he would be entitled immediately. See *Crickett* v. *Dolby*, 3 Ves. 13; *Feltham* v. *Feltham*, 2 P. W. 271." (Note by Mr. Jarman.)

(*g*) 3 Jur. 577; see also *Wadley* v. *North*, 3 Ves. 364; *Williams* v. *Clark*, 4 De G. & S. 472; *Edmunds* v. *Waugh*, 4 Drew. 275; *Knox* v. *Wells*, 2 H. & M. 674; *Shrimpton* v. *Shrimpton*, 31 Bea. 425; *Maher* v. *Maher*, 1 L. R. Ir. 22; *Brocklebank* v. *Johnson*, 20 Bea. 205; whence it appears that the Court is always anxious to find a gift independent of the direction to pay, or a direction to set apart a fund for payment of the legacy. But see *Shum* v. *Hobbs*, 3 Drew. 93.

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certain sums of stock to trustees, to pay £40 per annum to his daughter M. for life, and, after her decease, 'to pay, assign and transfer the sum of £1,000 stock equally amongst all and every the child and children of M., share and share alike, *to be paid and transferred to them when and so soon as the youngest should attain his or her age of twenty-one years*' (*h*); and directed that, after the decease of his daughter, the dividends should be applied for the maintenance of the children. At the death of the testator, M. had four children, one of whom died before the youngest attained twenty-one. The youngest alone survived M. Sir L. Shadwell, V.-C., held that the four children took vested interests in the stock. There was, he observed, in the first place, a clear gift to all the children in the shape of a direction to pay and transfer, followed by another direction to pay and transfer, '*when and so soon as the youngest of such children should attain his or her age of twenty-one years.*'

Superadded words of division or distribution.

"Words directing division or distribution between two or more objects at a future time, fall under the same consideration as a direction to pay; and, therefore, where they are engrafted on a gift, which would, without these superadded expressions, confer an immediate interest, they do not postpone the vesting. Thus, a bequest to A and B of £3,000, Navy £5 per cent. Annuities, and all dividends and proceeds arising therefrom, to be equally divided between them, when they should arrive at twenty-four years of age, has been held to vest the stock immediately in the legatees" (*i*).

It should be remembered that a mere direction that a legacy is not to be paid until the legatee attains an age exceeding twenty-one years, is, by itself, as a general rule, inoperative, and the legatee is entitled to payment on attaining twenty-one (*k*).

The general principle stated by Mr. Jarman prevails where payment is in terms postponed until the testator's debts are satisfied (*l*), or his assets realised (*m*), or an outstanding security is got in (*n*), or until certain real estate is sold (*o*), or money directed by the will to be laid out in the purchase of land is so

(*h*) This is said to mean "when the youngest child that lives to the age of twenty-one attains that age": *Ford* v. *Rawlins*, 1 S. & St. 328; *Evans* v. *Pilkington*, 10 Sim. 412; see *Castle* v. *Eate*, 7 Bea. 296.

(*i*) *May* v. *Wood*, 3 B. C. C. 471; *Farmer* v. *Francis*, 2 Sim. & St. 505.

(*k*) *Re Couturier*, [1907] 1 Ch. 470, following *Gosling* v. *Gosling*, Johns. 265, cited *post*, p. 1396, n. (*m*).

(*l*) *Small* v. *Wing*, 5 B. P. C. Toml. 66.

(*m*) *Gaskell* v. *Harman*, 6 Ves. 159, 11 Ves. 489. The position in the text seems to be warranted by Lord Eldon's observations in this case. The case itself was an extremely special one.

(*n*) *Wood* v. *Penoyre*, 13 Ves. 325a.

(*o*) *Stuart* v. *Bruere*, 6 Ves. 529, n.; and see *Tily* v. *Smith*, 1 Coll. 434.

laid out (*p*), or until the death of another person (*q*). And an immediate gift to several is not made contingent by a superadded direction for distribution between them equally as three barristers should think fit, the discretion not extending to authorise any alteration in the extent of the interests given to the legatees (*r*).

Immaterial that the words of division precede those of gift.

It is, of course, immaterial whether the gift precedes or follows the direction to pay. Therefore, where a testator bequeathed a sum of money to trustees, in trust for his daughter for life, and after her death in trust to pay the same unto or between or amongst all and every the children of his daughter, as and when they should respectively attain the age of twenty-one, share and share alike, "to whom I give and bequeath the same accordingly," Lord Cottenham held the legacy vested in the children on their birth (*s*).

The rule yields to a clear contrary intention.

But if it is clear from the language of the will that the attainment of a certain age is made a condition precedent to the vesting of a legacy, such legacy will be contingent notwithstanding a gift of the legacy distinct from the direction to pay; so that a gift to A, to be paid in case he attained the age of twenty-one and not otherwise, is contingent upon A's attaining that age (*t*). Again, the original gift may be so connected with the direction to pay that the legacy must be held to be contingent (*y*). So, where a testator clearly expressed his intention that the benefits given by his will should not vest till his debts were paid (*z*), or until a sale directed thereby should be completed (*a*), or until assets in a foreign country should be actually remitted to the legatee (*b*), the intention was carried into execution, and the vesting as well as payment was held to be postponed (*c*).

(*p*) *Sitwell* v. *Bernard*, 6 Ves. 520; see also *Hutchin* v. *Mannington*, 1 Ves. jun. 365, 4 B. C. C. 491, n.; *Entwistle* v. *Markland*, 6 Ves. 528, n.; *Whiting* v. *Force*, 2 Bea. 571; *Lucas* v. *Carline*, *ib.* 367; *Re Dodgson's Trust*, 1 Drew. 440.

(*q*) *Billingsley* v. *Wills*, 3 Atk. 219.

(*r*) *Kavanagh* v. *Morland*, cited by Wood, V.-C., in *Maddison* v. *Chapman*, 4 K. & J. 715.

(*s*) *Re Bartholomew*, 1 Mac. & G. 354; and see *Livesey* v. *Livesey*, 3 Russ. 287, 542; *King* v. *Isaacson*, 1 Sm. & G. 371; *Re Lyman's Trust*, 2 L. T. (N.S.) 662.

(*t*) *Knight* v. *Cameron*, 14 Ves. 389; *Lister* v. *Bradley*, 1 Hare, 10; *Heath* v. *Perry*, 3 Atk. 101. *Re Kirkley*, 119 L. T. 304 ("if and when"). See also *Hunter* v. *Judd*, 4 Sim. 455; and *Merry* v. *Hill*, L. R. 8 Eq. 619, where the construction was aided by the context; see *post*, p. 1397.

(*y*) *Shum* v. *Hobbs*, 3 Dr. 93.

(*z*) *Bernard* v. *Mountague*, 1 Mer. 422.

(*a*) *Elwin* v. *Elwin*, 8 Ves. 547; *Faulkener* v. *Hollingsworth*, cit. *ib.* 558; *Re Mabbett*, [1891] 1 Ch. 707 (fund for purchase of annuity).

(*b*) *Law* v. *Thompson*, 4 Russ. 92.

(*c*) But not necessarily to the time when the debts have been actually paid, or the sale completed; for the Court will inquire when these purposes might, in a due course of administration, have been effected, and consider the legacies vested from that period. See the cases cited above, and see *Small* v. *Wing*, 5

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Legacy in uncertain event.

Moreover, as Mr. Jarman points out (*d*), "if the payment or distribution is deferred not merely (as in the cases just noted) until the lapse of a definite interval of time, which will certainly arrive, but until an event which may or may not happen, the effect, it should seem, is to render the legacy itself contingent. This distinction was recognised in *Atkins* v. *Hiccocks* (*e*), where a sum of £200 was bequeathed to A, to be paid at her marriage, or three months afterwards, provided she married with consent; and Lord Hardwicke held that A having died unmarried, her representative was not entitled to the legacy.

Rule where the only gift is in the direction to pay, etc.

"It should seem, too, that, where the only gift is in the direction to pay or distribute at a future age, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift.

Leake v. *Robinson.*

"Thus, in a leading case (*f*), where a testator gave certain real and personal property to trustees, upon trust, in a certain event, to pay, apply, and transfer the same unto and amongst all and every the brothers and sisters of R., share and share alike, *upon his, her or their attaining twenty-five, if a brother or brothers, and if a sister or sisters, at such age or marriage with consent*; and the trustees were authorised to apply the rents, profits, and interest, or so much as they should think

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B. P. C. Toml. 66; *Astley* v. *E. of Essex*, L. R. 6 Ch. 898. In *Birds* v. *Askey*, 24 Bea. 615, where there was a residuary gift, "after satisfying the trusts" of the will, to A if then living—one of the trusts being in favour of A himself for life—and it was decided that this meant if A was living after provision had been made for the due execution of the will, the M.R. held that this was a duty which fell on the executors immediately on the testator's decease, and that the residue vested in A at that time.

(*d*) First ed. p. 761.

(*e*) 1 Atk. 500; and see *Ellis* v. *Ellis*, 1 Sch. & Lef. 1; *Morgan* v. *Morgan*, 4 De G. & S. 164; *Re Cantillons*, 16 Ir. Ch. 301. Compare *Booth* v. *Booth*, 4 Ves. 399, and *West* v. *West*, 4 Gif. 198 (legacy on marriage with consent of guardians, was construed to require consent only to marriage under age). See also *Money* v. *Money*, 44 L. T. 639, where certain trusts to take effect on the marriage of the testator's son were held to take effect on the marriage taking place after the testator's death and before payment of the legacy. In *Bartleman* v. *Murchison*, 2 R. & My. 136, an annuity was bequeathed to A for life and after her decease to B "if a widow, but not otherwise"; B was married at the death of A, and it was held that the gift failed, although she afterwards became a widow.

(*f*) *Leake* v. *Robinson*, 2 Mer. 363; *Bentinck* v. *Duke of Portland*, 4 L. J. (o.s.) Ch. 13; *Meredith* v. *Tooke*, Hov. Sup. Ves. jun. 324; *Murray* v. *Tancred*, 10 Sim. 465; *Mair* v. *Quilter*, 2 Y. & C. C. C. 465; *Boughton* v. *James*, 1 Coll. 26; *Walker* v. *Mower*, 16 Bea. 365; *Gardiner* v. *Slater*, 25 Bea. 509; *Shum* v. *Hobbs*, 3 Dr. 93; *Locke* v. *Lamb*, L. R. 4 Eq. 372; *Re Edwards*, [1906] 1 Ch. 570. By the position in the text it is not to be understood, that the gift of a legacy under the form of a direction to pay at a future time, or upon a given event, is less favourable to vesting than a simple and direct bequest of a legacy at a like future time, or upon a like event; but that a distinction is to be taken between these two cases on the one hand and the case, mentioned above, of a gift of a legacy, with a superadded direction to pay at a future time, or upon a given event, on the other hand. *Per* Wigram, V.-C., 2 Hare, 17, 18. Still a direction to pay may help with other indications to show that the legacy is intended not to vest till payment: *per* Jessel, M.R., 6 Ch. D. 246.

proper, for the maintenance of such brothers and sisters in the meantime. Sir W. Grant, M.R., held, that this was not a case in which the enjoyment only was postponed; the direction to pay was the gift, and that gift was only to attach to children that should attain twenty-five (*g*).

Ford v. *Rawlins.*

"So, where (*h*) a testator left for his wife's use certain furniture, etc., adding, 'which I desire may be distributed amongst our children, on the youngest attaining twenty-one years, at her and my executor's discretion; such part being nevertheless reserved for her own use as may be thought convenient, and at her death to be distributed as above directed'; Sir J. Leach, V.-C., on the principle above stated, held, that children who died before the youngest attained twenty-one took no interest (*i*).

Effect where payment is postponed for convenience of fund.

"But even though there be no other gift than in the direction to pay or distribute *in futuro*; yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question. Thus, where a sum of stock is bequeathed to A for life; and, after his decease, to trustees, upon trust to sell and pay and divide the proceeds to and between C and D, or to pay certain legacies thereout to C and D; as the payment or distribution is evidently deferred until the decease of A, for the purpose of giving precedence to his life interest, the ulterior legatees take a vested interest at the decease of the testator."

Extent of the doctrine.

Sir J. Wigram, V.-C., has expressed his entire concurrence in the doctrine thus stated by Mr. Jarman (*j*), which is further

(*g*) It will be noticed that the gift was not to such of the brothers and sisters as should attain twenty-five, etc., but to the brothers and sisters upon their attaining twenty-five, but Sir W. Grant thought that this made no difference. "If there were an antecedent gift, a direction to pay upon the attainment of twenty-five certainly would not postpone the vesting. But if I give to persons of any description *when* they attain twenty-five, or upon their attainment of twenty-five, or from and after their attaining twenty-five, is it not precisely the same thing as if I gave to *such* of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five, can claim anything under such a gift" (2 Mer. p. 386). But there is a distinction between a gift to the children of A "as" or "when" they attain twenty-five, and a gift to "such" of the children of A "as" attain twenty-five: *Bull* v. *Pritchard*, *post*, p. 1398.

(*h*) *Ford* v. *Rawlins*, 1 S. & St. 328. The case of *Taylor* v. *Bacon*, 8 Sim. 100, is also cited by Mr. Jarman as an authority on the doctrine now under discussion, but in that case there was a direction to apply the interim income to the maintenance of the infants, which would bring it within the doctrine of *Fox* v. *Fox*, and other cases cited *post*, p. 1384. In *Leake* v. *Robinson* there was also a trust for maintenance, but being what the M.R. described as a discretionary trust, he did not consider it sufficient to make the interests vested. According to Jessel, M.R., the reason was that the income was not divided into aliquot shares; *Re Parker*, *post*, p. 1386.

(*i*) See *Leeming* v. *Sherratt*, 2 Hare, 14, stated *ante*, pp. 1326-7. In that case it was held that a child who attained twenty-one took a vested interest, although he died before the youngest attained that age.

(*j*) *Packham* v. *Gregory*, 4 Ha., at p. 396.

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supported by numerous authorities. The doctrine applies as well in gifts to a class (*k*), as to individuals; and as well where there has (*l*), as where there has not (*m*), been a trust for sale interposed between the prior and ulterior limitations: the sale being intended only to facilitate the distribution, not to postpone the vesting.

Ambiguous words in subsequent clause.

Ambiguous words occurring in a subsequent clause of the will do not, as a general rule, prevent the application of the doctrine. Thus, in *Re Duke* (*n*), where there was a gift to A and B for life, with remainder to their children, followed by a direction that the investment of the fund should not be altered during the lives of A and B; "nor until the period arrives for its distribution (after their death) among their children surviving": it was held that the latter clause did not import the contingency of survivorship into the original gift.

Gift over.

A gift over in case of the legatee's death before the period of distribution will not generally prevent the application of this doctrine (*o*).

Occurrence of new words of gift.

On the same principle, the mere introduction into an ulterior gift of new words of disposition, has no effect in postponing the vesting. Thus, where a testator bequeaths personalty to trustees, in trust for A for life, adding, "and after her decease, then I give," etc., these words do not postpone the vesting of the gift to the posterior legatee until the decease of A, but merely show that that is the period at which it will take effect in possession (*p*).

Class subject to enlargement before time of payment.

In *Oppenheim* v. *Henry* (*q*), a testator bequeathed property in trust for his grandchildren, to be divided amongst them at

(*k*) *Smith* v. *Palmer*, 7 Ha. 225; *Re Bennett's Trust*, 3 K. & J. 280.

(*l*) *Bromley* v. *Wright*, 7 Hare, 334; *Day* v. *Day*, 1 Drew. 569; *Bayley* v. *Bishop*, 9 Ves. 6; *Parker* v. *Sowerby*, 1 Drew. 488; *Hodges* v. *Grant*, L. R. 4 Eq. 140; *Partridge* v. *Baylis*, 17 Ch. D. 835 (as to the gift over in this case, see *post*, p. 2112; *Re Boam*, 56 Sol. J. 142. In *Bayley* v. *Bishop* and *Parker* v. *Sowerby*, the property to be sold was real, but this makes no difference; *Re Hart's Trusts*, 3 De G. & J. 195. See also *Beck* v. *Burn*, 7 Bea. 492; *Chevaux* v. *Aislabie*, 13 Sim. 71; *Davidson* v. *Proctor*, 19 L. J. Ch. 395, which appear to be undistinguishable from, and inconsistent with, the other cases. *Beck* v. *Burn* was doubted by Kindersley, V.-C., in *Parker* v. *Sowerby*, 17 Jur. 752; and by Romilly, M.R., in *Adams* v. *Robarts*, 25 Bea. 658; and though constantly cited, appears never to have been followed.

(*m*) *Hallifax* v. *Wilson*, 16 Ves. 168; *Chaffers* v. *Abell*, 3 Jur. 578; *Cousins* v. *Schroder*, 4 Sim. 23; *Watson* v. *Watson*, 11 Sim. 73; *Baynes* v. *Prevost*, 8 Jur. 506; *Packham* v. *Gregory*, 4 Hare, 396; *Re Wilson*, 14 Jur. 263; *Salmon* v. *Green*, 11 Bea. 453; *Homer* v. *Gould*, 1 Sim. (N.S.) 541; *Marshall* v. *Bentley*, 1 Jur. (N.S.) 786; *Strother* v. *Dutton*, 1 De G. & J. 675; *Re Bright's Trust*, 21 Bea. 67; *M'Lachlan* v. *Taitt*, 28 Bea. 407. As to the effect of a gift over in the event of a legatee dying before his legacy or share becomes "payable," see *post*, p. 2110.

(*n*) 16 Ch. D. 112.

(*o*) *Shrimpton* v. *Shrimpton*, 31 Bea. 425.

(*p*) *Benyon* v. *Maddison*, 2 B. C. C. 75

(*q*) 10 Hare, 441.

the expiration of twenty years after his decease: it was held that the grandchildren living at his death took vested interests, subject to be opened and to let in grandchildren born before the expiration of the twenty years.

Gift to class, followed by gift to one object.

In some cases, where there is a gift to a class, followed by a gift to take effect in the event of only one object answering the description, the construction of the gift to the class may be affected by the terms of the latter gift (*r*). On the other hand, the gift to the class may be contingent, while the gift to the sole object may be vested (*s*).

Gift seemingly contingent vested by gift of intermediate interest.

Mr. Jarman continues (*t*): "Where a legacy is given to a person if, or provided, or in case, or when, (for it matters not which of these words is used (*u*),) he attains the age of twenty-one years (*x*), or marries (*y*), though such legacy standing alone and unexplained would clearly be contingent, *i.e.*, would be liable to failure in case of the legatee dying before the prescribed age or event; yet if the interest accruing in the interval between the death of the testator and the future period in question is appropriated to the benefit of the legatee, it is held, in analogy to the doctrine of *Boraston's Case* (*z*), that the words of futurity and contingency refer to the possession only, and that the gift amounts, in substance, to an absolute vested legacy, divided into two distinct portions or interests, for the purpose of protracting, not the vesting, but the possession only. Thus, in *Hanson* v. *Graham* (*a*), where A gave to his grandchildren B, C, and D, £500 £4 per cent. Annuities a-piece, *when* they should respectively attain their ages of twenty-one years, or day or days of marriage, which should first happen with consent, and directed that the interest of the said Bank Annuities should be laid out for the benefit of the grandchildren till they should attain their respective ages of twenty-one years, or day or days of marriage; Sir W. Grant, M.R., after a full and able examination of the authorities, held, on the principle above stated, that the legacies vested at the death of the testator.

Hanson v. *Graham*.

(*r*) See *Judd* v. *Judd*, 3 Sim. 525; and *King* v. *Isaacson*, 1 Sm. & G. 371; referred to *post*, p. 1397. The principle of these cases seems to apply to ordinary legacies. See *Lewis* v. *Templer*, 33 Bea. 625.

(*s*) *Johnson* v. *Foulds*, L. R. 5 Eq. 268. In *Re Fletcher*, 53 L. T. 813, the gift was to children who attained twenty-one, etc., in equal shares, "if only one child wholly to him or her," but if no child attained a vested interest, over: there was one child who died under age and unmarried, and it was held that she did not take a vested interest.

(*t*) First ed. p. 764.

(*u*) *Hanson* v. *Graham*, 6 Ves., at p. 243.

(*x*) *Atkinson* v. *Turner*, 2 Atk. 41; *Knight* v. *Cameron*, 14 Ves. 389.

(*y*) *Elton* v. *Elton*, 3 Atk. 504; *Re Wrey*, L. R. Eq. 315, *post*, p. 1381.

(*z*) *Ante*, p. 1345.

(*a*) 6 Ves. 239. See also 7 Ves. 421.

"So, in *Lane* v. *Goudge* (*b*), where A bequeathed certain £3 per cent. Consols to L for his (L's) second daughter, that he should have born, for her education till she should attain the age of twenty-one years; and, after she should attain to the said age of twenty-one years, the testator gave the said interest to her and her heirs for ever, she being christened Z. The second daughter was christened Z, and was held to be absolutely entitled, though she died at the age of seventeen" (*c*).

Discretionary trust to pay whole or part.

And a discretionary trust or power to pay the whole or part of the income has the same effect. In *Re Parker* (*d*), the rule was thus stated by Jessel, M.R.: "When a legacy is payable at a certain age, but is, in terms, contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees 'shall pay the whole or such part of the interest as they shall think fit.'"

Gift of interest followed by gift of principal.

In *Batsford* v. *Kebbell* (*e*) a testatrix gave to E. the dividends that should become due after her decease upon £500 3 per cent. annuities until he should arrive at the full age of thirty-two years, at which time she directed her executors to transfer to him the principal sum of £500 of her 3 per cent. annuities for his own use. E. died under the age of thirty-two, and Lord Loughborough held that the legacy failed. Mr. Jarman, in referring to this case, and *Sansbury* v. *Read* (*f*), and *Ford* v. *Rawlins* (*g*), remarks (*h*): "These cases have been commonly considered as decided on the principle, that, where the interest or dividends alone are the subject of bequest until a particular time, and the principal is then, *for the first time*, to be taken out of it, the intermediate gift of the interest or dividends will not vest the capital: 1 Rop. Leg. p. 581, White's ed. It must not too readily be assumed, however, that any given case falls within the principle, as the Courts have evinced no great inclination to extend it; and, in truth, in some of

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(*b*) 9 Ves. 225. See also 2 Freem. 24; Pre. Ch. 317; *Parker* v. *Golding*, 13 Sim. 418; *Hammond* v. *Maule*, 1 Coll. 281; *Hobbs* v. *Parsons*, 2 Sm. & Gif. 212.

(*c*) See also *Love* v. *L'Estrange*, 5 B. P. C. Toml. 59; *Boulton* v. *Pilcher*, 29 Bea. 633; *Bird* v. *Maybury*, 33 Bea. 351; *Hardcastle* v. *Hardcastle*, 1 H. & M. 405; *Re Peek's Trusts*, L. R. 16 Eq. 221; *Keily* v. *Monck*, 3 Ridg. P. C. 205; *Vize* v. *Stoney*, 1 Dr. & War. 337; *M'Cutcheon* v. *Allen*, 5 L. R. Ir. 268; *Vivian* v. *Mills*, 1 Bea. 315. In *Sullivan* v. *Edgell*, 23 W. R. 722, the gift was held to be contingent on the construction of the whole will.

(*d*) 16 Ch. D. 44. Quoted and followed by Neville, J., in *Re Williams*, [1907] 1 Ch. 180, *post*, p. 1396.

(*e*) 3 Ves. 363.

(*f*) 12 Ves. 75.

(*g*) 1 S. & St. 328, *ante*, p. 1377.

(*h*) First ed. p. 765, note

the cases of this class, the difference of expression was very slight" (*i*). In reality, however, the decision in *Batsford* v. *Kebbell* did not turn on the fact that the gift of capital followed that of the dividends, but on the marked distinction which was drawn between the dividends and the capital (*k*).

In *Westwood* v. *Southey* (*l*), after referring to *Batsford* v. *Kebbell* and *Billingsley* v. *Wills* (*m*), Kindersley, V.-C., said: "These cases have very often been relied upon in support of a proposition, which they do not at all establish, *viz.*, that if in the first instance there is a gift of dividends only, and then the gift of the principal, with a limitation over, for that reason only, there is no vesting. That principle is not, in my opinion, established by these cases." And in *Pearson* v. *Dolman* (*n*), a gift of this kind was held by Wood, V.-C., to confer a vested interest. It is true that in *Spencer* v. *Wilson* (*o*), Malins, V.-C., held that a similar gift did not give a vested interest, but this decision has not been followed, and the later cases of *Re Bunn* (*p*), *Scotney* v. *Lomer* (*q*), and *Re Wrey* (*r*), seem to show that *Batsford* v. *Kebbell* would at the present day, if followed at all, be followed only in a case exactly on all fours with it.

Gift on marriage.

In *Re Wrey* (*r*) the gift was to pay the dividends of stock to G. until his marriage, and at the time of his marriage to hand over the stocks to him: it was held that G. was entitled to have them transferred to him on his attaining twenty-one, although he had not married.

Defeasible gift of income.

In *Pearson* v. *Dolman* (*s*) and *Scotney* v. *Lomer* (*q*), the gift of the income was defeasible on alienation, etc.

Gift of income to a class followed by gift of corpus.

The same principle applies where the gift is to a class. Thus, in *Re Groves' Trusts* (*t*), a testator gave real property upon trust to pay the rents and profits to all and every the child and children of A until the youngest attained twenty-one, and then

(*i*) It was suggested by Arden, M.R., 3 Ves., at p. 367, that *Batsford* v. *Kebbell* was to be referred to the circumstance that the gift of principal was postponed to a more advanced age than that at which the law would put the legatee in possession. Such a postponement is of course ineffectual after twenty-one, if the legacy is vested, see *ante*, p. 536. But this distinction has not been recognised. See *Scotney* v. *Lomer*, 29 Ch. D. 535; 31 Ch. D. 380.

(*k*) *Re Hart's Trusts*, 3 De G. & J. 195.
(*l*) 2 Sim (N.S.) 192.
(*m*) 3 Atk. 219.
(*n*) L. R. 3 Eq. 315.
(*o*) L. R. 16 Eq. 501, dissented from in *Bolding* v. *Strugnell*, 24 W. R. 339.
(*p*) 16 Ch. D. 47.
(*q*) 29 Ch. D. 535; 31 Ch. D. 380.
(*r*) 30 Ch. D. 507.
(*s*) L. R. 3 Eq. 315.
(*t*) *Re Groves' Trusts*, 3 Giff. 575, more fully reported 9 Jur. (N.S.) 38; *Boulton* v. *Pilcher*, 29 Bea. 633; *Re Parker*, 16 Ch. D. 44.

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on trust to sell and divide the proceeds equally among all the said children: it was held that all the children took vested interests. *Jones* v. *Mackilwain* (*u*) was an even stronger case, but there the gift was residuary.

Gift of maintenance does not necessarily cause vesting,

Mr. Jarman continues (*x*): "A gift of interest, *eo nomine*, obviously is difficult to be reconciled with the suspension of the vesting, because interest is a premium or compensation for the forbearance of principal, to which it supposes a title; but a mere allowance for maintenance out of, and of less amount than the interest, has, it seems, no such influence on the construction (*y*).

—unless whole income is given as interest.

"If, however, the *entire* interest is made applicable to maintenance, the argument in favour of the vesting exists in full force" (*z*).

So if the whole income is given, subject to an annuity or the like (*a*).

But an annual allowance for maintenance, although equal in amount to the interest, will not, unless given as interest, have the same effect. As Lord Cottenham said in *Watson* v. *Hayes* (*b*): "It is the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance; but when maintenance is given, questions arise, whether it be a distinct gift, or merely a direction as to the application of the interest: and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy."

In *Russell* v. *Russell* (*c*), there was a gift of specific property upon trust for A upon his attaining twenty-five, with a direction to accumulate the income in the meanwhile upon trust for A upon his attaining twenty-five, and a discretionary power to

(*u*) 1 Russ. 220. This case is referred to *post*, p. 1383.

(*x*) First ed. p. 766.

(*y*) *Pulsford* v. *Hunter*, 3 B. C. C. 416. See also *Leake* v. *Robinson*, 2 Mer. at p. 386.

(*z*) *Fonereau* v. *Fonereau*, 3 Atk. 645; *Hoath* v. *Hoath*, 2 Br. C. C. 3; *Re Bunn*, 16 Ch. D. 47. See also 1 Russ. 220, 1 Tam. 18; *Lister* v. *Bradley*, 1 Ha. 10; *Re Lyman's Trust*, 2 L. T. (N.S.) 662; *Re Hart's Trusts*, 3 De G. & J. 195; *Bell* v. *Cade*, 2 J. & H. 122; *Tatham* v. *Vernon*, 29 Bea. 604; *Shrimpton* v. *Shrimpton*, 31 Bea. 425. The decision in *Re Ashmore's Trusts*, L. R. 9 Eq. 99, so far as it is *contra* seems inaccurate; see *Fox* v. *Fox*, L. R. 19 Eq. 286. In *Re Ashmore's Trusts*, James, V.-C., relied on *Pulsford* v. *Hunter*, 3 B. C. C. 416, which has generally (see 2 Mer. 386) been considered an authority only for the position for which it is cited *supra*. The report is obscure: but it is very improbable that Lord Thurlow (whose decision it is, but of which there seems to be no entry in R. L.) intended to overrule his own previous decision in *Hoath* v. *Hoath*, 2 B. C. C. 3, where he held that "giving the interest for maintenance was precisely the same thing" as giving the interest *simpliciter*. The decision in *Taylor* v. *Bacon*, 8 Sim. 100, seems to have turned on the scheme of the whole will. In *Perrott* v. *Davies*, 38 L. T. 52, *Re Ashmore's Trusts* is distinguished.

(*a*) *Potts* v. *Atherton*, 28 L. J. Ch. 486.

(*b*) 5 My. & Cr. at p. 133; *Livesey* v. *Livesey*, 3 Russ. 287; *Corr* v. *Corr*, Ir. R. 7 Eq. 397.

(*c*) [1903] 1 Ir. 168.

apply any part of the income for his maintenance, etc., while under that age: it was held that the gift failed by the death of A under twenty-five.

Gift of income operates to vest legacy to a class,

Where the legacy is to a class (*d*), a gift of the interest for maintenance operates to vest the legacy, provided that each member of the class has a distinct title to the interest of his own share. The decision in *Jones* v. *Mackilwain* (*e*) rested on this principle, although there the construction was aided by the fact that the gift was residuary (*f*). In that case the trust was to pay the income of one moiety of the property for the maintenance of the children of A until they severally attained their several and respective ages of twenty-one, and after they severally and respectively attained that age, as to all the property, "as and when they and each and every of them shall attain his, her and their respective age and ages of twenty-one years," in trust to pay and dispose of the same unto and amongst all and every such child and children: it was held that the children took vested interests (*g*).

—unless given as a common fund.

But where the interest is given as a common fund for the maintenance of all the members of the class, it does not vest the legacy. Thus in *Lloyd* v. *Lloyd* (*h*), the testator devised lands to trustees upon trust for his daughter for her life, and after her death upon trust to apply the rents "for and towards the maintenance, education and benefit of all and every the child and children of his said daughter during their minority, and when and as soon as all such children, if more than one, should have attained the age of twenty-one years, upon trust to sell the lands, and pay the money arising therefrom to and amongst all and every such child or children, share and share alike, if more than one, and if but one then the whole to such only child." Wood, V.-C., treated it as settled that a gift in that form, without the gift of income, vested only in such as attained twenty-one (*i*). Then, did the gift of income vest it sooner? He thought not (*k*).

(*d*) Of course a gift "to each child of A who shall attain twenty-one" is not a gift to a class; such a gift falls under the general rule above stated; *Re Byrne*, 23 L. R. Ir. 260.

(*e*) 1 Russ. 220.

(*f*) As to residuary bequests, see *post*, p. 1394.

(*g*) The decision in *Fox* v. *Fox*, L. R. 19 Eq. 286, appears to follow the same principle; see *Re Mervin*, [1891] 3 Ch. 197, stated, *post*, p. 1387; and the remarks on *Fox* v. *Fox*, *post*, p. 1388.

(*h*) 3 K. & J. 20; and see *Vorley* v. *Richardson*, 8 D. M. & G. pp. 126, 129, 130; *Re Hunter's Trusts*, L. R. 1 Eq. 295; *Davenhill* v. *Davenhill*, 5 W. R. 18; *Bickford* v. *Chalker*, 2 Drew. 327; and *per* Sir J. Romilly, *Sanders* v. *Miller*, 25 Bea. 154. *A fortiori* if the trustees have power to exclude some of the class from all maintenance: *Re Barnshaw's Trusts*, 15 W. R. 378. See *Re Parker*, 16 Ch. D. 44, *infra*, and *Sullivan* v. *Edgell*, 23 W. R. 722.

(*i*) See *Parker* v. *Sowerby*, 1 Drew. 488 at p. 496.

(*k*) In the fourth edition of this work (by Mr. Vincent), it was suggested

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Again, in *Re Parker* (*l*), Jessel, M.R., after stating the general rule that where a legacy is given to a person on his attaining a certain age, a direction to pay the intermediate income to him makes the legacy vested, said : " I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held to create a vested interest in a member of the class who does not attain that age."

Discretionary trust for maintenance.

Where personal property is given upon trust for a person on attaining a certain age, with a trust to apply the whole of the income, or so much as the trustees think fit, for his maintenance in the meanwhile, a more difficult question arises, because such a trust is obviously not a gift of the whole income (*m*), and it might therefore be supposed that the case would fall within the rule above stated (*n*), and in *Hardcastle* v. *Hardcastle* (*o*), Wood, V.-C., said that such a provision would be conclusive against vesting, " because in that case [the children] could not be treated as entitled during minority to the whole interest."

Fox v. *Fox*.

However, in *Fox* v. *Fox* (*p*), where a fund was given upon trust, after certain life interests, for the children of T. as they should respectively attain twenty-five, applying from time to time the income of the presumptive share of each child, or so much as the trustees might think proper, for his or her maintenance, until his or her share should become payable, it was held by Jessel, M.R., that the children of T. took vested interests. There was a gift over, and the M.R. added that this, if not conclusive, certainly aided the construction (*q*).

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that in the view of the V.-C. the words " during their minority " meant while any child was under age, so as to include children who had attained twenty-one; but this seems inconsistent with the concluding part of the judgment. See also *Re Lodwig*, [1916] 2 Ch. 26.

(*l*) 16 Ch. D. 44. This passage was cited with approval by Stirling, J., in *Re Mervin*, [1891] 3 Ch. 197, where the gift was one of residue, and the leaning in favour of the shares being vested was consequently even stronger than in the cases now under discussion; *post*, p. 1395.

(*m*) See the judgment of Wood, V.-C., in *Re Sanderson's Trusts*, 3 K. & J. at p. 507.

(*n*) *Pulsford* v. *Hunter*, 3 Br. C. C. 416 (as explained in *Fox* v. *Fox*, L. R. 19 Eq. 286), and *Leake* v. *Robinson*, 2 Mer. 363, *ante*, pp. 1376, 1382.

(*o*) 1 H. & M. 405.

(*p*) L. R. 19 Eq. 286. The earlier cases of *Eccles* v. *Birkett* and *Re Rouse's Estate*, *infra* note (*q*), were not cited in *Fox* v. *Fox*.

(*q*) The M.R. relied on *Harrison* v. *Grimwood*, 12 Bea. 192, where, however, the trust for maintenance (during part of the interval) was only one of several combined grounds for the decision. The judgment as reported in Beavan is not in accordance with the judgment as delivered, for it appears from the reports in the Law Journal and the Jurist (18 L. J. Ch. 485; 13 Jur. 864) that Lord Langdale gave his general views on the subject on one day and his considered judgment some days later; in his considered judgment he did not refer to the trust for maintenance at all. It is quite clear that the gift over was an important element in the case. See *post*, p. 1388. *Eccles* v. *Birkett*, 4 De G. & S. 105, is open to a similar observation, having regard

But in *Re Parker* (*r*) the M.R. laid down the general principle as one not requiring the assistance of a gift over: "In my opinion, when a legacy is payable at a certain age, but is in terms contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees 'shall pay the whole or such part of the interest as they shall think fit.'" The point did not arise in the case, and the statement of the M.R. is therefore only a dictum, but it was adopted as correct by Neville, J., in *Re Williams* (*s*). In that case the gift was one of residue, and the presumption in favour of a vested interest was therefore stronger.

Re Turney.

The decision in *Fox* v. *Fox* was approved by Lindley, L.J., and Jeune, P., in *Re Turney* (*t*). In that case a testator bequeathed a fund upon trust for a daughter for life, and after her death in trust for all her children when they should attain twenty-five, but not before, and if more than one in equal shares; if there should be no such child the fund was to fall into residue; until the fund should be invested the trustees were directed to pay to the children interest on their respective portions; the trustees were empowered to raise part of the expectant share of any grandchild for his or her advancement, and to apply all or any part of the income of the expectant share of any grandchild for maintenance, and they were directed to accumulate the unapplied income and add it to the capital of the share. It was held by the Court of Appeal (*dubitante* Romer, L.J.) that the grandchildren took immediate vested interests, subject to their being divested in case they died under twenty-five. Lindley, L.J., said: "I am by no means satisfied that *Fox* v. *Fox* was wrongly decided. So far as I have considered it, my impression is that the decision is very good sense and very good law."

Limitations on doctrine of *Fox* v. *Fox*.

The decision in *Re Turney* turned on the language of the will, and not on the point decided in *Fox* v. *Fox*, for Lindley,

especially to the contrast between the clearly contingent words "children who, etc.," and the more equivocal "as and when," and to the exception of two children by name—as to which last point see 1 Drew. 496; but no reasons are reported. A dictum of Turner, V.-C., in *Re Rouse's Estate*, 9 Hare, 649, has also been sometimes cited to the same effect; but it proceeds on a questionable interpretation of what Lord Kenyon said in *Wynch* v. *Wynch*, 1 Cox, 433, imputing to the latter the doctrine that a gift out of income for maintenance vests a legacy. The V.-C.'s decision is referable to other grounds, *post*, p. 1392.

(*r*) 16 Ch. D. 44, *post*, p. 1386. This doctrine does not apply if the money for maintenance is given, not out of the interest, but out of a separate fund: *Rudge* v. *Winnall*, 12 Bea. 357.

(*s*) [1907] 1 Ch. 180.

(*t*) [1899] 2 Ch. 739.

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L.J., said that he attached great importance to the phrase "interest on their respective portions," but not much importance to the maintenance clause (*u*), which formed the basis of the decision in *Fox* v. *Fox*. It is therefore somewhat difficult to say how far the authority of *Fox* v. *Fox* extends. It is certain that it has its limitations.

Thus, in *Re Grimshaw's Trusts* (*x*), a testator gave a fund upon certain trusts for A. B. and his wife during their lives, and after the death of the survivor upon trust to apply the income, or so much as the trustees should think proper, in the maintenance of their children during their minorities, and upon their attainment to the age of twenty-one years, to pay and divide the fund "with the accumulations thereof" unto and equally amongst such child or children, and if there were no such child, unto G.: it was held by Hall, V.-C., that *Fox* v. *Fox* did not apply, and that the shares of the children were contingent on their attaining twenty-one: the V.-C. thought the case was governed by *Leake* v. *Robinson* (*y*).

Again, in *Dewar* v. *Brooke* (*z*), where a fund was given upon trust for children who, being sons, should attain twenty-five, or being daughters, should attain twenty-one or marry, with a discretionary power (not a trust) to apply the income to which any child should be entitled in expectancy for maintenance, this was held not to confer a vested interest on a son who had not attained twenty-five.

Re Parker.

And in *Re Parker* (*a*), where there was a gift of residue upon trust to pay the income, or such part thereof as the trustees should from time to time deem expedient, for the maintenance of the testatrix's children until they should attain their respective ages of twenty-one years, and from and immediately after their attaining their respective ages of twenty-one years, upon trust to pay and transfer the capital to the children in equal shares; there was a power of advancement out of the "presumptive share" of any child: Jessel, M.R., held that there was no gift of an aliquot share of income to any individual child, but a trust for maintenance out of the income of the whole fund, and that consequently the interests of the children were contingent on their attaining twenty-one.

(*u*) It was a mere discretionary power (not a trust, as in *Fox* v. *Fox*), and probably had reference to the gift of residue, not being consistent with the direction as to payment of interest on the specific fund above referred to As to the gift of residue, see *post*, p. 1399, where the later case of *Re Gossling*, [1903] 1 Ch. 448, is cited.

(*x*) 11 Ch. D. 406.

(*y*) *Ante*, p. 1376.

(*z*) 14 Ch. D. 529.

(*a*) 16 Ch. D. 44, *ante*, p. 1385

Re Morris (*b*) and *Re Martin* (*c*), which were both cases of residuary gifts, seem to have been decided on the same principle.

In *Wilson* v. *Knox* (*d*), there was a legacy to each child of the testator who being sons should attain the age of twenty-one, and being daughters, should attain that age or marry, with power to the trustees to apply the whole or part of the income of each expectant legacy for maintenance : it was held that the legacy of a daughter who died under twenty-one and a spinster did not vest in her.

Re Mervin.

In *Re Mervin* (*e*), the provision for maintenance was also a power and not a trust. Stirling, J., however, did not rest his decision on this ground, but held that the principle of *Fox* v. *Fox* did not apply, because the income of the whole fund was made applicable for the maintenance of the children, as in *Re Parker* (*f*).

Re Wintle.

In *Re Wintle* (*g*), the testator gave his residue upon trust for his wife for life, and after her death upon trust for his children and remoter issue *per stirpes* absolutely upon their respectively attaining twenty-one, and he empowered his trustees to apply the whole or such part as they should think fit of the annual income of the share or presumptive share of any of his children or grandchildren during minority, for or towards his, her or their education or maintenance. North, J., did not lay any stress on the fact that the maintenance clause was a mere discretionary power, as he seems to have treated it as equivalent to a discretionary trust for maintenance (*h*), and dissented from *Fox* v. *Fox* as being contrary to the principles recognised in *Hanson* v. *Graham*, *Leake* v. *Robinson*, and *Vawdry* v. *Geddes* (*i*).

This decision is supported by the authority of Wood, V.-C. (*k*), but against it must be set the dictum of two Judges of the C. A. in *Re Turney* (*l*) expressing approval of *Fox* v. *Fox*.

Suggested distinction between *Fox* v. *Fox*, and *Re Wintle.*

In *Re Williams* (*m*), Neville, J., said he doubted whether *Fox* v. *Fox* and *Re Wintle* could both stand. There seems, however, to be an important distinction between the two cases :

(*b*) 52 L. T. 840.
(*c*) 57 L. T. 471.
(*d*) 13 L. R. Ir. 349.
(*e*) [1891] 3 Ch. 197.
(*f*) 16 Ch. D. 44.
(*g*) [1896] 2 Ch. 711.
(*h*) As did Stirling, J., in *Re Mervin*, *supra*. In *Eccles* v. *Birkett*, 4 De G. & S. 105 (*ante*, p. 1384, note (*q*)), the maintenance clause was in the form of a power.
(*i*) 1 R. & My. 203.
(*k*) *Hardcastle* v. *Hardcastle*, *ante*, p. 1384.
(*l*) [1899] 2 Ch. 739.
(*m*) [1907] 1 Ch. 180; *post*, p. 1396.

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in *Re Wintle* the gift was simply to the children upon their respectively attaining twenty-one, with a discretionary power of maintenance during minority : there was no gift over. In *Fox* v. *Fox* the gift was to the children as they respectively attained twenty-five, with a trust or direction to apply so much of the income as the trustees might think proper for maintenance, and a gift over in the event of all the children dying under twenty-five. In the somewhat similar case of *Harrison* v. *Grimwood* (*n*) (on which Jessel, M.R., relied in *Fox* v. *Fox*), Lord Langdale held that such a gift confers a vested interest, subject to be divested on death under twenty-five. So, in *Re Turney* (*o*), where a gift to children on attaining twenty-five, with a gift over, was held to confer interests subject to be divested, the decision did not turn on the gift of maintenance, but on the gift over, and it is, therefore, submitted that the approval of *Fox* v. *Fox* expressed by the C. A. had reference to the effect of a gift over in conferring vested interests subject to be divested. If this distinction is sound, *Fox* v. *Fox* and *Re Wintle* can both stand.

It is to be remarked that notwithstanding the apparent inconsistency between *Fox* v. *Fox* and *Re Wintle*, the decision in each case carried out the obvious intention of the testator, for in *Fox* v. *Fox* the testator meant the children to take if they attained twenty-five, while in *Re Wintle* the testator meant that the representatives of a child dying under twenty-one were not to take its share, as they would have done if the share had been held to be vested. And it is submitted that the intention would have been equally clear if the testator had directed the trustees to apply such part of the income as they thought proper for the maintenance of each child.

Re Ussher.

The cases and the subsequent cases of *Re Hume* (*p*) and *Re Woolf* (*q*) were considered by Astbury, J., in *Re Ussher* (*r*), who said : " The result, therefore, is that, so far as this Court is concerned, *Fox* v. *Fox* (*s*) and *Re Williams* (*t*) are clear decisions to the effect that in cases of this kind a trust to apply the whole or part as the trustees shall think fit of the intermediate

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(*n*) 12 Bea. 192, *ante*, p. 1384, note (*q*). According to the report in the Law Journal (18 L. J. Ch. 485) and the Jurist (13 Jur. 864), which is clearly more accurate than the L. J.), Lord Langdale laid less stress on the trust for maintenance than would appear from the report in Beavan; he thought the gift to the children ambiguous and decided the case on the whole will.

(*o*) [1899] 2 Ch. 739.

(*p*) [1912] 1 Ch. 693.

(*q*) [1920] 1 Ch. 184.

(*r*) [1922] 2 Ch. 321, at p. 331. See *Re Blackwell*, [1926] 1 Ch. 223; *Re Campbell*, 120 L. T. 562.

(*s*) L. R. 19 Eq. 286.

(*t*) [1907] 1 Ch. 180.

income in favour of the legatee is sufficient to vest what would otherwise be a contingent gift."

Result of the authorities.

The following rules may be deduced from the foregoing authorities :

(1) A bequest to a class consisting of persons who attain a certain age or marry, etc., is contingent, and a gift of the intermediate income or of maintenance will not give a vested interest to any person before attaining that age or marrying, etc. (*u*).

(2) A bequest to an individual or a class of persons on attaining a certain age or marrying, etc., accompanied by a gift of the intermediate income or a trust to apply the whole of it for maintenance, will generally have the effect of conferring a vested interest (*x*). But according to the latest decisions, if the bequest is to a class or number of individuals, an aliquot share of the income must be appropriated by the will to each legatee; it is not sufficient to direct the whole income to be applied for maintenance as a common fund (*y*).

(3) On the question whether a trust to apply the income of the property, or such part as the trustees think proper, for maintenance, is equivalent to a gift of the whole income for the purposes of the foregoing rule, it has been settled so far as Courts of first instance are concerned that the answer is in the affirmative, but the point is open in the Court of Appeal (*z*). It does not follow that a mere discretionary power of maintenance has the same effect (*a*); the statutory power of maintenance has not (*b*).

Gift of interest for the whole of the intermediate time implied from direction how to apply it during part of the time.

It seems, although this is a point which can scarcely be considered settled, that the direction to apply the intermediate income for the maintenance of the legatee, need not extend to the whole time which must elapse before the period appointed for payment arrives. Thus, in *Davies* v. *Fisher* (*c*), where a

(*u*) *Leake* v. *Robinson*, 2 Mer. 363; *Stead* v. *Platt*, 18 Bea. 50; *Atcherley* v. *Du Moulin*, 2 K. & J. 186; *Lloyd* v. *Lloyd*, 3 K. & J. 20; *Dewar* v. *Brooke*, 14 Ch. D. 529; *Locke* v. *Lamb*, L. R. 4 Eq. 372; *Wilson* v. *Knox*, 13 L. R. Ir. 349.

(*x*) *Ante*, p. 1379, where expressions equivalent to "on attaining," etc., are given, and see *Potts* v. *Atherton*, 28 L. J. Ch. 486, where an annuity was charged on the trust fund.

(*y*) *Re Parker*, 16 Ch. D. 44, and other cases cited, *ante*, p. 1386-7. See also *Re Gossling*, *post*, p. 1399.

(*z*) *Re Ussher*, [1922] 2 Ch. 321.

(*a*) *Re Blackwell*, [1926] 1 Ch. 223.

(*b*) *Re Jobson*, 44 Ch. D. 154.

(*c*) 5 Bea. 201. In *Milroy* v. *Milroy*, 14 Sim. 48, the word "minority" was held to mean the whole interval until the youngest child attained twenty-five. See *Maddison* v. *Chapman*, 4 K. & J. 709; 3 De G. & J. 536; *Fraser* v. *Fraser*, 1 N. R. 430; *Lloyd* v. *Lloyd*, *ante*, p. 1383, and *Harrison* v. *Grimwood*, 13 Jur. 864, and the comments thereon in *Re Wintle*, [1896] 2 Ch. 711, *ante*, p. 1387.

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testatrix bequeathed her residuary personal estate in trust for A for life, and after his death in trust for his children, as they severally attained the age of twenty-five years, the income to be applied by their guardians during their respective minorities for their maintenance : Lord Langdale, M.R., thought that although there was no distinct gift of the interest, yet that such a gift was to be implied from the direction to apply it during minorities. "The inference or implication," he said, "arises from the direction to apply the interest, and, although the direction is limited to the minorities, it is not necessary, or I think reasonable, to limit the inference or implication in like manner, or to the mere time to which the direction applies. At that time the mode of enjoyment expressly directed will cease, but I do not think that it is therefore to be concluded that there is to be no enjoyment." He therefore held that on this ground alone the children would have taken vested interests. But the case did not rest entirely on this ground (*d*); and even if it did, it would not be an authority that a gift of interest arising during a part only of the interval before the time of payment vests the legacy. There are dicta opposed to such a doctrine (*e*); and in the case itself a gift of interest during the whole interval was (as will have been seen) supplied by implication (*f*), a construction which might often be found convenient to fill up a gap in such cases.

Gift of interest will not vest the legacy where a contrary intention appears.

It is hardly necessary to say that a testator is not to be denied the power of giving interest without vesting the legacy, if such be his intention. Thus, in *Re Bulley's Estate* (*g*), where residue was bequeathed in trust for A for life, and after her death "to be paid to her surviving children in equal shares, as soon as they shall come to the ages of twenty-two years respectively, and not to go to their heirs or assigns or to any other person or persons on any pretence whatsoever; that is to say, the share of each child which may die after the death of A and before it arrives at the age of twenty-two years shall go among the others who may arrive" at that age; "and if any of the said children shall be under twenty-two after the death of A then my will is that only the interest of the share of such child shall be paid to it or for its benefit until it arrives at the

(*d*) See *S. C.*, *post*, p. 1403. The same remark applies to *Brennan* v. *Brennan*, [1894] 1 Ir. 69, where there was a gift to children at twenty-four, with a trust for maintenance during minorities.

(*e*) *Per* Wood, V.-C., L. R. 3 Eq. at p. 321; *per* Romilly, M.R., 31 Bea. at p. 302.

(*f*) In *Tatham* v. *Vernon*, 29 Bea. 604, this was so expressed, *viz.*, a gift to children at twenty-five, with gift of interest "in the meantime," for their maintenance "during minority."

(*g*) 11 Jur. (N.S.) 847.

age of twenty-two"; it was held by Stuart, V.-C., and on appeal by K. Bruce and Turner, L.JJ., that only those children who attained twenty-two were intended to share.

Effect where principal and interest are blended.

Mr. Jarman continues (*h*): "Where (*i*) the principal and interest are so undistinguishably blended in the bequest that both must vest, or both be contingent, of course no argument in favour of the vesting of the principal can be drawn from the gift of the interest. Thus, where (*k*) a testator gave to each of the daughters of K., as soon as they attained the age of twenty-one years, the sum of £200, with interest at the rate of £5 per cent. per annum, Sir J. Leach, V.-C., held that there was no gift either of principal or interest until the daughter attained twenty-one.

"But the construction which suspends the vesting of the interest as well as the principal, inconvenient as it evidently is, will not be adopted, unless the intention be very clear. Thus, in *Breedon* v. *Tugman* (*l*), where a testator bequeathed one-third of his personal property to his wife; another third to his son, to be laid out in an annuity; and the other third to his daughter, adding, 'and in case of my decease, to have the interest therein and principal when she arrives at the age of twenty-five years'; it was contended that the words 'in case of my decease,' imported contingency, and which, as in *Knight* v. *Knight*, extended to the interest as well as the principal, and that neither of them was vested until the age of twenty-five; but Sir J. Leach, M.R., said that this was plainly an absolute gift to the daughter, and that the payment only was postponed; the testator meant not to qualify or restrict the nature of the previous gift, but to distinguish beween the time when she was to receive the interest, and the time when she was to receive the principal.

"So a direction subjoined to a simple bequest of stock, that the 'interest' shall be added to the 'principal' till the legatee attains twenty-one, has been held not to suspend the vesting, though there were vague expressions in the residuary clause of the testator's expectation that the annuities (which term it was

(*h*) First ed. p. 766.

(*i*) Mr. Jarman here refers to *Watson* v. *Hayes*, 9 Sim. 500, but this reference seems to be an error.

(*k*) *Knight* v. *Knight*, 2 S. & St. 490. See also *Re Thruston*, 17 Sim. 21; *Chance* v. *Chance*, 16 Bea. 572; *Morgan* v. *Morgan*, 4 De G. & S. 164; *Locke* v. *Lamb*, L. R. 4 Eq. 372; *Butcher* v. *Leach*, 5 Bea. 392, is, perhaps, referable to this principle; *sed qu.*

(*l*) 3 My. & K. 289. "This is the case of a residue, and therefore may seem to belong to the next section; but as the ground of decision seemed to connect it with *Knight* v. *Knight*, it has been stated here." (Note by Mr. Jarman.)

contended, pointed to the interest on the legacies) might fall in (*m*)."

Rule in *Boraston's Case* applies to personalty.

It has also been held that a bequest to a person, if or when he attains a particular age, will be vested if the whole intermediate interest, though not given to the legatee himself, is expressly disposed of in the meantime for the immediate benefit or furtherance of some other person or object. It is only an exception out of the whole property meant to vest in the legatee, whose interest is, therefore, in the nature of a remainder which vests immediately, and its actual enjoyment only is postponed. This is in conformity with the principle of *Boraston's Case* (*n*), which, according to Sir W. Grant, M.R. (*o*), there was no ground to say ought to have been differently decided if it had occurred as to a pecuniary legacy.

Thus, in *Lane* v. *Goudge* (*p*), where one of the bequests was to L. till his (L.'s) second daughter should attain the age of twenty-one years, and after she should attain that age to her absolutely, the same Judge held that, supposing the gift to L. was for his own and not for his daughter's benefit (and there was nothing but conjecture for a contrary supposition), yet that the daughter took a vested interest.

Effect where apparently contingent gift must be severed from the estate immediately.

Again, a legacy to be severed from the general estate *instanter*, for the use and benefit of a legatee (*q*), is a very different thing from a legacy to be severed from the estate only on the happening of a particular event. Therefore, in *Saunders* v. *Vautier* (*r*), where a testator bequeathed his E. I. stock to trustees upon trust to accumulate the dividends until A should attain his age of twenty-five years, and then to transfer the principal with the accumulated dividend to A, his executors, administrators and assigns, absolutely; it was contended on the authority of *Knight* v. *Knight*, that the legacy was contingent

(*m*) *Stretch* v. *Watkins*, 1 Mad. 253. See also *Blease* v. *Burgh*, 2 Bea. 221; *Josselyn* v. *Josselyn*, 9 Sim. 63; *Bull* v. *Johns*, Taml. 513; *Oppenheim* v. *Henry*, 10 Hare, 441.

(*n*) 3 Rep. 16, *ante*, p. 1345.

(*o*) 6 Ves., at p. 247. In *Laxton* v. *Eedle*, 19 Bea., at p. 323, there is a contrary dictum of the M.R., which, however, appears unnecessary to the decision of that case.

(*p*) 9 Ves. 225.

(*q*) As to what is a severance, see *Re Nunburnholme*, [1912] 1 Ch. 489.

(*r*) Cr. & Ph. 240. See also *Greet* v. *Greet*, 5 Bea. 123; *Lister* v. *Bradley*, 1 Hare, 10; *Bell* v. *Cade*, 2 J. & H. 122; *Love* v. *L'Estrange*, 5 B. P. C. Toml. 59, cit. 6 Ves., at p. 248; *Thruston* v. *Anstey*, 27 Bea. 335; *Oddie* v. *Brown*, 4 De G. & J., at pp. 185, 194; *Re Rouse's Estate*, 9 Hare, 649; *Dundas* v. *Wolfe Murray*, 1 H. & M. 425; *Brennan* v. *Brennan*, [1894] 1 Ir. 69. So, although in one event the legacy is expressly given back to residue: *Pearson* v. *Dolman*, L. R. 3 Eq. 315. But compare *Festing* v. *Allen*, 5 Hare, 573; and *Gotch* v. *Foster*, L. R. 5 Eq. 311, suggesting the limits of the doctrine.

on A attaining the specified age; but Lord Cottenham, on the principle stated above, held it vested, and decreed payment to A when he was twenty-one years of age.

It seems that the doctrine of *Saunders* v. *Vautier* does not necessarily apply to a specific bequest. In *Re Jobson* (*s*), a testator gave a leasehold house upon trust for his daughter for life, and after her death for all her children in equal shares on their respectively attaining twenty-one: there was no gift of the income after the daughter's death, and no gift over, and it was held by North, J., that the children did not take vested interests until they attained twenty-one.

Effect of gift over.

There are cases in which it has been held that a gift over has the effect of making interests vested, which would otherwise be contingent. Thus, if a fund is given to A for life and after her death to such of her children as shall then be living as they attain twenty-one, with a gift over if A dies without leaving issue, it has been held that this may be construed to show an intention that the children are to take vested interests on the death of A, whether they attain twenty-one or not (*t*). So a bequest of leasehold property for the children of A as and when they attain the age of twenty-one, with a gift over in case A dies without leaving issue, may confer vested interests on the children, whether they attain twenty-one or not (*y*).

But the tendency of the modern decisions is to construe plain words according to their proper meaning, without regard to a gift over, imperfectly expressed (*z*). Thus, where a fund was bequeathed to A for life and after her death to her children "on their attaining twenty-one," with a gift over in the event of her dying without leaving issue, the interests of the children were held to be contingent on their attaining twenty-one (*a*).

Gift to contingent or restricted class.

The distinction between a gift to a class of children "who shall attain" a certain age, and a gift to children "when" or "as" they attain that age, is discussed in connection with gifts of residue (*b*).

Effect of gift over in construing limitations to children.

The effect of a gift over in aiding a construction in favour of vesting has been frequently referred to in citing the foregoing

(*s*) 44 Ch. D. 154.

(*t*) *Bree* v. *Perfect*, 1 Coll. 128; *Re Bevan's Trusts*, 34 Ch. D. 716 (where the construction seems to have been influenced by a desire to evade the doctrine of remoteness); *Lang* v. *Pugh*, 1 Y. & C. C. C. 718; and compare the cases on residuary gifts, *post*.

(*y*) *Ingram* v. *Suckling*, 7 W. R. 386.

(*z*) *Re Edwards*, [1906] 1 Ch. 570, overruling *Kidman* v. *Kidman*, 40 L. J. Ch. 359.

(*a*) *Re Wrangham's Trust*, 1 Dr. & Sm. 358, approved in *Re Edwards*, [1906] 1 Ch. 570 (gift of residue).

(*b*) *Post*, p. 1398; see also *ante*, p. 1355.

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authorities. A class of cases may here be referred to in which a gift which, standing by itself, would clearly be contingent, has been held to be vested by virtue of a gift over. Thus, in *Re Knowles* (*c*), a testatrix gave the income of certain property upon trust for her three daughters in equal shares, and directed her trustees, after the decease of any daughter, to apply the deceased's share of income to the support of the children of the deceased parent "who may be living at their mother's decease until they become twenty-one years of age, then they will be entitled to their mother's portion, and if the children or child die (if but one) before they become of that age," then over. It was held by Kay, J., that a child who attained twenty-one and died in his mother's lifetime took a vested interest, thus applying the general rule that in construing a settlement on children (whether by deed or will) the Court will, if there is an ambiguity or inconsistency, lean to a construction which will give portions to all the children who may live to require them (*d*).

On the same principle, the Court sometimes disregards the express words of a gift over, which, if taken literally, would defeat an interest vested in a child by previous words of gift (*e*).

Interest vested subject to being divested.

The effect of a gift over in converting an interest which is apparently contingent, into an interest which is vested subject to being divested, has been already considered (*f*).

Clear gift not affected by gift over.

Where an interest is clearly contingent, a gift over will not make it vested (*g*).

Vesting of residuary bequests.

X.—Vesting of Residuary Bequests.—Most of the rules above stated with regard to the vesting of bequests of personalty, apply to residuary bequests, and indeed *a fortiori*, for, as Mr. Jarman points out (*h*): "It has been generally thought that a very clear intention must be indicated, in order to postpone the vesting under a residuary bequest, since intestacy is often the consequence of holding it to be contingent, or, at least (and this is the material consideration) such *may be* its effect; for, in construing wills, we must look indifferently at actual and possible events.

(*c*) 21 Ch. D. 806. The property in this case was realty, but the principle is of general application.

(*d*) *Perfect* v. *Lord Curzon*, 5 Madd. 442; *Jackson* v. *Dover*, 2 H. & M. 209.

(*e*) This application of the principle is discussed in Chap. XLII, *post*.

(*f*) *Ante*, p. 1350; *Edwards* v. *Hammond*, *Phipps* v. *Ackers*, and *Whitter* v. *Bremridge*, all cited *ante*, pp. 1349 *seq*. And see the remarks on *Fox* v. *Fox*, L. R. 19 Eq. 286, *ante*, p. 1385.

(*g*) *Ante*, p. 1351.

(*h*) First ed. p. 767. The doctrine that the Court leans against an intestacy does not affect the construction of unambiguous provisions; *per* Romer, L.J., in *Re Edwards*, [1906] 1 Ch., at p. 574.

Possible as well as actual events to be regarded.

"Among the numerous cases which may be cited as illustrative of the leaning of the Courts towards the vesting of residuary bequests, is *Booth* v. *Booth* (*i*), where A bequeathed the residue of his estate to trustees, upon trust to pay the dividends equally between his great nieces B and C, until their respective marriages, and from and after their respective marriages, to transfer their respective moieties. Sir R. P. Arden, M.R., held that B acquired a vested interest, although she died without having been married; his Honor relying much on the circumstance that it was the bequest of a residue (*j*).

"So, in *Jones* v. *Mackilwain* (*k*), where a testator gave to trustees all his real and personal estate, upon trust for sale, and as to one moiety of the produce for the benefit of his daughter A during her life, and after her decease, upon trust to pay to her husband B an annuity of £100 during his life, and to apply the remainder of the annual income of the said moiety for and towards the maintenance of all and every the child and children of A, until they should severally attain his and their ages or age of twenty-one years, and as to all the said principal monies or produce of the testator's said real and personal estate *as and when they and each and every of them should attain his, her, and their respective age or ages of twenty-one years*, in trust to pay and dispose of the same unto and amongst all and every *such* child and children. A had two sons, both of whom died under twenty-one, and Lord Gifford, M.R., held that they respectively acquired vested interests; his Lordship adverting to the fact of its being a residuary bequest, and that the yearly income was given to the children until the prescribed age.

After clear immediate gift, vesting not postponed by equivocal terms.

"It seems that where the testator first gives the residue in terms which would, beyond all question, confer a vested interest, the addition of equivocal expressions of a contrary tendency will

(*i*) 4 Ves. 399. See also *West* v. *West*, 4 Gif. 198. "Compare *Atkins* v. *Hiccocks*, *ante*, p. 1376, observing that there the bequest was pecuniary, and there was no gift of the interest in the meantime, nor any gift over. The disinclination so to construe a will as to make a testator die partially intestate, was also admitted in *Lett* v. *Randall*, 10 Sim. 112, where, however, the V.-C., considered himself forced into this undesirable conclusion by the ambiguity of the will; the testator having, in a certain event, made a bequest of the share of a deceased daughter to children then living in such a manner as to leave it doubtful whether he referred to the period of his own death, the death of his wife, or the happening of the contingency." (Note by Mr. Jarman.) And see *per* Romilly, M.R., 33 Bea., at p. 396, which may be set against 14 Bea., at p. 461. The remainder of this note, dealing with *Archer* v. *Jegon*, 8 Sim. 446, and other cases on the construction of gifts to persons "then living," has been transferred to Chap. XLII, where the rules for ascertaining classes are discussed.

(*j*) As Sir W. Grant points out in *Leake* v. *Robinson* (2 Mer., at p. 386), the decision also turned to a considerable extent on the fact that the whole income was given to the legatees. The effect of a gift of income or maintenance is discussed further, *post*, p. 1399.

(*k*) 1 Russ. 220.

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not suspend the vesting. Thus, where (*l*) A by his will gave unto the children of his sister the whole of his real and personal estate (subject to certain legacies), and afterwards expressed his desire that the children should be educated with the yearly interest of whatever portion of his estate might fall to each child's lot or share, *and such portion not to be otherwise claimed or inherited, directly or indirectly, until the children arrived at the age of twenty-two years*, whether married or single—Sir R. P. Arden, M.R., held that the subsequent vague words were not sufficient to control the prior clear words, but the meaning was, that the legacy should be absolute, and that the legatees should not have the command of the principal till the age of twenty-two; and his Honor laid some stress on the fact of the interest being given for maintenance.

"So, where (*m*) a testator, after disposing of his real and personal estate in strict settlement, added that none of the devisees should take or come into possession before the age of twenty-five, this was held to refer to the actual possession only, and not to postpone the vesting."

Re Williams.

In *Re Williams* (*n*), a testator gave all his residuary estate to trustees upon trust, as to one-third part thereof, to pay the income, or such part thereof as his trustees should think fit, to his son W. for his advancement, preferment, or benefit by equal [*sic*] weekly instalments until he should attain thirty-five, and then to pay him the corpus; when the testator died the son was twenty-five years of age: it was held that he took a vested interest at the testator's death, and was entitled to immediate payment. Neville, J., followed the rule laid down by Jessel, M.R., in *Re Parker* (*o*), and said that the fact of the gift being one of residue, so far as it had any effect, was an added reason for holding that the gift vested at once.

In gift to a class subsequent words may be explanatory where the preceding are ambiguous.

Where the gift is one to a class, the question of vesting is often more difficult than where it is to an individual. Some cases of frequent occurrence are referred to by Mr. Jarman. He says (*p*): "Where the terms of the original gift in favour of a class are ambiguous in regard to the period of vesting, a clear

(*l*) *Dodson* v. *Hay*, 3 B. C. C. 404—409. See also *Stretch* v. *Watkins*, 1 Mad. 253; *Brocklebank* v. *Johnson*, 20 Bea. 205; *Pearman* v. *Pearman*, 33 Bea. 394; but see *Shum* v. *Hobbs*, 3 Drew. 93.

(*m*) *Montgomerie* v. *Woodley*, 5 Ves. 522. It is not competent for a testator to defer the receipt by the legatee of a legacy absolutely vested in him beyond the age of legal majority: *Re Jacob's Will*, 29 Bea. 402; *Gosling* v. *Gosling*, Johns, 265; *Phillips* v. *Phillips*, [1877] W. N. 260; *Re Couturier*, [1907] 1 Ch. 470.

(*n*) [1907] 1 Ch. 180.

(*o*) 16 Ch. D. 44.

(*p*) First ed. p. 770.

intention to suspend the vesting, manifested in carrying on the gift to the class in the event of its consisting of a single object, will be decisive of the construction; as it is hardly supposable that the testator could mean to create a difference of this nature between a plurality of objects and an individual object. Thus, where (*q*) A. gave the residue of his estate, real and personal, to trustees, as to one-third, in trust for his daughter S. for life, and after her decease for the child or children of his said daughter, if more than one share and share alike, to be paid, assigned, and transferred to them by his trustees upon their respectively attaining the age of twenty-five years; but in case S. should leave but one child her surviving, then the whole of such one-third part *should become the property of such only child, upon his or her attaining the age of twenty-five years*, and be transmissible to his or her heirs, executors or administrators; and in case his said daughter should leave no child her surviving, or in case she should leave a child or children who should not attain the age of twenty-five years, then over. Sir L. Shadwell, V.-C., held that the gift in case the daughter should leave one child only her surviving, was clearly contingent on that child attaining the age of twenty-five; and the same construction, he observed, must be put on the gift, in case she should leave more than one."

Judd v. *Judd*.

The same argument would, without doubt, apply to a case where the ambiguity existed in the gift to the single object, the original gift in favour of the class being clearly conditional. But where no such ambiguity exists, it is of course not allowable, by inference from the collective gift, to import a contingency into the gift to the individual. This were to add words to the will, not to explain terms already existing in it; a course not warranted by the apparent singularity of the distinction made by the testator (*r*).

King v. *Isaacson* (*s*) was the converse of *Judd* v. *Judd*; the question being, whether a clearly vested bequest to the single object, imparted its own nature to ambiguous expressions contained in the prior gift to the class, when consisting of many. The testator gave the residue of his real and personal estate to trustees, in trust, as to two-thirds of the annual proceeds, for A

King v. *Isaacson*.

(*q*) *Judd* v. *Judd*, 3 Sim. 525; see also *Tracy* v. *Butcher*, 24 Bea. 438; *Knox* v. *Wells*, 2 H. & M. 674 (as to the children surviving their father James); *Madden* v. *Ikin*, 2 Dr. & Sm. 207; *Smith* v. *Vaughan*, 8 Vin. Ab. 381, Tit. Devise (Zc.) pl. 32; *Merry* v. *Hill*, L. R. 8 Eq. 619; *per* Lord Selborne, L. R. 16 Eq., at pp. 271, 272; *Re Fletcher*, 53 L. T. 813.

(*r*) *Walker* v. *Mower*, 16 Bea. 365; *Johnson* v. *Foulds*, L. R. 5 Eq. 268; *Re Edwards*, [1906] 1 Ch. 570. As to *Re Fletcher*, 53 L. T. 813, see *ante*, p. 1363.

(*s*) 1 Sm. & Gif. 371.

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for life, and as to the remaining one-third, in trust for B for her life; and in trust, after the decease of A and B, or either of them, to convey, pay, assign, transfer and make over all the residue, in the shares following, *i.e.*, upon the decease of A, to convey, etc., two-thirds unto and among all and every the child or children of A as and when they should severally attain twenty-one, as tenants in common; and if there should be but one child of A, then to such only child, and to whom he gave the same accordingly; with similar trusts of the remaining third, *mutatis mutandis*, for the children of B. Sir J. Stuart, V.-C., considering the general indisposition to hold a bequest contingent, and looking to the absolute gift to an only child (which was clearly vested (*t*)), and to the direction to convey, which, he thought, was to be observed immediately on the decease of a tenant for life, held that the children took vested interests on the testator's death.

Attainment of particular age made part of the description of the objects.

The vesting is obviously postponed, where the attainment to a particular age is introduced into and made a constituent part of the description or character of the objects of the gift; as where the bequest is to "the children who shall attain," or to "such children as shall attain," the age of twenty-one years; there being in such case no gift, except to the persons who answer the qualification which the testator has annexed to the enjoyment of his bounty (*u*).

Bull v. *Pritchard.*

Thus, in *Bull* v. *Pritchard* (*v*), where a testator bequeathed the residue of his personal estate to trustees, in trust for his daughter M. for life, and after her decease to pay or transfer the same unto and among all and every the child and children of M. who should live to attain the age of twenty-three years, with benefit of survivorship in case of the death of any of them under the age of twenty-three years, as tenants in common; and if there should be but one such child, then to such only child; and in case there should be no such child, or, being such, all should die under the age of twenty-three, then over to the testator's brothers and sisters. The trustees were empowered to lay out and apply the interest of each child's respective share, or so much thereof as they might think necessary, towards their maintenance, notwithstanding such child's share should not be then absolutely vested. Lord Gifford, M.R., was of opinion that those children alone who attained the age of twenty-three were to take, and therefore the gift was void for remoteness; observing, that the attainment of the age of twenty-three years

(*t*) See *Re Bartholomew*, 1 Mac. & G. 354, *ante*, p. 1375.

(*u*) See *Newman* v. *Newman*, 10 Sim. 51; *Hatfield* v. *Pryme*, 2 Coll. 204; *Thomas* v. *Wilberforce*, 31 Bea. 299.

(*v*) 1 Russ. 213. And see the cases cited *ante*, p. 305, n. (*s*).

was made a condition precedent to the vesting of any interest in the children.

Cases of this kind (gifts to a restricted or contingent class) must be distinguished from those in which the gift is to children "on attaining," or "if" or "when" they attain, a certain age, for although such a gift is *prima facie* contingent, yet a contrary intention may appear from the context. And first as to the effect of a gift of the intermediate income.

Gift of intermediate income.

It has been already pointed out that when a residue is given to a class of persons on attaining a certain age or marrying, etc., and the whole income is given to them, or directed to be applied for their maintenance, in the meantime, this is generally construed as conferring a vested interest.

The principle of the old cases was that the testator had given the whole property to the legatees, and that the direction to pay or apply the income during minorities merely operated as an exception out of the property, and a description of the time when each legatee was to have possession (*w*). With reference to the statement of Jessel, M.R., in *Re Parker* (*x*), quoted on p. 1384, as to the effect of a direction to apply the income of the whole fund (payable to a class equally on attaining a certain age) for their maintenance, it is to be observed that neither *Booth* v. *Booth* nor *Jones* v. *Mackilwain* (both stated *ante*, p. 1395) were cited in that case. And in *Re Gossling* (*y*), where a testator gave his residue upon trust, after the decease of his wife, to pay and divide the same unto and equally between his two children A and B on their severally attaining the age of twenty-one years, their heirs, executors, administrators and assigns as tenants in common, the income during their respective minorities to be applied in or towards their maintenance and support: the C. A., in holding that the children took vested interests, proceeded entirely on the ground that, by the terms of the particular will, the income was not to be applied for maintenance as a common fund, but that the income of the share of each child was to be applied for its separate maintenance. In this case, also, *Booth* v. *Booth* and *Jones* v. *Mackilwain* were not cited, and some of the authorities which were cited were gifts of legacies (*z*), the rules as to the vesting of which are stricter than in residuary gifts.

Re Gossling.

Discretionary trust or power of maintenance.

It has not been finally settled whether a gift of residue, in

(*w*) See the judgments in *Booth* v. *Booth* and *Jones* v. *Mackilwain*, *ante*, p. 1395, and *Davies* v. *Fisher*, 5 Bea. 201, *ante*, p. 1390.

(*x*) 16 Ch. D. 44.

(*y*) [1902] 1 Ch. 945; [1903] 1 Ch. 448.

(*z*) *Ante*, p. 1379.

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trust for a class of persons on their attaining a certain age or marrying, etc., confers a vested interest, if it is accompanied by a power to apply the whole, or such part of the income of each share as the trustees think fit, for the maintenance of the legatee of that share in the meantime. If the question is settled in the affirmative in the case of legacies (*a*), the principle applies *a fortiori* to bequests of residue.

Effect of gift over.

Another class of cases in which a gift of residue, apparently contingent, has been held to be vested, is where that intention is inferred from a gift over.

It is clear that if residuary personal estate is given to A on his attaining twenty-four, but in case of his not attaining that age, then to B, this gives A a vested interest, subject to being divested in the event of his dying under twenty-four (*b*). And it seems now settled that the same rule applies to gifts to classes, although the authorities are not altogether consistent.

Gift on attaining certain age held contingent.

The principal difficulty is created by *Vawdry* v. *Geddes* (*c*), where A gave the residue of her estate and effects equally between her four sisters, and directed that, on the death of her sisters, the interest of their respective shares should, at the discretion of her executors, be applied in the maintenance or accumulate for the benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years, and, " upon any of their attainment to that age," they should be entitled to their proportion of their mother's share of the principal, and " in case of any of their decease under that age," leaving lawful issue, such issue should be entitled to their respective parent's share at such time as such parent would have been entitled, if living, thereto, and there was a gift over in favour of the other children of the testator's sisters, in case of the death of any under twenty-two, without issue, or, being such, they should die before the principal of their respective shares should become payable. Sir J. Leach, M.R., held that the vesting was postponed until the age of twenty-two, and therefore that the gift was too remote. He thought that the case was governed by *Leake* v. *Robinson* (*d*); and that, even if the income had been expressly given to the children until they attained twenty-two, the shares would not have vested. He observed, that where interim interest is given, it is presumed that the testator meant

(*a*) See *Re Blackwell*, [1926] 1 Ch. 223; *Re Ussher*, [1922] 2 Ch. 321; and *ante*, pp. 1383 *seq.*

(*b*) *Whitter* v. *Bremridge*, L. R. 2 Eq. 736. Compare *Edwards* v. *Hammond*, 3 Lev. 132, and *Phipps* v. *Ackers*, 9 Cl. & Fin. 583, *ante*, p. 1349.

(*c*) 1 R. & My. 203.

(*d*) *Ante*, p. 1376.

an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property; but that presumption fails entirely when the testator has expressly given the legacy over in the event of the death of the legatee before a particular period.

Remarks on *Vawdry* v. *Geddes*.

"But," Mr. Jarman asks (*f*), "did not the gift over, to which his Honor here refers, suggest a strong argument for the immediate vesting? Where a testator directs that, on a given event, the 'shares' of persons before named shall go in a certain manner, there seems ground to infer that, in the alternative event, the property is to be retained by the legatees; *a fortiori*, where there are cross executory gifts disposing of the 'shares' of dying objects in an event in which, if the vesting be postponed, they would have no shares for the clause to operate upon. The construction adopted in the case just stated rendered the terms of the clause of substitution (for such it clearly was) inaccurate throughout (*g*).

Bland v. *Williams*.

Vesting immediate by explanatory effect of gift over.

"More weight, in favour of the immediate vesting, seems to have been ascribed to the argument derived from the gift over, in *Bland* v. *Williams* (*h*), where the testator bequeathed the residue of his estate and effects to trustees, upon trust to receive the annual income thereof, and thereout pay unto his daughter an annuity, and, after her decease, upon trust to apply the income [or a sufficient part thereof] for the maintenance of the children of his daughter until they should severally attain their ages of twenty-four years; and when and as they should respectively attain that age, then upon trust to pay, transfer, and convey all the said residue of his estate, with the interest, dividends, and proceeds thereof, as should not have been applied for their maintenance, equally unto and amongst all her said children, *when and as they should severally and respectively attain their said age of twenty-four years*; and in case any or either of her said children should happen to die before having attained that age, and without leaving lawful issue of his or her body, then in trust to pay, assign, transfer, and convey all the

(*f*) First ed. p. 774.

(*g*) "See also *Mackell* v. *Winter*, 3 Ves. 236, and *Barker* v. *Lea*, T. & R. 413, in both which residuary bequests to children, on their attaining a particular age, were held to be contingent in the interim, though, in each case, there was a bequest over in the event of the legatee's dying before the prescribed age; and in the former, the postponement seemed to refer to the time of payment rather than to the gift itself. In these cases, the leaning, often avowed, to the vesting of residuary bequests, was but very faintly discernible; and one cannot help suspecting that the judgment of the Court was somewhat biassed by the actual event, which rendered the adopted construction convenient. If intestacy had happened to be produced by the postponement of the vesting in each instance, the adjudication probably would have been different." (Note by Mr. Jarman.)

(*h*) 3 My. & K. 411.

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said residue of his estate unto *such of her said children as should live to attain his, her, or their respective ages of twenty-four years*, share and share alike, if more than one, and if but one, then the whole to that one child; but in case all and every of *her said children should happen to die under that age, and without leaving lawful issue*, as aforesaid, then upon trust to pay the annual income thereof unto certain persons. It was contended, that, under the trust in favour of the daughter's children, the vesting was postponed until the age of twenty-four, and consequently, the gift was too remote. Sir J. Leach, M.R., however, held that the legatees acquired immediately vested interests:—'Whether, in a gift of this nature,' said his Honor, 'the time of vesting is postponed, or only the time of payment, depends altogether upon the whole context of the will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age (*i*). In this case, the gift over is not simply upon the death under twenty-four, but upon the death under twenty-four without leaving issue. If upon a death under twenty-four, at whatever age issue was left, then the gift over is not to take place. It is in effect, therefore, a vested interest, with an executory devise over, in case of death under twenty-four without leaving issue: all the cases upon the subject, except the one before Lord Gifford (*i.e.*, *Bull* v. *Pritchard*), are reconcilable with this distinction.'"

Remark on *Bland* v. *Williams*.

Mr. Jarman seems to have had some doubt as to the correctness of the decision in *Bull* v. *Pritchard* (*k*), and he thought *Vawdry* v. *Geddes* and *Barker* v. *Lea* wrongly decided. He

(*i*) "Why not? A gift over to take effect simply on the event alternative to that on which the prior gift was apparently made to vest, *may* surely have the effect (if such be the intention collected from the whole will) of explaining that the original gift was to be divested in favour of the ulterior substituted legatee on the happening of the prescribed event. This, we may venture to affirm, would, with very little aid from the context, be generally the construction. No such distinction as the M.R. suggests is discoverable in the cases (cited *ante*, p. 1351), in which, under a devise to A, if he shall attain the age of twenty-one years, with a devise over, in case he shall die under that age, the devise over is (we have seen) held to denote that the prior words (instead of suspending the vesting *ab initio*) point merely at the period when it becomes absolute. The principle of these cases obviously applies to residuary bequests framed in such terms." (Note by Mr. Jarman.) In *Taylor* v. *Frobisher*, 5 De G. & S., at p. 200, Parker, V.-C., said that the M.R.'s distinction was not meant to be of general application, but referred only to the will before him. In *Re Baxter's Trusts*, 10 Jur. (N.S.) 845, Wood, V.-C., also treated the supposed distinction as unfounded. See *Davies* v. *Fisher*, *infra*.

Where real and personal estates are included in the same gift, and the real estate is held to be vested, the personal property follows the same construction, *Farmer* v. *Francis*, 2 S. & St. 505; *Tapscott* v. *Newcombe*, 6 Jur. 755; *James* v. *Lord Wynford*, 1 Sm. & Gif. 40.

(*k*) First ed. p. 772. His remarks are not given here, because they are based on a misapprehension of the grounds of the decision.

remarks (*l*): "It would certainly be a convenient rule of construction to say, that whenever, under a residuary bequest to children as a class, the vesting is, in the first instance, postponed to a given age, and this is accompanied by a direction that the intermediate interest shall be applied for their maintenance; after which the testator proceeds to dispose of the shares of children dying under the age in question, either absolutely or upon some contingency, to the survivors, or to children, or any other person, the gift over is to be considered as explaining the testator's intention to be, that, under the preceding words, the *absolute* ownership only should be suspended until the prescribed age, and that, in the meantime, the legatees should take vested interests, with a liability to be divested on the happening of the prescribed event. But though several of the cases (we have seen) point to such a conclusion, yet the state of the authorities, on the whole, hardly warrants any general position of this nature."

Modern authorities.

Since Mr. Jarman wrote, however, the tendency of the decisions on bequests in this form, whether residuary or not, is almost universally in favour of such a rule.

Davies v. *Fisher*.

Thus, in *Davies* v. *Fisher* (*m*), where a testatrix gave the residue of her personal estate to trustees, in trust for W. D. for life, and after his decease, in trust for the children of the said W. D. as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one then the whole to such one child, the income to be applied during their respective minorities by the guardian for the time being of such children for their maintenance; and in case no child of the said W. D. should live to attain the age of twenty-five years, then in trust as therein mentioned. Lord Langdale, M.R., held that the children of W. D. took an immediate vested interest in the residue. The decision was, indeed, in a great measure, founded on the gift of the intermediate interest (*n*); but as to the argument resting on the dicta of Sir J. Leach in *Vawdry* v. *Geddes* and *Bland* v. *Williams*, that the gift over prevented the residue from vesting in the meantime, he cited authorities to show that such a proposition was untenable (*o*); and observed that, on the contrary, the gift over afforded some evidence of an intention to divest after a previous vesting. So in *Pearman* v. *Pearman* (*p*), a testator

Pearman v. *Pearman*.

(*l*) First ed. p. 776.

(*m*) 5 Bea. 201.

(*n*) *Ante*, p. 1389.

(*o*) *Skey* v. *Barnes*, 3 Mer., at p. 340. See also *Davidson* v. *Dallas*, 14 Ves. 576; *Heron* v. *Stokes*, 2 Dr. & War. at p. 115.

(*p*) 33 Bea. 394. See also *Ridgway* v. *Ridgway*, 4 De G. & S. 271, better reported 20 L. J. Ch. 256; *Wetherell* v. *Wetherell*, 1 D. J. & S. 134; *Re Baxter's Trusts*, 10 Jur. (N.S.) 845.

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gave his residue upon trust to use such part thereof as might be necessary in maintaining, etc., all his children, and he directed his trustees to pay and divide his residue unto all his said children in equal shares as and when he, she or they should respectively attain the age of twenty-one years, with a substitutionary gift to the issue of children dying under age, and a gift over in the event of his having no children or child attaining the age of twenty-one, or such, if any, dying without leaving issue; it was held by Romilly, M.R., partly on the ground that the gift was one of residue, partly on the ground of the gift over, and partly on the ground of the trust for maintenance (*q*), that the share of each child was vested, subject to being divested in case he or she died under twenty-one without issue. Again, in *Re Turney* (*r*), a testator gave one moiety of his residue in trust to pay the income to A for life, and after his death for his child or children "absolutely" upon their attaining twenty-five; and in the event of the death of either or all the children before attaining twenty-five, then upon trust "to pay the share of the child or children so dying" to B: it was held by the C. A. that the children took vested interests, subject to being divested on death under twenty-five.

Re Turney.

The decision turned to a considerable extent on the use of the word "share" in the gift over (*s*).

Gift over on event different from event mentioned in primary gift.

But a gift over limited to take effect on an event different from that upon which the primary gift depends, will not generally be construed as of itself indicating such an intention, as where property is given to the children of A on their attaining twenty-one, with a gift over in the event of A dying without leaving issue (*t*).

It does not seem to have been decided whether the doctrine of *Bree* v. *Perfect* (*u*) applies to gifts of residue. The decisions in *Ingram* v. *Suckling* (*x*) and *Re Bevan's Trusts* (*y*), in which that case was followed, lay stress on the fact that they were concerned with separate funds (*z*).

(*q*) It seems doubtful, according to some modern decisions, whether this argument was admissible, the maintenance being given out of the residue as a common fund, *ante*, p. 1399.

(*r*) [1899] 2 Ch. 739, *ante*, p. 303.

(*s*) The word also occurred in *Pearman* v. *Pearman*, 33 Bea. 394, *supra*, but no stress was laid upon it.

(*t*) *Re Wrangham's Trust*, 1 Dr. & Sm. 358; *Chadwick* v. *Greenall*, 3 Gif. 221; *Walker* v. *Mower*, 16 Bea. 365. The decision in *Re Wrangham's Trust* was misunderstood by Malins, V.-C., in *Kidman* v. *Kidman*, 40 L. J. Ch. 359; see *Re Edwards*, [1906] 1 Ch. 570.

(*u*) 1 Coll. 128, *ante*, p. 1319.

(*x*) 7 W. R. 386.

(*y*) 34 Ch. D. 716.

(*z*) See also *Re Edwards*, [1906] 1 Ch. 570, where some doubt is thrown on the doctrine of *Bree* v. *Perfect*.

CHAPTER XXXVIII.

EXECUTORY DEVISES AND BEQUESTS.

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I.—Nature of an Executory Devise.—"An executory devise," says Mr. Jarman (*a*), "is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder; for it is well settled (and, indeed, has been remarked as a rule without an exception), that when a devise is capable, *according to the state of the objects at the death of the testator*, of taking effect as a remainder, it shall not be construed to be an executory devise (*b*). It is necessary, therefore, in treating of this species of estate first, to ascertain what constitutes a remainder. A remainder may be described to be a limitation which is so framed as to be immediately expectant on the natural determination of a particular estate of freehold, limited by the same instrument. It follows, that every devise of a future interest, which is not preceded by an estate of freehold, created by the same will (*c*) (whether consisting of one or more testamentary papers), or which, being so preceded, is limited to take effect *before* or *after*, and not *at* the expiration of such prior estate of freehold, is an executory devise (*d*).

Limitation capable of taking effect as a remainder cannot take effect as an executory devise.

Executory devise—what.

"The first mentioned species of executory estate occurs, as well where the devise is future in its operation, from the non-existence of the object at the death of the testator, as where it is future in the express terms of its limitation. Thus, a devise to the children of A, who happens to have no child at the death

(*a*) First ed. p. 778. It must be borne in mind that since 1925 all remainders and partial interests are equitable.

(*b*) *Purefoy* v. *Rogers*, 2 Lev. 39, 2 Saund. 380; *Reeve* v. *Long*, Carth. 309, 1 Salk. 227; *Goodright* v. *Cornish*, 4 Mod. 256; *Carwardine* v. *Carwardine*, 1 Ed. 27; *Goodtitle* v. *Billington*, Doug. 758; *Brackenbury* v. *Gibbons*, 2 Ch. D. pp. 417, 419; *Re Wrightson*, [1904] 2 Ch. 95; *White* v. *Summers*, [1908] 2 Ch. 256.

(*c*) See *Key* v. *Gamble*, T. Jones, 123; *Moore* v. *Parker*, 1 Ld. Raym. 37, Skinn. 558; *Doe* v. *Earl of Scarborough*, 3 Ad. & El. 2, 897.

(*d*) See *Blackman* v. *Fysh*, [1892] 3 Ch. 209.

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Devise executory for want of a preceding freehold.

of the testator (*e*), or to the heirs of the body of A, a person then living, is executory (*f*), for the reason suggested. The creation of a term of years, determinable with the life of the ancestor, to whose heirs the subsequent limitation is made, of course does not vary the principle; a chattel interest being inadequate to support a contingent remainder (*g*). Thus, if lands are devised to A for ninety-nine years, if he shall so long live, remainder to the heirs of the body of A, the fee-simple, subject to the term, descends to the heir-at-law of the testator during the life of A, at whose decease an estate tail vests in the heir of his body by executory devise. So, a devise to a person or persons, whether *in esse* or not, to take effect at a given period after the death of the testator, as to A at the death of B (a stranger), or at six months from the testator's decease, obviously belongs to the class of limitations under consideration (*h*).

Devise executory, notwithstanding prior freehold.

"With respect to the cases in which the devise is executory, notwithstanding the creation of a prior estate of freehold, it is to be observed, that to constitute the ulterior limitation an executory devise in such a case, the precedent estate must not be merely *liable* to be determined before the ulterior limitation takes effect (as such liability only renders the remainder contingent), but it must be *necessarily* determinable before the taking effect of the ulterior devise. Thus, a devise to A for life, and, after his decease, to the unborn children of B, is a contingent remainder in such children, because as A *may* live until B has a child, there is not necessarily any interval between the two estates; but, under a devise to A for life, and after his decease, *and one day*, to the children of B, the children would take by executory devise, and the interval of a day, which would be undisposed of, would belong to the residuary devisee, if any, or if not, to the heir.

"It is an obvious consequence of the general principle before laid down, that where the event which gives birth to the ulterior limitation, abruptly determines and breaks off the preceding estate, the limitation is executory, inasmuch as it is essential to the constitution of a remainder, that it wait for the regular expiration of such estate. Thus, in the case of a devise to A for life, or in tail, with a limitation over to B, in case A shall

(*e*) *Hopkins* v. *Hopkins*, Cas. t. Talb. 44; *Stephens* v. *Stephens*, *ib.* 228; *Gore* v. *Gore*, 2 P. W. 28, 2 Stra. 958; *Bullock* v. *Stones*, 2 Ves. sen. 521.

(*f*) *Snow* v. *Cuttler*, 1 Lev. 135, T. Raym. 162; *Doe* v. *Carleton*, 1 Wils. 225; *Harris* v. *Barnes*, 4 Burr. 2157; *Doe* d. *Fonnereau* v. *Fonnereau*, Dougl. 487; *Doe* d. *Mussell* v. *Morgan*, 3 T. R. 763.

(*g*) *Ib.* For an instance of limitations failing for this reason, see *Cunliffe* v. *Brancker*, 3 Ch. D. 393.

(*h*) *Reding* v. *Stone*, 8 Vin. Ab. 215, pl. 5; and see *Clarke* v. *Smith*, 1 Lutw. 793.

become entitled in possession to a certain estate, or shall omit to assume a certain name, this is an executory devise to B (*j*).

Executory devise in derogation of a preceding fee.

"It will be apparent from what has been stated, that every devise to a person in derogation of, or substitution for, a preceding estate in fee-simple is an executory limitation. Thus, in the case of a devise to A and his heirs, and if he shall die under twenty-one and without issue (*i.e.*, without issue living at his death), or if he shall die without issue living B, then to B; in each of these cases the devise to B is executory (*k*); in the same manner as if the fee, instead of being limited to A, had been suffered to descend to the heir-at-law of the testator, and the property had been simply devised to B on either of such events; the only difference being, that in one case the property shifts, on the happening of the contingency, from the prior devisee, and in the other, from the heir of the testator to the devisee of the executory interest. No species of executory limitation is of such frequent occurrence as those which are limited in defeasance of a prior estate in fee (*l*).

"The short but comprehensive definition of an executory devise before given, will be found to comprise every class of limitations of this nature, and, perhaps, will be more easily understood and remembered by the student, than the more elaborate classification which has been generally presented to him. A learned writer, whose labours on this subject are well known to the profession (*m*), has added to the distribution of the cases adopted by Mr. Fearne (*n*), several classes, two of

(*j*) *Nicholl* v. *Nicholl*, 2 W. Bl. 1159; *Nicolls* v. *Sheffield*, 2 B. C. C. 215; *Doe* d. *Heneage* v. *Heneage*, 4 T. R. 13; *Carr* v. *Earl of Errol*, 6 East, 58; *Stanley* v. *Stanley*, 16 Ves. 491; *Doe* d. *Kenrick* v. *Beauclerk*, 11 East, 657. Shifting clauses are referred to more in detail, *post*, p. 1422.

(*k*) Cro. Jac. 592; Palm. 131; Gilb. 393; 2 Mod. 289; Pre. Ch. 67; *ib.* 486; 10 Mod. 419; Cas. t. Talb. 228; 8 Vin. Ab. 112, pl. 38; 1 B. C. C. 147; 3 T. R. 143; 2 B. & P. 324; 10 East, 460; 1 B. & Ald. 530; *ib.* 713; 2 *ib.* 441; 1 Eq. Ca. Ab. 186, pl. 1; 1 Wils. 105; Fea. C. R. 396; 10 B. & Cr. 201. Many of these cases are referred to in the course of this Chapter and in Chap. LII. See also *Re Parry & Daggs*, 31 Ch. D. 130.

(*l*) It must be borne in mind that in any will coming into operation after the 31st of December, 1882, executory gifts over of land defeating a prior estate in fee or for life or for a term of years absolute or determinable with life, in default or on failure of issue, becomes void as soon as any issue attains twenty-one years of age; see the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 10, now replaced and extended by section 134 of the Law of Property Act, 1925.

(*m*) 2 Prest. Treat. on Abstracts, 139.

(*n*) * For which see *Doe* v. *Carleton*, 1 Wils. 225; Fea. C. R. 400. "These two classes of cases show that Mr. Fearne's position (C. R. 251 and 530, 8th ed.), 'that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the remainder,' must be received with some qualification. A condition properly so called, namely, which descends upon the heir, necessarily determines the whole estate, which is subject to it; but it is difficult to perceive upon what principle any objection can be advanced to an executory devise, to take effect in partial derogation of a preceding estate, on the ground that it defeats that estate in part only; and

* Mr. Fearne's position, that a condition or limitation must defeat the whole estate, questioned.

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which, though they clearly fall within the terms by which this species of interest has been before described, are sufficiently peculiar to entitle them to distinct notice.

Estate in fee or in tail reduced to an estate for life.

"First, Where an estate tail, or an estate in fee-simple, is in some event reduced to an estate for life. As where (*o*) a testator devised real estate to his two daughters, their heirs and assigns; but if either of them should marry without the consent of his executors, the daughter so marrying should have an estate for life therein; if either of them should die unmarried, then R. to take it, paying the other daughter £500. It was held, that on one of the daughters marrying without consent, her estate was cut down to an estate for life.

Estate partially defeated by executory limitation.

"Secondly, Where an estate is limited in derogation of a preceding estate, and in *partial* exclusion of the same. As where (*p*) a testator devised certain lands to his son B in fee, and other lands to his son C in fee, subject to a proviso, that if either of his sons should die before marriage, or before twenty-one, and without issue of their bodies, then he gave all the lands of such of his sons as should so die, etc., unto such of his said two sons as should the other survive. It was held, that the sons took in fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under twenty-one, and without issue; and that, as one of them had attained twenty-one, and died unmarried, the survivor was entitled to his moiety for life."

As this case simply affirmed the validity of the devise over for life, leaving untouched the destination of the ulterior interest, it cannot, perhaps, be treated as a direct adjudication on the point for which it is here cited, namely, that the estate originally devised was affected only to the extent necessary for the introduction of the life interest, and subject thereto remained in the prior devisee; there is, however, no doubt as to the doctrine in question. Thus in *Gatenby* v. *Morgan* (*q*), a testa-

Gatenby v. *Morgan.*

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it is observable, that, in all the cases cited by this able writer in illustration of his doctrine, the limitation over was either defective in the terms of its creation (on which, however, some remarks will be found in the sequel; see *Corbet's Case*, 1 Rep. 83 b; and other cases observed upon *infra*), or was repugnant to the nature and incidents of the estate on which it was engrafted; or was contrary to the rule of law fixing the period within which such interests must be limited to arise." (Note by Mr. Jarman.) See *Seymour* v. *Vernon*, 10 Jur. (N.S.) 487, *post*, p. 1468.

(*o*) *Wright* v. *Wright*, 1 Ves. sen. 409, Fea. C. R. 500.

(*p*) *Hanbury* v. *Cockerell*, 1 Roll. Ab. 835, Fea. C. R. 396.

(*q*) 1 Q. B. D. 685. See also the earlier case of *Jackson* v. *Noble*, 2 Kee. 590, "which," Mr. Jarman says, "appears to have decided, that where a devise in fee is followed by an executory limitation in fee, in favour of an object or class of objects not *in esse*, and who, in event, never come into existence, the first devise remains absolute." But this statement of the law was treated by Lord St. Leonards (Powers, 514) as having been overruled by the Exchequer Chamber in *Doe* v. *Eyre*; and the learned author

tor, by a will made in 1811, devised certain hereditaments to E. C. and her heirs, but if E. C. died without leaving lawful issue living at her death, the testator devised the property to other persons: the will being made under the old law, the ulterior devisees took estates for life only, and it was held that subject to these estates, the property remained in E. C. and her heirs. In *Re Jones* (*r*) Sargant, J., applied the principle of *Gatenby* v. *Morgan* to equitable estates.

But if the executory devise is limited in defeasance of the whole of the preceding estate, the general rule is that on the happening of the contingency, the preceding estate is put an end to, even although the executory devise fails to take effect.

Where prior devise is defeated although gift over ineffectual. *Doe* v. *Eyre*.

Thus, in *Doe* d. *Blomfield* v. *Eyre* (*s*), where M. S. having an exclusive power of appointing lands by will amongst her children, appointed them to her eldest son, J. B., in fee; but if J. B. and his brother both died before her husband, then she appointed the estate to her father-in-law (a stranger to the power) in fee. J. B. and his brother both died in their father's lifetime, and it was held, in the Exchequer Chamber, that although the father could not take, yet the son lost the estate. Parke, B., delivered the judgment of the Court, and after premising that the question was the same, whether it arose upon an ordinary devise or upon an appointment under a power, he said, "If a testator seised in fee were to devise a real estate to A. B. in fee, and to direct that, in the event of A. B. dying in the lifetime of J. S., the estate should go over to a charity, it surely was perfectly clear that if A. B. should die in the lifetime of J. S., he, or rather his heirs, would lose the estate. The testator could not give to the charity without taking away from the devisee. The testator, therefore, in such a case, by his will said, 'If A. B. dies in the lifetime of J. S., I do not mean that he or his heirs should any longer have the estate.' That which defeated the estate of J. B. was the death of himself and his brother in his father's lifetime, not the giving over the estate to strangers."

The case put by Parke, B., of a devise over to a charity, afterwards came before Sir R. Kindersley, V.-C., who felt himself bound to decide it in conformity with *Doe* v. *Eyre*, though

added, "the case of *Jackson* v. *Noble* was not decided on any general rule, but on the ground that looking at all the devises the estate was not intended to go over in the event which happened . . . if it cannot be supported upon the intention as collected by the court it must be considered as opposed to the later decision in the Exchequer Chamber." And in *Hurst* v. *Hurst*, 21 Ch. D., at p. 290, Jessel, M.R., remarked that *Jackson* v. *Noble* laid down no general principle. See, however, *Jones* v. *Davies*, 28 W. R. 455, where the M.R. accepted *Jackson* v. *Noble* as an authority.

(*r*) [1915] 1 Ch. 246 (will before 1838).

(*s*) 5 C. B. 713. *Re Bold*, 134 L. T. 595.

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not approving of the doctrine of that case. He thought a strong argument against it might have been found in the statute (*t*), which declared, all gifts to charity, not made as therein provided, void to all intents and purposes; he also thought it very difficult to reconcile *Jackson* v. *Noble* with *Doe* v. *Eyre*, but concluded that the ground of the decision in the former was that the contemplated contingency had not happened (*u*).

Exception where substituted gift is void for remoteness.

But to the rule thus laid down in *Doe* v. *Eyre*, the case of a gift over which is to defeat a prior devise in a too remote event forms an exception (*x*), since the law refuses permission to await that event for any purpose; so that the prior gift must, of necessity, remain absolute.

Interim income.

An executory devise did not, as a general rule, carry the interim rents; but a residuary devise might do so before 1926, if the realty is given with the personalty as a mixed fund (*y*), and will do so, if the will comes into operation after 1925 and the income is not otherwise disposed of (*z*).

Equitable contingent remainders.

It has been already mentioned (*a*) that contingent remainders of equitable estates are not subject to all the rules governing contingent remainders of legal estates. In one sense, therefore, they resemble executory devises, but they are not generally so classified, for " executory devise " usually means such a limitation of a legal estate in land as the law allows in the case of a will, though contrary to the rules of limitation in conveyances at common law (*b*).

And an equitable contingent remainder resembles a legal contingent remainder in two respects: (1) it was (before 1926) subject to the rule in *Whitby* v. *Mitchell* (*c*); and (2) where there is a devise of land upon trust for such of the children of A as attain twenty-one, the first child who attains that age becomes entitled to the whole of the rents until another child attains twenty-one, and so on (*d*).

(*t*) 9 Geo. 2, c. 36, s. 3.

(*u*) *Robinson* v. *Wood*, 27 L. J. Ch. 726. See Sug. Pow. 514, 8th ed., where *Doe* v. *Eyre* is approved. *Doe* v. *Eyre* was followed in *Hurst* v. *Hurst*, 21 Ch. D. 278, and in *Re Bold*, 134 L. T. 595. See also *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388; *Ridgway* v. *Woodhouse*, 7 Bea. 437.

(*x*) Sug. Pow. 514, 8th ed. Farwell on Powers, 3rd ed. 348, citing *Re Brown & Sibly*, 3 Ch. D. 156.

(*y*) The rules are stated *ante*, p. 929.

(*z*) Section 175 of the Law of Property Act, 1925.

(*a*) *Ante*, p. 299.

(*b*) Fearne, C. R. 386. Mr. Fearne treats of equitable contingent remainders in the first part of this work, p. 304.

(*c*) *Re Nash*, [1910] 1 Ch. 1, *ante*, p. 258. The rule is abolished by section 161 of the Law of Property Act, 1925.

(*d*) *Re Averill*, [1898] 1 Ch. 523.

Shifting clauses.

An important kind of executory devise, already shortly referred to (*e*), is that known as a shifting clause, by which an estate is, on the happening of a certain event, taken away from the person to whom it was originally given, and transferred to another (*f*).

Rule against Perpetuities.

Shifting clauses, like other executory devises, must be limited so as to take effect within the period allowed by the Rule against Perpetuities, unless they are to take effect on the determination of an estate tail (*g*). A shifting clause may be alternative or divisible, so as to be good in one event, and bad in the other (*h*).

Where estate has been diminished in value;

Where land is devised to A subject to a shifting clause to take effect on A's becoming entitled to the possession of another estate, the clause will not, as a general rule, take effect if the estate to which he succeeds is materially less valuable than it was at the time of the testator's death; as where it has been incumbered without A's consent (*i*).

or sold.

Nor will the clause take effect, it seems, if the estate has been converted into personalty (*k*).

Construction of shifting clauses.

It is often said that a shifting clause must be construed strictly, but this merely means that the testator's intention must be reasonably manifest (*l*); the clause is construed according to its primary and natural meaning (*m*).

Accordingly, if a testator devises land to C, his youngest son, with a shifting clause to take effect in the event of C succeeding to another estate, and of any younger son of the testator being then living, this means "younger in order of birth," and the clause will not take effect unless there is a son born after C (*n*). The cases in which "younger son" has been construed to mean "son not otherwise provided for," or the like, are cases where a parent is making provision for his family (*o*).

(*e*) *Ante*, p. 1407; as to shifting clauses in settlements by deed, see Vaizey on Settlements, 1262 *seq.*, where Mr. Butler's rules are referred to.

(*f*) For an example of a shifting clause operating by way of postponement, see *Milbank* v. *Vane*, [1893] 3 Ch. 79.

(*g*) *Ante*, p. 294.

(*h*) *Miles* v. *Harford*, 12 Ch. D. 691.

(*i*) *Fazakerly* v. *Ford*, 4 Sim. 390; *Stacpoole* v. *Stacpoole*, 2 Con. & L. 489; *Harrison* v. *Round*, 2 D. M. & G. 190.

(*k*) *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819, *S. C. sub nom. Law Union, &c. Co.* v. *Hill*, [1902] A. C. 263.

(*l*) *Harrison* v. *Round*, 2 D. M. & G., at p. 201; *Micklethwait* v. *Micklethwait*, 4 C. B. (N.S.) at p. 870. In that case one of the questions was what was the property referred to in the shifting clause. See also *Cope* v. *Earl de la Warr*, L. R. 8 Ch. 982, where the shifting clause was framed with reference to the provisions of letters patent conferring a peerage (*Buckhurst Peerage*, 2 A. C. 1).

(*m*) See *Collingwood* v. *Stanhope*, L. R. 4 H. L. 43; and *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819, in which *Fazakerly* v. *Ford*, 4 Sim. 390, is explained.

(*n*) *Wilbraham* v. *Scarisbrick*, 1 H. L. C. 167.

(*o*) See Chap. XLII, *post*, p. 1703.

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Where a shifting clause is expressed in clear language, its construction is not affected by the fact that it produces results which it seems improbable that the testator could have contemplated : as where he must have known that its effect would be such that by no possibility could the devisee take any benefit under the devise to him (*p*). So in *Lord Kenlis* v. *Earl of Bective* (*q*), where the limitations of the shifting clause were (apparently by oversight) declared in such terms that they had the effect of bringing back the estate to the person from whom they were directed to shift.

Questions arising on the construction of shifting clauses generally have references to the persons who are to take under them. Sometimes an estate is limited to A, B and C in succession, with a direction that in a certain event the limitation in favour of A shall cease as if he were dead, and that the estate shall go over to the person next entitled in remainder under the will (*r*) : or that the estate shall devolve as if A had died without issue (*s*). A shifting clause may also affect the construction of the original devise : as for instance by converting the estate of a devisee in fee into an estate tail (*t*).

Sometimes the question arises whether a shifting clause merely accelerates the estates in remainder already limited by the will, or whether it creates new estates (*u*).

Interim rents and profits.

Where a shifting clause takes effect by putting an end to the estate of a devisee, but the person next entitled beneficially in remainder is non-existent or unascertained, it is a question whether the rents and profits are undisposed of, and go to the heir, according to the opinion of Kindersley, V.-C. (*x*), or whether they follow the limitations of the settlement, according to the opinion of Turner, L.J. (*y*).

Alteration in limitations.

Where the shifting clause is to take effect on A succeeding to an estate which the testator describes as being subject to an existing settlement, this means, as a general rule, that the

(*p*) *Lambarde* v. *Peach*, 4 Drew. 553; *Turton* v. *Lambarde*, 1 D. F. & J. 495.

(*q*) 34 Bea. 587.

(*r*) *Doe* v. *Heneage*, 4 T. R. 13; *Lambarde* v. *Peach*, 4 Drew. 553; *Turton* v. *Lambarde*, 1 D. F. & J. 495, where the persons so entitled were trustees to preserve contingent remainders.

(*s*) *Morrice* v. *Langham*, 11 Sim. 260, 8 M. & W. 194; *Sanford* v. *Morrice*, 11 Cl. & F. 667; *Jellicoe* v. *Gardiner*, 11 H. L. C. 323; *Carr* v. *Earl of Errol*, 6 East 58 (" without issue of his body ").

(*t*) *Biddulph* v. *Lees*, 28 L. J. Q. B. 211.

(*u*) *Doe* v. *Earl of Scarborough*, 3 A. & E., pp. 2, 897; *Milbank* v. *Vane*, [1893] 3 Ch. 79.

(*x*) *Lambarde* v. *Peach*, 4 Drew. 553.

(*y*) *Turton* v. *Lambarde*, 1 D. F. & J. 495, followed by Romilly, M.R., in *D'Eyncourt* v. *Gregory*, 34 Bea. 36. See also *Sanford* v. *Morrice*, 11 Cl. & F. 667; *Stanley* v. *Stanley*, 16 Ves. 491; see also the authorities on interim rents in the case of executory devises, *ante*, p. 929.

shifting clause will only operate if A succeeds by force of the limitations of that settlement; and therefore if the estate is disentailed and A takes it by devise or descent, etc., the shifting clause does not operate (*z*). But if the disentailing deed is followed by a re-settlement containing the same limitations as the original settlement, this will, as a general rule, be looked upon as a continuation or renewal of the title, and if A succeeds under it, the shifting clause takes effect (*a*). According to some of the authorities, indeed, it may be laid down as a general rule that no dealings by A with his interest in the estate to which he succeeds, will prevent the shifting clause from taking effect (*b*).

Meaning of "entitled."

A shifting clause is often directed to take effect on a person to whom land is devised becoming "entitled" to another specified estate: it seems that *prima facie* this means "beneficially entitled in possession" (*c*). In *Monypenny* v. *Dering* (*d*), a testator devised the M. estate upon trust for his wife for life, and after her death, upon trust for P. M. and his issue male in strict settlement, with a shifting clause to take effect in the event of P. M. or any of his issue becoming entitled to the J. estate; on the death of the widow, P. M. was entitled to a life estate in remainder in the J. estate expectant on the death of S. H.; it was held by Lord St. Leonards that this did not make P. M. "entitled" within the meaning of the shifting clause, "as the testator could never have intended that a mere accession to a life estate in remainder, which might never be enjoyed, should take away an estate in possession." But on the death of S. H. the life estate of P. M. fell into possession, and it was held that the shifting clause took effect.

"Entitled to possession."

A person may be "entitled to the actual possession or receipt of the rents and profits" of an estate within the meaning of a shifting clause, although he derives no actual benefit from it; *e.g.*, by reason of the testator's widow having the right to occupy part of the property rent free, and of the charges on the estate exhausting the rents of the remainder (*e*). On the other hand, if the trustees of a will have powers of management during the

(*z*) *Taylor* v. *Earl of Harewood*, 3 Ha. 372. See also *Wandesforde* v. *Carrick*, Ir. R. 5 Eq., at p. 497.

(*a*) *Ib.*, at p. 384; *Harrison* v. *Round*, 2 D. M. & G. 190. See also *Wright* v. *Marshall*, 51 L. T. 781, and *Re Croker's Estate*, Ir. R. 2 Eq. 58. In *Meyrick* v. *Laws*, L. R. 9 Ch. 237, the decision seems to have turned chiefly on the fact that the estates were diminished in quantity.

(*b*) *Per* Lord St. Leonards, in *Monypenny* v. *Dering*, 2 D. M. & G., at p. 188; but see Vaizey on Settlements, 1281.

(*c*) Compare *Chorley* v. *Loveband*, 33 Bea. 189, and *Umbers* v. *Jaggard*, L. R. 9 Eq. 200, cited *ante*, p. 659; *Re Finch*, 17 Ch. D. 211; *Re Maunder*, [1903] 1 Ch. 451; *Re Gryll's Trusts*, L. R. 6 Eq. 589.

(*d*) 2 D. M. & G. 145, and see *Curzon* v. *Curzon*, 1 Giff. 248, and *Bagot* v. *Legge*, 34 L. J. Ch. 156.

(*e*) *Re Varley*, 62 L. J. Ch. 652.

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minority of the tenant for life or tenant in tail, this may prevent him from being "entitled to the possession" within the meaning of a shifting clause (*f*).

In *Re Hinckes* (*g*) an ingenious device was adopted for avoiding the operation of a shifting clause.

Where title is described.

Where the shifting clause is expressed to take effect on A becoming entitled to property in the county of X under any "will or settlement, or other assurance (except actual purchase for money)," it will not take effect by reason of A succeeding to property in the county of X by descent (*h*).

In *Micklethwait* v. *Micklethwait* (*i*) (where the facts were very complicated), there was a shifting clause to take effect in the event of a devisee becoming entitled to the settled property of A "as the heir male of his body"; the devisee became entitled to the property as tenant in tail male by purchase, and it was held that the shifting clause took effect.

Meaning of "eldest son" in shifting clause.

In *Bathurst* v. *Errington* (*k*), a testator devised his estates to the second, third, and fourth sons, by name, of T. S., with a shifting clause to take effect in the event of any of them becoming "the eldest son" of T. S.; T. S. survived the testator, and died, leaving his first, second, and third sons living; the first and the second sons died without male issue, and the third son claimed the estates: it was held that he was entitled to them, because the shifting clause was only intended to take effect in the event of both his elder brothers dying before T. S.: in the natural and ordinary sense of the words, a man cannot be said to become the eldest son of his father after his father's death.

Other events.

Most of the shifting clauses above referred to are intended to take effect on the happening of an event beyond the control of the devisee, but there are instances of shifting clauses directed to take effect on some voluntary act of the devisee, such as

Name and arms clause.

"entering into religion and becoming a professed nun" (*l*). The commonest instance of this kind is a shifting clause to enforce performance of a condition imposed by the testator, such as a clause directing the devisee to assume a particular name or coat of arms (*m*).

(*f*) *Leslie* v. *Earl of Rothes*, [1894] 2 Ch. 499; *Re Edwards*, [1910] 1 Ch. 541.

(*g*) [1920] 2 Ch. 54; [1921] 1 Ch. 475.

(*h*) *Walmesley* v. *Gerard*, 29 Bea. 321.

(*i*) 4 C. B. (N.S.) 790.

(*k*) 2 A. C. 698, affirming C. A. in *Hervey-Bathurst* v. *Stanley*, and *Craven* v. *Stanley*, 4 Ch. D. 251. Compare the cases on gifts to the "first" or "eldest" son of A, or to children other than an eldest son, which are considered in Chap. XLII, *post*, pp. 1703 *seq.*

(*l*) *Biddulph* v. *Lees*, 28 L. J. Q. B. 211.

(*m*) *Post*, p. 1514. As to the way in which a name and arms shifting

A shifting clause may be made to take effect more than once; for example, Blackacre may be devised to A, B, and C successively, so that if A becomes entitled to another property, Blackacre shall devolve to B, and if B becomes entitled to that property, Blackacre shall devolve to C. But an intention that the clause shall have this operation must be shown (*n*).

Repeated operation of shifting clause.

Where the operation of a shifting clause, in the event of its taking effect, would be to defeat an estate tail, it is put an end to if that estate tail is barred by a disentailing deed (*o*).

Barring of shifting clause.

Not infrequently a clause of cesser or forfeiture is found in a will, either alone, or in conjunction with a shifting clause or gift over (*p*). It seems clear that, as a general rule, a clause of cesser is good, and takes effect on the happening of the event provided for, even if there is no gift over (*q*). So if there is a gift over, the clause of cesser or forfeiture may take effect even if the gift over fails (*r*). It is true that, in *Hodgson* v. *Halford* (*s*), Hall, V.-C., said: "When you find a forfeiture clause associated with a gift over, is it not reasonable to read them together?" and he refused to construe the clause of forfeiture separately from the gift over. But it seems clear that no such general rule is established by the authorities (*t*). According to Turner, V.-C., it is a question of construction in each case: "the Court is to collect the intention of the testator, whether his intention was that the life interest should not continue" (*u*). The Courts, however, seem more reluctant to give effect to a clause of forfeiture where it is annexed to the gift of an absolute interest, than where it is annexed to a life interest. Thus, in *Re Catt's Trusts* (*x*), the testatrix required every residuary legatee to take and use the name and arms of W.,

Clauses of cesser or forfeiture.

clause should be framed in pursuance of an executory trust, see *Trevor* v. *Trevor*, 13 Sim. 108; Davidson, Conv. iii. 366. See also *Holmesdale* v. *West*, 12 Eq. 280, as to portions and jointures.

(*n*) *Doe* v. *Earl of Scarborough*, 3 A. & E., pp. 2, 897.

(*o*) *Doe* v. *Earl of Scarborough*, 3 A. & E., pp. 2, 897; *Milbank* v. *Vane*, [1893] 3 Ch. 79.

(*p*) As in *Re Cornwallis*, 32 Ch. D. 388, and *Re Baker*, [1904] 1 Ch. 157. As to clauses of forfeiture see Chap. XXXIX.

(*q*) *Re Dickson's Trust*, 1 Sim. (N.S.) 37; *Rochford* v. *Hackman*, 9 Ha. 475 (personalty), approved in *Hurst* v. *Hurst*, 21 Ch. D. 278 (realty), and in *Adams* v. *Adams*, [1892] 1 Ch. 369.

(*r*) *Hurst* v. *Hurst*, 21 Ch. D. 278; following *Doe* v. *Eyre*, *ante*, p. 1409. See also *per* Jessel, M.R., in *Hervey-Bathurst* v. *Stanley*, 4 Ch. D., at p. 265.

(*s*) 11 Ch. D. 959.

(*t*) See *per* Jessel, M.R., in *Hurst* v. *Hurst*, 21 Ch. D., at p. 293. The subject is also referred to *ante*, p. 1409.

(*u*) *Rochford* v. *Hackman*, 9 Ha., at p. 481.

(*x*) 2 H. & M. 46. Mr. Vaizey (Settlements, 1287) seems to consider this an anomalous decision. It was not referred to in *Hurst* v. *Hurst*, although it might have been cited in answer to an inquiry of Jessel, M.R. (21 Ch. D., at p. 290).

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and declared that if any legatee should neglect to do so, his or her interest should cease and be void and devolve as if he or she were then actually dead : Wood, V.-C., held that the whole clause was ineffectual, because the gift over was expressed in such terms that the Court could not tell in whom the property was intended to be vested ; consequently he held that the legatees who neglected to comply with the clause did not forfeit their shares. So, in *Musgrave* v. *Brooke* (*y*), a testatrix devised real estate to A, B and C in fee simple, with a proviso requiring each of them to take the surname of J., and declaring that in case any of them should refuse or neglect so to do, the estate limited to her should cease, determine and be utterly void, and that the property should thereupon first go to X for life, and after her decease to the person or persons " next in remainder " under the trusts of the will, as if the person so refusing or neglecting were dead; X died during the lifetime of A, without having complied with the clause : it was held by Pearson, J., that the devise being in fee simple, there could not be any person " next in remainder " and that the clause was absolutely void.

Law of Property Act, 1925.

II.—Distinction between Contingent Remainders and Executory Devises.—By virtue of section 1 of the Law of Property Act, 1925, legal remainders have ceased to exist since 1925, not only as regards wills coming into operation since 1925, but as regards previous wills; and the legal estate in fee simple in the property is vested in accordance with the provisions of Part II of the First Schedule to the Act. But the question arises how, if at all, these vesting provisions may affect the validity of devises in remainder contained in wills coming into operation before the Act. There is a proviso (i) that nothing in that part of that Schedule shall operate to render invalid any limitation or trust which would have been capable of taking effect as an equitable limitation or trust; and it had previously been decided that a valid equitable limitation did not fail by subsequently becoming clothed with the legal estate (*z*). The editors of the 11th edition of Wolstenholme and Cherry's Conveyancing Acts state (Vol. I, p. 413) that the loss of the legal estate under the Law of Property Act, 1925, will not affect the validity of a limitation which was legal before the Act. So that although the distinction between a contingent remainder and an executory devise will become of decreasing importance it has been thought better to retain this Section in the present edition.

(*y*) 26 Ch. D. 792.
(*z*) *Re Freme*, [1891] 3 Ch. 167; *Re Robson*, [1916] 1 Ch. 116.

Executory interests not affected by acts of owner of precedent estate.

The essential quality in executory devises, which under the old law gave to the distinction between them and contingent remainders its chief importance, is this,—that such interests are not in general liable to be affected by any alteration in the preceding estate (*a*): while, on the other hand, as the rule was that a contingent remainder must take effect, if at all, at the instant of the determination of the preceding estate (*b*), it followed that any act by the owner of the prior estate of freehold, which amounted to a forfeiture of it, produced the destruction of the dependent contingent remainders, the effect being to place them in the same situation as if the preceding estate had regularly expired before the period of vesting. But their destructibility by such an act is now a doctrine of little practical importance, since, by the Real Property Act, 1845, s. 8, contingent remainders are made "capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened."

Destructibility of contingent remainders; cured by Real Property Act, 1845.

This statute, however, left untouched the general principle that a contingent remainder will fail unless it vests before, or simultaneously with, the regular determination of the particular estate; for it is obvious that a contingent remainder may be of such a nature as to admit the possibility of its continuing in suspense or contingency, after the regular determination of the previous estate of freehold. For instance, suppose freehold lands to be devised (by a will made before August 2, 1877) to A for life, with remainder to such of the children of A as shall attain the age of twenty-one years, it is evident, that if all the

Liability to failure.

(*a*) *Pells* v. *Brown*, Cro. Jac. 590.

(*b*) "Formerly the doctrine of the necessity that the remainder should vest at the very instant of the determination of the particular estate at farthest, was extended to the case of a posthumous son. In the case of *Reeve* v. *Long* (1 Salk. 227), an estate was limited to A for life, remainder to his eldest son in tail; A died, leaving his wife *enseint*. She afterwards had a son. It was adjudged that the son, not being *in esse* at the time of the determination of the particular estate, could not take under the limitation. This judgment was afterwards affirmed in the Court of King's Bench; but it was reversed in the House of Lords, against the opinion of all the judges. To obviate all doubts respecting the law in this case, the statute of 10 Will. 3, c. 16, was passed, by which it was enacted, that where any estate is, by marriage, or any other settlement, settled in remainder to children, with remainders over, any posthumous child may take in the same manner as if born in the father's lifetime. It is singular that this statute does not expressly mention limitations or devises made by will. There is a tradition, that, as the case of *Reeve* v. *Long* arose upon a will, the lords considered the law to be settled by their determination in that case, and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination. Besides, in the above case of *Reeve* v. *Long*, the words of the act may be construed, without much violence, to comprise settlements of estates made by will, as well as settlements of estates made by deed." [Butler's note to Co. Litt. 298a.] As to the general rule that a child *en ventre* is considered as a living person, see *post*, Chap. XLII, p. 1677.

children of A happen to be under age at the time of A's decease, the remainder to the children would, according to the rule before referred to, wholly fail unless preserved by an estate limited to trustees during the life of A, and the further period of the possible minority of one at least of the children (*c*).

Contingent Remainders Act, 1877.

An important modification of the rule above referred to was made by the Contingent Remainders Act, 1877, which enacts that, "every contingent remainder created by any instrument executed after the passing of this Act [August 2, 1877], or by any will or codicil revived or re-published by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use, or executory devise or other executory limitation."

If, therefore, in the instance above supposed, the devise were made by a will executed since August 2, 1877, it would not be liable to failure in the event of A's children being all under age at the time of his death, because such a devise to them, without any preceding estate of freehold, would be good as an executory devise. On the other hand, if the devise had been to A for life, with remainder to such of his children as should attain twenty-five, and all his children were under that age at his death, the devise to them would have failed, notwithstanding the statute, because such a devise, although good as a contingent remainder (*d*), would have been bad for remoteness as an executory devise (*e*).

But suppose that A (in the case already put) survives the testator, and afterwards dies leaving several children, some of whom have already attained the prescribed age, and others not. Here the rule before the Act was (*f*), that those children alone took who attained twenty-one before the particular estate determined, to the exclusion of others who might afterwards attain that age. Now what happens in such a case is this: either the contingent remainder in the entirety vests in the child who first attains the age in the lifetime of A, with a liability to open and let in such others as afterwards attain the age in A's lifetime—

(*c*) *Festing* v. *Allen*, 12 M. & W. 279; *Holmes* v. *Prescott*, 33 L. J. Ch. 264; *Cunliffe* v. *Brancker*, 3 Ch. D. 393.
(*d*) *Ante*, p. 302.
(*e*) *Ante*, p. 300.
(*f*) *Ante*, p. 303.

and this is the commonly received opinion (*g*); or, at latest, the entirety vests, *eo instanti* that the particular estate determines, in all those children who have then attained the age, to the exclusion of those who have not. In either case the particular estate does not determine before the contingent remainder vests, and thus the event in which alone the Act operates has not happened.

It has been suggested that as every infant child *in esse* during the particular estate might by possibility have become entitled to a share by attaining twenty-one during the continuance of the particular estate, such share was a contingent remainder at the time of the determination of the estate, and is consequently saved by the Act. But this view seems inconsistent with the nature of a gift to a class: since, under such a gift, those only are objects of the gift who have attained the required qualification when the time for ascertaining the class arrives—*viz.* (in the present case), the determination of the particular estate—and they take the whole.

The result seems to be that in the case supposed the Act made no change in the law, and that the children who attain twenty-one before the particular estate determines, take, to the exclusion of those who afterwards attain that age (*h*).

Equitable contingent remainders.

The rule that a contingent remainder is liable to fail by the determination of the particular estate before the happening of the contingency, never applied to so-called equitable contingent remainders (*i*). And it has been decided that where such a contingent remainder is created before the Act of 1877, and after 1877 becomes clothed with the legal estate, it does not thereby

(*g*) Fea. C. R. 312; *Mogg.* v. *Mogg*, 1 Mer. 654; 1 Preston Conv. 52, 53, 3 *ib.* 555. And see Solicitors' Journ. 1878, pp. 544, 563, 601, 622, 640, 661; *Brackenbury* v. *Gibbons*, 2 Ch. D. 417, as explained by the late Mr. Joshua Williams (Seisin, 205). But it is not quite clear that Hall, V.-C., approved of the opinion in question, *ante*, p. 302, n. (*z*). In the third edition of this work (by Messrs. Wolstenholme & Vincent) the law was thus stated: "If lands of which the testator had the legal inheritance be devised to A. for life, with remainder in fee to the children of A. who shall attain the age of twenty-two, the devise in remainder will be good, for as soon as any child attains twenty-two in the lifetime of A., the whole remainder vests in him, subject to open and let in such other children as attain twenty-two in A.'s lifetime, and on the death of A. those children alone take who have attained twenty-two, to the exclusion of others who may afterwards attain that age (*Mogg* v. *Mogg*, 1 Mer. 654); and if at the death of A. no child has attained twenty-two, the remainder fails (*Festing* v. *Allen*, 12 M. & Wels. 279; *Alexander* v. *Alexander*, 16 C. B. 59)." This passage was printed in the third edition (vol. i. p. 239) without brackets, as if it formed part of Mr. Jarman's text, and it has been quoted and accepted as such (Williams on Seisin, 206). The original passage as it appears in the first edition is printed *ante*, p. 301.

(*h*) Williams on Seisin, 206.

(*i*) *Ante*, p. 273.

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become liable to failure by the subsequent determination of the particular estate (*k*).

Trust to convey legal estate.

A devise of land to trustees upon trust to convey the legal estate to a person to be ascertained on the happening of a contingent event, does not give that person a contingent remainder; it is an executory devise (*l*).

Restrictions on the creation of contingent remainders and executory devises.

To return to contingent remainders properly so-called. Another distinction between contingent remainders and executory devises was introduced by section 10 of the Conveyancing Act, 1882, now replaced by section 134 of the Law of Property Act, 1925. The provisions of this section have been already considered (*m*), as has also the question whether contingent remainders, like executory devises, are subject to the rule against remoteness (*n*).

Estate *pur auter vie*.

An executory devise of an estate *pur auter vie* is valid, and cannot be defeated by the prior devisee of a *quasi* estate in fee simple (*o*).

When a devise is a contingent remainder and when an executory devise.

It is obvious that the Contingent Remainders Act, 1877, even in the case of wills made since 1877, only partially abolished the distinction between contingent remainders and executory devises, and it is, therefore, still important to consider the points of difference between them.

Statement of the rules.

The question has been frequently discussed in connection with gifts to classes, such as children, brothers, nephews, etc., and the cases are considered in detail, with reference to gifts of personalty as well as realty, in a later chapter of this work (*p*). It may, however, be convenient to state shortly the principal rules as regards real estate :—

Rules as to real estate.

(1) An immediate devise to the children of A *prima facie* means children in existence at the testator's death : but if there are no children then in existence, or if the testator clearly shows an intention to include afterborn children, the devise will take effect as an executory devise, so as to include the children of A whenever born (*q*).

(*k*) *Re Freme*, [1891] 3 Ch. 167; *Re Robson*, [1916] 1 Ch. 116; see 60 Sol. J. 426.

(*l*) *Re Finch*, 17 Ch. D. 211.

(*m*) *Ante*, p. 1407, n. (*l*). (*n*) *Ante*, p. 343.

(*o*) *Re Barber's Settled Estates*, 18 Ch. D. 624; *Re Michell*, [1892] 2 Ch. 87.

(*p*) Chapter XLII.

(*q*) See Hawkins on Wills, 3rd ed. 86 : *Wild's Case*, 6 Rep. 16 b; *Mogg* v. *Mogg*, 1 Mer. 654, and the authorities there cited, especially *Singleton* v. *Gilbert*, 1 Cox, 68; *S. C. sub nom. Singleton* v. *Singleton*, 1 B. C. C. 541 n.; also *Scott* v. *Harwood*, 5 Madd. 332. The question what words are sufficient to show an intention to include afterborn children is discussed *post*, pp. 1650 *seq*.

(2) A devise to A for life, and after his death to his children, vests in all the children in existence at the death of the testator, but so as to open and let in children subsequently born during A's lifetime. So where the devise is to such children as attain a certain age, only those who attain that age during A's lifetime can take (*r*). Such a devise is therefore a contingent remainder, unless the context shows an intention to give vested interests subject to be divested (*s*).

(3) A devise to A for life, and after his death to such of his children as, either before or after his death, shall attain twenty-one, is an executory devise, and children who attain twenty-one after A's death are included (*t*).

(4) A devise to A for life, and after his death to the children of B, is a contingent remainder: but if the devise is to the children of B living at the death of A or thereafter to be born, this is an executory devise (*u*).

(5) From the general rule above stated (*x*), that a limitation to take effect before the natural determination of a preceding estate of freehold is an executory limitation, it follows that if land is devised to A for life, with remainder to his children, and A's life estate is determined under a clause of forfeiture, the gift to the children takes effect as an executory devise (*y*).

In the case of limitations to individuals, it is sometimes difficult to say whether they take effect as contingent remainders or executory devises. The difficulty is enhanced by the technical rule already referred to (*z*), that a limitation which is capable of taking effect as a remainder can never be construed as an executory devise, whatever the intention of the testator may be. Thus, in *Re Wrightson* (*a*), a testator by his will devised freehold estates to uses in strict settlement, and afterwards

Re Wrightson.

(*r*) *Festing* v. *Allen*, 12 M. & W. 279; *Holmes* v. *Prescott*, 10 Jur. (N.S.) 507, and other cases cited *ante*, p. 1356. This, of course, assumes that the Contingent Remainders Act, 1877, does not apply to such a devise, *ante*, p. 1420. Compare *Symes* v. *Symes*, [1896] 1 Ch. 272, where the limitations were by deed.

(*s*) *Ante*, p. 1349 *seq.*

(*t*) *Re Lechmere and Lloyd*, 18 Ch. D. 524; dissenting from *Brackenbury* v. *Gibbons*, 2 Ch. D. 417; *Re Lechmere and Lloyd* was followed in *Miles* v. *Jarvis*, 24 Ch. D. 633; *Re Bourne*, 56 L. T. (N.S.) 388; and *Dean* v. *Dean*, [1891] 3 Ch. 150. Some remarks on *Lechmere* v. *Lloyd* and *Brackenbury* v. *Gibbons* will be found in Challis, R. P. 114. In *Re Norrington*, 40 T. L. R. 96, a testator devised real estate in trust for his son for life and then for the son's children and if (as happened) there should be no child of the son, then in trust for the right heirs of the son. This was held to be a contingent remainder to the right heirs, so that the son took the fee under the rule in *Shelley's Case*.

(*u*) *Miles* v. *Jarvis*, 24 Ch. D. 633.

(*x*) *Ante*, p. 1405.

(*y*) *Blackman* v. *Fysh*, [1892] 3 Ch. 209.

(*z*) *Ante*, p. 1405.

(*a*) [1904] 2 Ch. 95.

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made a codicil by which he directed that no devisee of any of his real estates devised under, or by virtue of his will, should have a vested interest therein or in any part thereof, or be entitled to the possession of the same or any part thereof, until the attainment of the age of twenty-four years, anything contained in his said will or any law or usage to the contrary notwithstanding : it was held that the effect of the codicil was to convert the limitations of the will into executory devises, and that they were consequently void for remoteness. The case was brought within the rule laid down by Mr. Fearne (*b*)—that if an ulterior limitation wants that connection with, or relation to, the preceding estate of freehold, which is requisite to constitute it a remainder, it may take effect as an executory devise—because the testator in *Re Wrightson* showed an intention that a tenant in remainder should not be entitled to possession on the determination of the preceding estate, but should wait until he attained twenty-four, a provision inconsistent with the idea of a remainder at common law.

White v. *Summers.*

On the other hand, in *White* v. *Summers* (*c*), where the testator (who died in 1847) devised land to B for life, with remainder (in the events which happened) to the eldest or other son of J. S. who should first attain or have attained the age of twenty-one years successively in tail male, and in default of such issue to F. S., etc., and at the death of B no son of J. S. had attained twenty-one, it was held that the devise to his sons failed : Parker, J., was of opinion that the devise was a contingent remainder, and that being so, it was immaterial to consider what the testator's intention was; he also held that the devise to F. S. "in default of such issue" of J. S. did not mean that F. S. was only to take if J. S. had no issue who attained twenty-one, but that the words were merely intended to limit a remainder to F. S. to take effect on the failure of the preceding limitation. Otherwise the devise to F. S. would have failed, for a son of J. S. attained twenty-one about ten years after the death of B.

Nature of limitation sometimes dependent on events happening in testator's lifetime;

"As every devise operates according to the state of the objects at the death of the testator, it frequently happens," as Mr. Jarman points out (*d*), "that a limitation which, on the face of the will, appears to be a contingent remainder, and which, according to the state of events at the date of the will, would have taken effect as such, becomes, by the effect of

(*b*) Cont. Rem. 398.
(*c*) [1908] 2 Ch. 256.
(*d*) First ed. p. 788.

subsequent events happening in the testator's lifetime, an executory devise. Thus, if lands be devised to A for life, remainder to the future sons of B, and A die in the lifetime of the testator, at whose decease no future son of B is born, the devise will be executory, precisely as if it had been originally limited to the future sons of B, without any preceding freehold (*e*). The consequences of this event on the rights of the respective devisees might be very important: for if the devise had once operated to confer a contingent remainder, or, in other words, if A had survived the testator, and had afterwards died before any future son of B was born, the remainder to such future son would have failed by the determination of the preceding estate before it vested.

—and possibly even on subsequent events.

"Where the limitation of a future interest, by way of executory devise, is followed by other limitations expectant thereon, in the nature of remainders, (which, of course, can only happen where the first estate is less than the fee-simple,) such subsequent limitations may, it is evident, according to events happening as well after as before the death of the testator, take effect either as remainders or as executory devises. If, by the removal out of the way of the preceding limitation or limitations, by the death of the object or objects, or otherwise, before the happening of the contingency on which the whole line of limitations depends, a subsequent devisee is placed at the head of the train; his estate will, on the happening of such contingency, take effect as an executory devise, though had it retained its original position, such estate would have vested as a remainder.

"Thus, in *Doe* d. *Fonnereau* v. *Fonnereau* (*f*), where A devised to the heirs male of the body of T, his eldest son, (who had an estate for life by deed,) and in default of such issue to his (testator's) second, third, fourth, and fifth sons successively, in tail male; it was held, that if T died leaving an heir male of his body, the limitation to A's next son took effect as a remainder expectant on the estate tail of such heir male; and that if he died leaving no male issue who survived the testator, it took effect immediately as an executory devise.

Effect where one of the several concurrent contingent remainders is subject to an executory devise.

"Sometimes a limitation is so framed, as to take effect as a remainder in fee in one event, and as an executory limitation engrafted on an alternative contingent remainder in fee in

(*e*) See *Hopkins* v. *Hopkins*, Cas. t. Talb. 44, 1 Atk. 581, 1 Ves. sen. 268; *Doe* d. *Scott* v. *Roach*, 5 M. & Sel. 482. So in the case already considered (*ante*, p. 1418), of a devise to A for life, with remainder to such of his children as shall attain twenty-one, if A died in the lifetime of the testator, leaving children all under age, the limitation to them would take effect as an executory devise.

(*f*) Doug. 487; *Hopkins* v. *Hopkins*, Fea. C. R. 510.

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another event. Thus, in *Doe* d. *Herbert* v. *Selby* (*g*), where the devise was to A for life, and after his decease to his children in fee as tenants in common; and if A should die without issue, or leaving such issue, and such child or children should die under twenty-one, or (which was read *and* (*h*)) without issue, then over to B in fee. A suffered a common recovery, and *died without issue*; and it was held that, in the event which had happened, the limitation to B would have taken effect as a contingent remainder, and consequently was destroyed by the recovery.

Observations upon *Doe* v. *Selby*.

"It is not quite accurate to say in such a case as *Doe* v. *Selby*, that the limitation is a contingent remainder in one event, and an executory devise in the other. There were, in fact, two alternative remainders in fee: one of which was (as *one* necessarily is in such a case) contingent, and was subject to an executory limitation in favour of the same person, who would have been the object of the alternate remainder. Such a case is clearly distinguishable from that of a devise to A for life; and if he shall die on the 1st of January, then, from one year afterwards, to B in fee; but if A shall die on any other day, then, immediately from the decease of A, to B in fee. In the first event, the limitation to B would take effect as an executory devise; and in the second, as a remainder; so that his interest would be destructible or not by the act of A, according to the event" (*i*).

A better example of alternative limitations is given by Parker, J., in *White* v. *Summers* (*k*): "In the case of a devise to A for life, and after his death to B if he shall then have attained twenty-one years, but if B shall not have then attained twenty-one years, then to B if and when he attains that age, there would be alternative gifts to B, one being a remainder and the other an executory devise, and which ultimately took effect would depend upon whether B had or had not attained the age of twenty-one at the death of A. That such alternative limitations would be good appears from the case of *Evers* v. *Challis*" (*l*).

Executory devise may be changed into a remainder by events subsequent to testator's death.

In *Doe* d. *Harris* v. *Howell* (*m*), where a testator devised real estates to his daughter for life, remainder to her son J. in

(*g*) 4 D. & Ry. 608, 2 B. & Cr. 926.

(*h*) *Ante*, p. 576; and see *Doe* d. *Evers* v. *Challis*, 18 Q. B. 224.

(*i*) It will be remembered that when Mr. Jarman wrote (1844), contingent remainders were destructible by the holder of the preceding estate of freehold; *ante*, p. 1417.

(*k*) [1908] 2 Ch., p. 266. In that case the wording of the will was not sufficiently explicit to justify the alternative construction.

(*l*) 7 H. L. C. 531. *Ante*, p. 333.

(*m*) 10 B. & Cr. 191.

fee; but in case J. should die before her, and she should have no other child living at her death, then as she should appoint. The daughter and her son both survived the testator, and then the son died before his mother, who afterwards had another son who survived her. It was decided that though the limitation (which, for argument's sake, was supplied by implication (*n*)), to the children of the daughter other than J., could operate only as an executory devise at the time of the testator's death, yet that by J.'s death in his mother's lifetime that limitation was converted into a remainder, and was barred by a fine which had been levied by her.

But not a remainder into an executory devise.

But a limitation which has once operated as a contingent remainder, can never, after the death of the testator, be changed into an executory devise (*o*).

Whether executory limitation to arise out of a contingent remainder is involved in its destruction.

Mr. Jarman continues (*p*): "If, in *Doe* v. *Selby*, the tenant for life had had children, *i.e.*, born after the recovery, who had died under twenty-one, and without issue, the case would have raised a question, not, I think, hitherto decided, namely, whether an executory devise engrafted on a contingent remainder in fee, is involved in the destruction of such remainder. If an executory devise were derived out of the estate in defeasance of which it is limited to take effect, it is clear that, in such a case, it would be held to share the fate of the parent limitation, out of which it is to spring, and to all the accidents of which it would seem, therefore, to be necessarily subject. *Accessorius sequitur naturam sui principalis* (*q*). It would then present an exception to the position of the learned author of the Treatise on Contingent Remainders that 'an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate *out of which*, or after which, it is limited' (*r*); (to which, indeed, the case of an executory devise, *being preceded by an estate tail*, *does* clearly form an exception (*s*)). But it is conceived, that the notion above suggested though seemingly countenanced by the terms of this position, is not correct in point of law. An executory devise is not derived out of, or dependent upon, the estate which it supersedes. It is a future substantive, independent, limitation to arise on a given event; and the circumstance, that that event involves the failure of the objects of a preceding estate, is merely accidental (*t*).

(*n*) But see *ante*, p. 648.
(*o*) 2 Prest. Abst. 172; *Hopkins* v. *Hopkins*, 1 Atk. 581; *Mogg* v. *Mogg*, 1 Mer., pp. 703, 704, arg., and the decree as to the High Littleton estate.
(*p*) First ed. p. 790.
(*q*) 3 Inst. 139.
(*r*) Fearne, C. R. 418.
(*s*) As Mr. Fearne himself remarks: Fea. C. R. 423, 424, *ante*, p. 294.
(*t*) Cf. *Vincent Lee's Case*, Moore, 268.

Effect where defeasible and executory fee become vested in same person.

"Here it may be observed, that where the defeasible estate in fee, and the executory fee to arise out of it on a given event, become vested in the same person, the latter is not merged or extinguished in the former, the two interests being successive, and not concurrent. Thus, in *Goodtitle* d. *Vincent* v. *White* (*u*), where a testator devised all his estate to his wife, in case his daughter (who became his heir) died under the age of twenty-one years. The wife died intestate; so that the daughter, to whom the estate had descended from her father, subject to the executory devise, became also entitled, by descent from her mother, to the executory interest so created. The daughter died a minor, upon which the heir *ex parte materna* claimed the property under the executory limitation, which claim was resisted by the heir *ex parte paterna*, on the ground that the executory fee had been extinguished by the union of both interests in the person of the daughter. But it was held, that no extinguishment had taken place, and that the maternal heir was entitled (*x*).

Curtesy and dower attach on a defeasible fee.

"It is to be observed, too, that an immediate estate in fee, defeasible on the taking effect of an executory limitation, has all the incidents of an actual estate in fee-simple in possession, such as curtesy, dower, etc.; the devisee having the inheritance in fee, subject only to a possibility. Therefore, in *Buckworth* v. *Thirkell* (*y*), where a testator devised lands to trustees and their heirs, in trust for his grand-daughter M. until she arrived at the age of twenty-one, or was married; and after she attained her age of twenty-one, or was married, then he gave the lands to M., and her heirs and assigns, for ever; but in case M. should die before the age of twenty-one years, and without leaving lawful issue of her body, then over. M. died under age, without leaving issue living at her decease, *but having had a child born alive*; and it was held, that the husband (the father of such child) was entitled to an estate for life as tenant by the curtesy."

Unless estate be such as issue could in no case have inherited.

But an exception exists where the prior estate is determined by executory devise over, in case of the birth or existence of children who, but for such devise over, would have inherited the parent's estate: and the circumstance of the executory devise being in favour of the children themselves does not alter the

(*u*) 15 East, 174; 2 B. & P. (N.R.) 383. See also *Goodright* d. *Larmer* v. *Searle*, 2 Wils. 29; *Doe* d. *Andrew* v. *Hutton*, 3 B. & P. 643.

(*x*) "The arguments in this case are replete with instructive learning."

(*y*) 1 Collect. Jur. 332, 3 B. & P. 652, n. The same rule exists with regard to dower out of an estate tail, after failure of issue. *Secus* of an estate determined by condition at common law, *Payne* v. *Samms*, 1 Leo. 167, Goulds. 81; *Paine's Case*, 8 Rep. 34, 5 Vin. 313, pl. 30.

case, since they would not, nor ever could, take by inheritance, but by purchase (*z*).

Same rule as to dower before 1926.

The general right to dower in similar cases is equally well established (*a*), and the same exception must exist here as in regard to curtesy; it being equally necessary, in support of either claim, that children of the marriage, if any such there be, may by possibility inherit (*b*).

Executory bequests.

III.—Executory Bequests.—As Mr. Jarman observes (*c*), "No remainders can be limited in real and personal chattels; every future bequest of which, therefore, whether preceded by a partial gift or not, is in its nature executory (*d*). An ulterior bequest of a term for years, after a prior limitation for life, owes its validity to this doctrine; the rule formerly being that, in such a case, the whole interest vested indefeasibly in the first legatee (*e*).

"Thus, in *Manning's Case* (*f*), where a man possessed of a term of years, devised it to B, after the death of A the testator's wife, and directed that, in the meantime, she should have the use and occupation during her life: it was contended, that the devise to A during her life gave her the whole term, and that, therefore, the devise over was void; but after much argument, three Judges held, that B took not by way of remainder, but by way of executory devise. And it was ruled that there was no difference between a gift of the land itself, and of the use or occupation or profits of the land.

"Both Courts of Law and Courts of Equity are at this day (*g*) constantly in the habit of entertaining suits, at the instance of an executory legatee, for the recovery of chattels, real as well as personal, and the latter, of pecuniary legacies, after a prior disposition for life or other partial interest.

(*z*) *Sumner* v. *Partridge*, 2 Atk. 47; *Barker* v. *Barker*, 2 Sim. 249.

(*a*) *Moody* v. *King*, 2 Bing. 447; *Goodenough* v. *Goodenough*, 3 Prest. Abs. 372; *Smith* v. *Spencer*, 2 Jur. (N.S.) 778.

(*b*) Litt. s. 53.

(*c*) First ed. p. 793.

(*d*) Fea. C. R. 402; *Re Tritton*, 61 L. T. 301. The reader will find some interesting remarks on this subject in an article by Professor Gray on "Future Interests in Personal Property," in the Harvard Law Review, xiv, 397, and in §§ 86a, 831 *seq.* of the second edition of his work on the Rule against Perpetuities.

(*e*) *Horton* v. *Horton*, Cro. Jac. 74; *Woodcock* v. *Woodcock*, Cro. El. 795.

(*f*) 8 Rep. 95; *Stevenson* v. *Mayor of Liverpool*, L. R. 10 Q. B. 81. See also *Doswell* v. *Earle*, 12 Ves. 473; *Theobalds* v. *Duffoy*, 9 Mod. 102; *Mallet* v. *Sackford*, 8 Vin. Ab. 89, pl. 5; *Lampet's Case*, 10 Rep. 47; *Catchmay* v. *Nicholas*, Finch, 116; *Roe* d. *Bendale* v. *Summerset*, 5 Burr. 2608. That personalty may be subjected to the same modifications of ownership, by way of executory gifts, as land, see *Martin* v. *Long*, 2 Vern. 151; *Johnson* v. *Castle*, Winch, 116, 8 Vin. Ab. 104, pl. 2.

(*g*) 1844.

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Successive interests in personal chattels.

" In *Hoare* v. *Parker* (*h*), an ulterior legatee recovered, by action of trover, certain chattels which the legatee for life had pledged to a pawnbroker, who had given a valuable consideration without notice; the rule being, that the property does not, unless sold in market overt, follow the possession of chattels capable of being identified (*i*).

Equitable remedy for their protection and recovery.

" Courts of Equity, too, will enforce the actual delivery of specific chattels, which are of such a nature as that the loss cannot be compensated in damages; the value arising from considerations personal to the owner, as plate bearing family inscriptions, etc. (*k*). They will also, during the continuance of the prior interest, protect the rights of the ulterior legatee; but this protection is now confined to compelling the legatee for life to give an inventory; which, as observed by Lord Thurlow, is more equal justice than requiring security, which was the old rule; as there ought to be danger to require that (*l*).

When trover will lie.

" Where the legal title is in trustees, it seems that they may maintain trover for the recovery of personal chattels, which have been taken in execution by the creditor of the person beneficially entitled for life (*m*). But where the first taker was clothed with the legal title, and his creditor had taken the chattels (which consisted of plate) in execution; on a bill by the legatee calling for their restoration to the house with which they were bequeathed, and for security and an inventory, Lord Thurlow felt much difficulty. On the one hand, if the Court could take away the articles, it was entitling the ulterior legatee to take from him the use, contrary to the testator's intention; and, on the other, if the creditors obtained the plate, they must succeed in applying it differently from the testator's intention; and there was, his Lordship said, a strong principle of justice for preserving the goods for the benefit of the person entitled, if the Court could so secure them. The point, however, was not decided, the case being disposed of on another ground (*n*).

" It is clear, at all events, that the ulterior legatee might, on his interest falling into possession, have maintained an action of trover for the plate in question; or, if incapable of being compensated in damages, a suit in equity for its delivery. These cases suggest, that, wherever temporary interests are created

(*h*) 2 T. R. 376.

(*i*) See *Hartop* v. *Hoare*, 3 Atk. 44.

(*k*) *Pusey* v. *Pusey*, 1 Vern. 273; *Duke of Somerset* v. *Cookson*, 3 P. W. 389; *Fells* v. *Read*, 3 Ves. 70; *Lloyd* v. *Loaring*, 6 Ves. 773; *Lowther* v. *Lowther*, 13 Ves. 95; *Earl of Macclesfield* v. *Davis*, 3 V. & B. 16.

(*l*) 1 B. C. C. at p. 279.

(*m*) *Cadogan* v. *Kennet*, Cowp. 432. It seems that they are not within the reputed ownership clauses of the Bankruptcy Acts : *Earl of Shaftesbury* v. *Russell*, 1 B. & Cr. 666.

(*n*) *Foley* v. *Burnell*, 1 B. C. C. 274. *Ante*, p. 669.

in chattels personal, the whole legal property should be vested in trustees.

"As personal property of this nature is thus preserved through any number of successive takers, for the benefit of the person entitled to the ulterior and absolute interest, it is evident that bequests of such property are within the dangers of, and are consequently subject to, the rule directed against perpetuities" (*o*).

Re Swan.

In *Re Swan* (*p*), the testatrix bequeathed jewellery to her daughter with remainder, in an event which happened, to her son, and appointed her daughter and son executors. The daughter took possession of the jewellery, and when she died some of the articles were found to have been broken up or missing. It was held that the daughter was in the position of trustee or bailee for the remainderman, and that he was entitled to recover by way of compensation out of her estate the amount necessary to restore or replace the articles.

Consumable articles cannot be limited.

But there can be no limitations of things the proper use of which lies in their consumption (*res quæ ipso usu consumuntur*): under a specific (*q*) gift of such things to A for life or other limited interest, A takes the absolute property (*r*). This rule, however, is not generally applicable to such things where they are the testator's stock-in-trade (*s*), or where personal use by the tenant for life is not contemplated (*t*). So also the rule does not necessarily apply where there is a gift to A of wines or other consumable articles which he may require for consumption while residing in a house, the occupation of which is bequeathed to him by the testator (*u*).

(*o*) *Vide ante*, p. 267 *seq.*

(*p*) [1915] 1 Ch. 829.

(*q*) If included in a residuary bequest they would of course be sold, and the interest of the proceeds enjoyed by the tenant for life, 3 Mer. at p. 195. See *Re Moir's Estate*, [1882] W. N. 139.

(*r*) *Randall* v. *Russell*, 3 Mer. 190; *Andrew* v. *Andrew*, 1 Coll. 690; *Twining* v. *Powell*, 2 *ib.* 262. This was formerly doubted, see *Porter* v. *Tournay*, 3 Ves. at p. 314.

(*s*) *Phillips* v. *Beal*, 32 Bea. 25 (wine); *Groves* v. *Wright*, 2 K. & J. 347 (farming); *Cockayne* v. *Harrison*, L. R. 13 Eq. 432 (farming); *Myers* v. *Washbrook*, [1901] 1 K. B. 360 (farming); *Re Powell*, [1921] 1 Ch. 178 (farming); *Maynard* v. *Gibson*, [1876] W. N. 204 (deer); *Paine* v. *Warwick*, [1914] 2 K. B. 486 (deer). In *Connolly* v. *Connolly*, 56 L. T. 304, it was doubtful whether the legatees took a life interest in the stock-in-trade, or an absolute interest. But in *Breton* v. *Mockett*, 9 Ch. D. 95, the tenant for life being expressly exempted from liability on account of diminution, was held to be absolutely entitled; and as to hay, roots, and cattle on a stock-feeding farm, see *Bryant* v. *Easterson*, 5 Jur. (N.S.) 166, and the remarks of Darling, J., in *Myers* v. *Washbrook*, *supra*; in that case there was no gift of the farming business, or direction that it should be carried on.

(*t*) *Re Hall's Will*, 1 Jur. (N.S.) 974 (bequest of testator's wearing apparel to his widow for life).

(*u*) *Re Colyer*, 55 L. T. 344. In *Clive* v. *Clive*, 2 Eq. R. 913, a bequest of the use and enjoyment of furniture, wines, etc., for life, was held to give the legatee an absolute interest in the consumable things.

Gifts over and clauses of cesser.

A clause by which a bequest of personalty in trust for A is directed to cease or go over in a certain event (as for instance on A becoming entitled to other property), is analogous to a shifting clause in the case of real estate (*x*). And the rule that where a condition or clause of forfeiture is followed by a gift over, the gift over must fit the previous clause (*y*), applies to personalty as well as realty (*z*).

Re Greenwood.

In *Re Greenwood* (*a*), a testator gave the income of his residuary estate to his children in equal shares, and made provision for a home to be maintained under the charge of M. for such of his unmarried children as chose to take advantage of it, and directed that while any child resided with M. a sum of £50 a year should be deducted from his or her share of the income and paid to M. It was held by the Court of Appeal (Kay, L.J., dissenting) that this operated as a bequest of £50 a year to M. out of the income of each unmarried child, contingently on his or her residing with M.

Absolute gift partially defeated by executory gift over,

We have already discussed the rule that, where an estate is devised on a contingency in partial derogation of a preceding estate in fee, the original devise is only affected to the extent necessary for the introduction of the contingent estate (*b*). "On the same principle," Mr. Jarman remarks (*c*), "it would seem to follow, that, if personal estate were bequeathed in terms which, standing alone, would confer the absolute interest, and there followed a bequest over in a certain event to a person for life, the first legatee would, subject to such executory gift for life, be absolutely entitled. It might appear to be a further deduction from this doctrine, that if the second gift were a contingent bequest of the entire interest in the property, and not for life only, and such contingent and substituted bequest failed in event, the prior legacy, in derogation of which the same was to take effect, would remain absolute. And the case of *Taylor* v. *Langford* (*d*) seems to lend some countenance to the hypothesis." But it would appear to be clearly settled that the principle of *Doe* v. *Eyre* (*e*) applies to personalty as well as

(*x*) *Curzon* v. *Curzon*, 1 Giff. 248, *ante*, p. 1413. *Portman* v. *Portman*, [1922] 2 A. C. 473, is a case of a shifting clause affecting heirlooms.

(*y*) *Ante*, p. 1415.

(*z*) *Bird* v. *Johnson*, 18 Jur. 976, stated *post*, p. 1468.

(*a*) 66 L. T. 101.

(*b*) *Ante*, p. 1407, n. (*n*).

(*c*) First ed. p. 783.

(*d*) 3 Ves. 119. See also *Harrison* v. *Foreman*, 5 Ves. 207, and other cases stated, *ante*, pp. 1340 *seq.* The statement of the case of *Joslin* v. *Hammond*, 3 Myl. & K. 110, which Mr. Jarman considered as militating against such a conclusion as that suggested in the text, has been transferred to Chap. XVII, *ante*, p. 542.

(*e*) *Ante*, p. 1409.

realty, so that where there is an absolute gift, followed by a gift over on the happening of a certain event, the prior gift is defeated on the happening of the event, although the gift over fails (*f*). Thus, in *O'Mahoney* v. *Burdett* (*g*), where a legacy was bequeathed to A for life, remainder to her daughter; but if the daughter should die unmarried or without children, then to B; B died in the testator's lifetime, and afterwards the daughter died without ever having a child. *Doe* v. *Eyre* and *Jackson* v. *Noble* were cited, and it was held in the House of Lords that the gift to the daughter was defeated, although the gift over had failed by lapse.

—although executory gift never takes effect.

And the exception to the principle of *Doe* v. *Eyre*, namely, that it does not apply where the gift over is void for remoteness, exists in the case of personalty as well as realty; the result being that the prior gift remains absolute (*h*).

Gift over void for remoteness.

But the principle does not apply in those cases "in which it is plain that the original gift was not intended to be defeated unless there [are] objects to take under the gift over, as for instance in cases of substitutionary gifts to children" (*i*). For example, where personalty is bequeathed to individuals or to a class, to come into possession at a future period (as, after a life-estate to A), and in case any of them should die before the period of distribution, then to their children; here, the original gift is divested only in the case of those who have children. Thus, in *Smither* v. *Willock* (*k*), where there was a bequest to the testator's wife for her life, and after her death to his brothers and sisters, named in the will, in equal shares; but in case of the death of any of them in the lifetime of the wife, the shares of him or her so dying were to be divided between his or her children; one of the testator's brothers died in the widow's lifetime, without having ever had a child; and Sir W. Grant declared his share to be vested, subject to be divested only in the event of his death in the lifetime of the widow, leaving children: and consequently, that event not having happened, his representative was entitled. So if a testatrix gives property to her sister A absolutely, and goes on to say that it is to be "divided in equal shares after my sister's death,

Effect where children substituted on death of original legatees.

(*f*) Quoted in *Re Bold*, 134 L. T. 595.

(*g*) L. R. 7 H. L. pp. 388, 407. See *Hurst* v. *Hurst*, 21 Ch. D. 278, where Jessel, M.R, referred to *O'Mahoney* v. *Burdett* as having been decided on the same principle as *Doe* v. *Eyre*.

(*h*) *Ante*, p. 1410. See *Hodgson* v. *Halford*, 11 Ch. D. 959; *Courtier* v. *Oram*, 21 Bea. 91; *Webster* v. *Parr*, 26 Bea. 236.

(*i*) *Per* Jessel, M.R., in *Hurst* v. *Hurst*, 21 Ch. D. at p. 293.

(*k*) 9 Ves. 233. See also *Hervey* v. *M'Laughlin*, 1 Pri. 264; *Salisbury* v. *Petty*, 3 Ha. 86.

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between G. and H., should they survive her," A's interest becomes indefeasible if G. and H. predecease her (*l*).

Effect where absolute interests are first given, and then trusts declared of shares of certain objects.

It seems, too, that where a testator, in the first instance, divides his property among his children, and then proceeds to declare certain trusts of his daughters' shares in favour of themselves and their children, these trusts are considered as defeating only *pro tanto* the absolute interests antecedently given to the daughters in common with the other children (*m*).

The same principle applies where the ulterior limitations are void for remoteness, or, in the case of an appointment under a special power, because they are in excess of the power (*n*).

Lassence v. *Tierney*.

The rule (which applies to shares of males as well as to shares of females (*o*)) is thus stated by Lord Cottenham : " If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case, the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee, as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee " (*p*). The rule applies to real estate (*q*).

Rule for deciding whether there be an absolute gift in the first place.

It is in the determination of this previous question, whether, namely, the gift to the primary legatee is absolute or qualified, that the real difficulty of these cases generally lies. The

(*l*) *Monck* v. *Croker*, [1900] 1 Ir. R. 56; *Crozier* v. *Crozier*, L. R. 15 Eq. 282, appears to rest on the same principle : see Chap. XVII, p. 542.

(*m*) *Whittell* v. *Dudin*, 2 J. & W. 279; *Hulme* v. *Hulme*, 9 Sim. 644. See also *Mayer* v. *Townsend*, 3 Bea. 443; *Winckworth* v. *Winckworth*, 8 *ib.* 576; *Re Forster*, 1 M. D. & D. 418, 2 *ib.* 177; *Arnold* v. *Arnold*, 16 Sim. 404; *Eaton* v. *Barker*, 2 Coll. 124; *Dawson* v. *Bourne*, 16 Bea. 29; *Re Young's Settlement*, 18 Bea. 199; *Lyddon* v. *Ellison*, 19 *ib.* 565; *Re Corbett's Trusts*, Joh. 591; *Norman* v. *Kynaston*, 3 D. F. & J. 29; *Bradford* v. *Young*, 29 Ch. D. 617; *Olphert* v. *Olphert*, [1903] 1 Ir. R. 326; *Fitzgibbon* v. *M'Neill*, [1908] 1 Ir. R. 1. See *Re Wilcock*, [1898] 1 Ch. 95; *Re Wood*, [1901] 2 Ch. 578, [1902] 2 Ch. 542, and *Hancock* v. *Watson*, [1902] A. C. 14, where the general rule is recognised. *Re Currie's Settlement*, [1910] 1 Ch. 329; *Re Connell's Settlement*, [1915] 1 Ch. 867; *Re Harrison*, [1918] 2 Ch. 59; *Re Atkinson*, [1925] W. N. 30.

(*n*) *Ring* v. *Hardwick*, 2 Bea. 352; *Churchill* v. *Churchill*, L. R. 5 Eq. 44; *Cooke* v. *Cooke*, 38 Ch. D. 202; *Re Boyd*, 63 L. T. 92; *Hancock* v. *Watson*, [1902] A. C. 14, affirming C. A. in *Re Hancock*, [1901] 1 Ch. 482.

(*o*) *Norman* v. *Kynaston*, 3 D. F. & J. 29.

(*p*) *Lassence* v. *Tierney*, 1 Mac. & G., at p. 561, and the cases cited *ante*, note (*m*). See also *Re Richards*, 50 L. T. 22.

(*q*) *Moryoseph* v. *Moryoseph*, [1920] 2 Ch. 33.

intention is, of course, to be collected from the whole will. Suppose, for instance, that after the gift to the primary legatee, there are gifts over in alternative contingencies exhausting every possible event: this is wholly inconsistent with an intention that there should, in any event, be an absolute gift to the primary legatee. But the point can only be material when the first expressions are ambiguous, for if there is a distinct positive gift, and the intention is express, nothing that afterwards follows can affect the construction of the positive gift; but where the first gift is capable of two constructions, other parts of the will are to be looked at to see what the intention was; and no doubt a disposition of the whole property, under all circumstances that can arise, is an important consideration in putting a construction on ambiguous expressions. It does not seem possible that the two intentions could exist together: if they are both found in the same will, the Court may have to decide which is to prevail (*r*); but if the first is ambiguous and the other is not, the unambiguous expression must have great effect in controlling that which is ambiguous (*s*).

Qualification by codicil.

Where the original gift is by will, and the qualification is contained in a codicil, the construction is generally a simpler matter than when both are contained in the same testamentary instrument (*t*).

Gift subject to a power which is extinguished.

Where there is a legacy subject to be defeated by the exercise of a discretionary power, and that power is extinguished, the legacy becomes absolute (*y*).

Acceleration of gift by lapse of prior absolute gift.

The doctrine that where personal property is given to A absolutely, with remainder to B absolutely, the gift to B takes effect if A predeceases the testator, is referred to elsewhere (*z*).

(*r*) See *Findon* v. *Findon*, 1 De G. & J. 380; *Re Lord Sondes' Will*, 2 Sm. & G. 416; *Salmon* v. *Salmon*, 29 Bea. 27.

(*s*) *Per* Lord Cottenham, *Lassence* v. *Tierney*, 1 Mac. & G., pp. 562, 567; *Reid* v. *Reid*, 25 Bea. 469; *Butler* v. *Gray*, L. R. 5 Ch. 26. Other cases where the primary gift has been held not absolute are *Rucker* v. *Scholefield*, 1 H. & M. 36; *Scawin* v. *Watson*, 10 Bea. 200; *Kay* v. *Winder*, 12 Bea. 610; *Gompertz* v. *Gompertz*, 2 Phil. 107; *Whitehead* v. *Rennett*, 22 L. J. Ch. 1020; *Waters* v. *Waters*, 26 L. J. Ch. 624; *Fullerton* v. *Martin*, 1 Dr. & Sm. 31; *Savage* v. *Tyers*, L. R. 7 Ch. 356; *Harris* v. *Newton*, 46 L. J. Ch. 268; *Re Richards*, 50 L. T. 22; *Re Buckmaster's Estate*, 47 L. T. 514; *Allen* v. *Allen*, 21 W. R. 747; *and Re Payne*, [1927] 2 Ch. 1.

In the following cases the first gift was held absolute: *Campbell* v. *Brownrigg*, 1 Phil. 301; *Lord* v. *Lord*, 3 Jur. (N.S.) 485; *Watkins* v. *Weston*, 3 D. J. & S. 434 (indefinite gift of rents of leaseholds); *M'Culloch* v. *M'Culloch*, 3 Gif. 606; *Combe* v. *Hughes*, 2 D. J. & S. 657; *Martin* v. *Martin*, L. R. 2 Eq. 404; *Bradford* v. *Young*, 29 Ch. D. 617; *M'Tear* v. *M'Dowell*, 11 Ir. Ch. 338; *Welply* v. *Cormick*, 16 Ir. Ch. 74; *Olphert* v. *Olphert*, [1903] 1 Ir. R. 326.

(*t*) See *Bell* v. *Jackson*, 1 Sim. (N.S.) 547; *Norman* v. *Kynaston*, 3 D. F. & J. 29; *Kellett* v. *Kellett*, L. R. 3 H. L. 160; *Re Wilcock*, [1898] 1 Ch. 95. In *Nevill* v. *Boddam*, 28 Bea. 554, there was a complete revocation by codicil of the original gift.

(*y*) *Keates* v. *Burton*, 14 Ves. 434.

(*z*) *Ante*, p. 427.

CHAPTER XXXIX.

CONDITIONS AND RESTRICTIONS.

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Creation of conditions.

I.—Creation of Conditions.—No precise form of words is necessary in order to create conditions in wills; any expression disclosing the intention will have that effect. Thus a devise to A, "he paying" or "he to pay £500 within one month after my decease," without more, would at common law create a condition, for breach of which the heir might enter (*a*). So a bequest "in consideration" of the legatee paying certain debts

(*a*) Co. Litt. 236 b.; *Barnardiston* v. *Fane*, 2 Vern. 366, *post*, p. 1456; *Re Oliver*, 62 L. T. 533. But as to the modern construction of such gifts, see Lord St. Leonards' statement quoted below.

and legacies, creates a condition (*b*). But the intention must be definitely expressed: thus, in *Yates* v. *University College* (*c*), a testator made a bequest to a college to found a professorship, "for the regulation of which I purpose preparing a code of rules and regulations"; if the college did not accept them within a certain time, the bequest was to be void: he died without making any rules, and it was held that the intention of the testator with regard to the rules did not create a condition.

Condition operating as gift.

Conversely, a provision in a will, expressed in the form of a condition, may operate as a substantive gift, by creating a trust or charge (*d*). Thus, if a testator gives property to A upon condition that he pays B a sum of money, this operates as a gift to B which does not lapse by the death of A in the testator's lifetime (*e*). And, as Lord St. Leonards points out (*f*), "what by the old law was deemed a devise upon condition, would now, perhaps, in almost every case, be construed a devise in fee upon trust, and by this construction, instead of the heir taking advantage of the condition broken, the *cestui que trust* can compel an observance of the trust by a suit in equity." This statement of the law was approved and acted on in *Wright* v. *Wilkin* (*g*), where it was held that a devise upon an express condition requiring the devisee to pay legacies created a trust and not a condition upon breach of which the heir could enter.

Condition creating personal liability.

In several cases it has been held that if property is given to a person upon condition of his making certain payments (debts, legacies, annuities, etc.), and he accepts the gift, this makes him personally liable for the payments, even if their amount exceeds the value of the property (*h*). But a contrary intention may appear from the context, as in *Re Oliver* (*i*), where words importing a condition were held to create only a charge. And a gift "subject to" certain payments creates a charge and not a trust (*j*).

(*b*) *Messenger* v. *Andrews*, 4 Russ. 478. Compare *Re Welstead*, 25 Bea. 612, below.

(*c*) L. R. 7 H. L. 438; *Re Panter*, 22 T. L. R. 431; *Re Williams*, 24 T. L. R. 716 (gift held to be absolute).

(*d*) See *Merchant Taylors' Co.* v. *Att.-Gen.*, L. R. 6 Ch. 512; *Att.-Gen.* v. *Wax Chandlers' Co.*, L. R. 6 H. L. 1; *Foot* v. *Cunningham*, Ir. R. 11 Eq. 306; *Cunningham* v. *Foot*, 3 A. C. 974.

(*e*) *Oke* v. *Heath*, 1 Ves. sen. 135, *ante*, p. 414; *Wigg* v. *Wigg*, 1 Atk. 382; *Hills* v. *Wirley*, 2 Atk. 605; *Re Kirk*, 21 Ch. D. 431; *Bird* v. *Harris*, L. R. 9 Eq. 204.

(*f*) Sugden on Powers, 106.

(*g*) 2 B. & S. 232; affd. 31 L. J. Q. B. 196. An illustration of a condition on breach of which the heir entered is *Warren* v. *Lee*, Dyer, 126 b.

(*h*) *Messenger* v. *Andrews*, 4 Russ. 478; *Doe* v. *Holmes*, 8 T. R. 1; *Pickwell* v. *Spencer*, L. R. 7 Ex. 105; *Rees* v. *Engelback*, L. R. 12 Eq. 225; *Re M'Mahon*, [1901] 1 Ir. R. 489.

(*i*) 62 L. T. 533.

(*j*) *Re Cowley*, 53 L. T. 494.

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Re Welstead.

In *Re Welstead* (*k*), a bequest towards the endowment of a church, in consideration of which the testator's nephew and his heirs were to nominate every third incumbent, was held not to create a condition, but to be equivalent to a purchase of the right; and the bishop declining to concede the right, the legacy failed. But if a legacy be to A on condition that he convey a particular estate to B, and A conveys accordingly, the analogy of purchase will not extend to give him a lien on the estate for his legacy, this being due from the executor (*l*).

Negative condition.

It seems that a condition requiring a person to whom land is devised, not to use it in a certain way, creates an obligation which may be enforced even although there is no gift over on breach. Thus, in *Blagrave* v. *Blagrave* (*m*), certain restrictions as to the use of a mansion, house and park were enforced by injunction at the suit of the person next entitled in remainder. But of course such a condition must be consistent with the rights of property (*n*).

Condition operating as limitation.

Again, a disposition which is in form capable of being construed as a condition will be construed as a limitation, if that appears to be the testator's intention (*o*). Thus, if a testator bequeaths a life interest in certain property to a single woman, with a proviso for its cesser in the event of her marrying, this will generally be construed as showing an intention to provide for her while she is unmarried, and not as a condition in restraint of marriage (*p*). So a devise to A upon condition that he marries a designated person, or a person answering a certain description, may be construed to create an estate in special tail in A (*q*). The construction of gifts over in the event of the original devisee or legatee marrying has been already considered (*r*).

In *Re Moore* (*s*), a testator directed his trustee to pay to his

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(*k*) 25 Bea. 612.

(*l*) *Barker* v. *Barker*, L. R. 10 Eq. 438.

(*m*) 1 De G. & S. 252. As to conditions annexed to an estate tail, see *Gulliver* v. *Ashby*, 1 W. Bl. 607; 4 Burr. 1929; and *post*, p. 1466.

(*n*) See *post*, p. 1440.

(*o*) See *Gulliver* v. *Ashby*, 1 W. Bl. 607; *Doe* v. *Lakeman*, 2 B. & Ad. 30; and the authorities cited in *Mary Portington's Case*, 10 Rep. 40 b; the subject of determinable and conditional estates is beyond the scope of this work: see Challis, Real Prop., chaps xvii, xviii.

(*p*) *Heath* v. *Lewis*, 3 D. M. & G. 954; *Jones* v. *Jones*, 1 Q. B. D. 279; *Re Moore*, 39 Ch. D. 116; *Meeds* v. *Wood*, 19 Bea. 215. See *Webb* v. *Grace*, 2 Ph. 701 (covenant), and the cases on conditions in restraint of marriage, cited *post*, pp. 1496 *seq.*

(*q*) *Page* v. *Hayward*, 2 Salk. 570; *Pelham Clinton* v. *Duke of Newcastle*, [1902] 1 Ch. 34; [1903] A. C. 111.

(*r*) *Luxford* v. *Cheeke*, 3 Lev. 125; *Sheffield* v. *Lord Orrery*, 3 Atk. 286; and the other cases cited *ante*, pp. 1334 *seq.*

(*s*) 39 Ch. D. 116, where a testator gave an annuity to his wife "yearly during her life" so long as she and his son should live together, Bacon, V.-C., held that the annuity did not cease by the death of the son: *Sutcliffe* v. *Richardson*, L. R. 13 Eq. 606.

sister, "during such time as she may live apart from her husband," a certain sum per week "for her maintenance whilst so living apart from her husband": it was held that this was not a condition which might be rejected as illegal, but a limitation, and that the gift was void as a limited gift the commencement and duration of which were fixed in a way the law does not allow.

Re Lovell.

In *Re Lovell* (*t*) the testator, who was living with S., a married woman, who had been deserted by her husband, bequeathed to her an annuity "provided and so long as she shall not return to live with her husband and provided and so long as she shall not remarry"; in the event of her remarrying or returning to live with her husband the annuity was reduced. It was held that the bequest was a limitation, and not upon a condition, and that it was not void as being contrary to the policy of the law, for its object was not to induce S. to continue to live apart from her husband and not to remarry, but to maintain her until she returned to her husband or remarried.

Words of description.

Words descriptive of the place or mode of life of a person at the death of the testator do not, properly speaking, create a condition (*u*). But a gift to a person at a future time, if he shall then answer a certain description, is *prima facie* contingent on his answering that description (*x*).

Bequest to evade Mortmain Act.

A bequest to trustees for the erection of buildings for a charitable purpose "as soon as land shall be given or obtained" for that purpose, does not *prima facie* constitute a bequest upon condition, but is a good charitable bequest, to be applied *cy-près* if necessary (*y*).

Illegal conditions.

II.—Void Conditions.—(i) *Illegal Conditions.*—A condition which requires the performance of an unlawful act, as to kill a man, is void (*z*). And although a gift to a married woman, in the event of her separation from her husband (*a*), or in case she should not be living with her husband at the testator's death (*b*),

(*t*) [1920] 1 Ch. 122; *Re Charleton*, 55 Sol. J. 330.

(*u*) *Woods* v. *Townley*, 11 Ha. 314; *Shewell* v. *Dwarris*, Johns. 172, below. n. (*b*).

(*x*) See *Bartleman* v. *Murchison*, 2 R. & My. 136, *ante*, p. 1376.

(*y*) *Chamberlayne* v. *Brockett*, L. R. 8 Ch. 206; *Re Gyde*, 79 L. T. 261.

(*z*) Shep. Touch. 132; *Mitchel* v. *Reynolds*, 1 P. W. 181; *Brannigan* v. *Murphy*, [1896] 1 Ir. R. 418 (condition involving breach of public duty). Formerly a condition requiring money arising from the rents of realty to be paid to a charity was void: *Ridgway* v. *Woodhouse*, 7 Bea. 437.

(*a*) *Bedborough* v. *Bedborough*, 34 Bea. 286. The grounds of the decision are not reported; it may possibly be supported either on the ground that the annuity was given as a provision for the woman in the event of her husband's death or misconduct, or on the ground that the words were a limitation and not a condition. See *Re Hope Johnstone*, [1904] 1 Ch. 470 (settlement).

(*b*) *Shewell* v. *Dwarris*, Johns. 172

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is good, yet a condition that a woman shall cease to reside with her husband is bad, being contrary to public policy (*c*). A condition that the children should not live with or continue or be under the custody, guardianship or control of their father was void as being against public policy, because it was inserted with the object of deterring the father from performing his parental duties, and also because it was an attempt to interfere with the discretion of the Court as to the custody and maintenance of its wards (*d*). But a power to maintain an infant except while he is under the custody or control of his father is good (*e*).

Public policy.

In *Re Morgan* (*f*) there was a bequest to the testator's daughter for life and then for her children who should survive her and the testator and attain twenty-one, but the testator declared that if at any time his daughter and her husband should be living separately only such of their children who being under twenty-one should permanently reside with or be under the sole control of his daughter should be entitled to any benefit under his will. It was held that the condition was void.

And a condition which is not legally enforceable seems to be illusory and of no effect (*g*). Thus, in *Re Gassost* (*h*), a testator bequeathed to a corporation a picture upon the condition that it should be hung in a conspicuous part of their common hall and always retained in that position : it was held that the gift was valid, the condition being a condition subsequent.

Instances of conditions not void on this ground.

A condition that a person shall not marry a Christian or become a Christian (*i*), or become a nun (*k*), or a member of the Roman Catholic Church (*l*), or of any sisterhood (*m*), or that the donee should obtain a baronetcy (*n*), is not void on the ground of public policy. But a condition not to enter the

(*c*) *Bean* v. *Griffiths*, 1 Jur. (N.S.) 1045; *Wren* v. *Bradley*, 2 De G. & S. 49; *Wilkinson* v. *Wilkinson*, L. R. 12 Eq. 604; *Re Moore*, 39 Ch. D. 116. See also *Cartwright* v. *Cartwright*, 3 De G. M. & G. 982; *H.* v. *W.*, 3 K. & J. 382. Other examples of conditions being held void on the ground of public policy will be found in *Egerton* v. *Earl Brownlow*, 4 H. L. C. 1, and the cases cited *post*, p. 1443, n. (*i*). As to conditions against the liberty of law, see *Cooke* v. *Turner*, stated *post*, p. 1521, and see *post*, p. 1443. See *Marlborough* v. *Marlborough*, [1901] 1 Ch. 165; *Re Morgan*, 26 T. L. R. 398.

(*d*) *Re Sandbrook*, [1912] 2 Ch. 471. See also *Re Boulter*, [1912] 1 Ch. 75 (condition not to live abroad).

(*e*) *Re Borwick's Settlement*, [1916] 2 Ch. 304. The judgment in *Re Dulson*, 140 L. T. 470, is so short that it is not clear what was decided as to the condition.

(*f*) 26 T. L. R. 398.

(*g*) See *Brown* v. *Burdett*, 21 Ch. D. 667, stated *ante*, p. 682.

(*h*) 70 L. J. Ch. 242.

(*i*) *Hodgson* v. *Halford*, 11 Ch. D. 959.

(*k*) *Re Dickson's Trust*, 1 Sim. (N.S.), 37.

(*l*) As to an infant being a Roman Catholic, see *Re May*, [1917] 2 Ch. 126.

(*m*) *Wainwright* v. *Miller*, [1897] 2 Ch. 255; *Re Hewitt*, [1926] Ch. 740 (" until she shall take the veil "). See also *Re Robinson*, [1897] 1 Ch. 85; [1923] 2 Ch. 332 (condition that clergyman shall wear a black gown held to be legal).

(*n*) *Re Wallace*, [1919] 2 Ch. 305; [1920] 1 Ch. 274.

military or naval service is void (*o*); so is a condition that the services of a church should be held according to the true time of the sun (*p*).

Uncertainty.

(ii) *Uncertainty.*—A condition may be void for uncertainty. Thus where a testator gave a life interest to A, followed by a declaration that if A " in any way associated, corresponded or visited with any of my present wife's nephews or nieces " the life interest was to be forfeited and go over, it was held that the condition was void for uncertainty (*q*). So a condition in the nature of a clause of defeasance is void if its operation is uncertain (*r*).

It has been held that a clause of defeasance to take effect in the event of a woman marrying " a person of ample fortune to maintain her in comfort and affluence " is not too vague to be enforced (*s*).

Rule against Perpetuities.

(iii) *Perpetuities and Remoteness.*—The question whether a common law condition can be void for remoteness under the modern Rule against Perpetuities is discussed elsewhere (*t*).

Any condition not being a common law condition is clearly void for remoteness if it infringes the Rule against Perpetuities, except in the case of charities; a conditional gift operating as a transfer from one charity to another is not void on this ground (*u*) : nor is a charitable gift made invalid by a condition which is merely a direction as to the application of the property, if the property is effectually devoted to charity within the period allowed by the Rule against Perpetuities (*x*).

Impossible condition.

(iv) *Impossible Conditions.*—A condition which is impossible *ab initio* is void : such as a condition that a man shall go to Rome in an impossibly short space of time (*y*).

Naturalization.

A condition to obtain naturalization within two years is not impossible, although the Naturalization Act, 1870, required five years' residence, because a private Act might be obtained (*z*).

(*o*) *Re Beard*, [1908] 1 Ch. 383.
(*p*) *Re Wood*, 36 T. L. R. 560.
(*q*) *Jeffreys* v. *Jeffreys*, 84 L. T. 417. See also *Clavering* v. *Ellison*, 7 H. L. C. 707; *Ridgway* v. *Woodhouse*, 7 Bea. 437; *Duddy* v. *Gresham*, 2 L. R. Ir. 442 (retirement into a nunnery); *Re McCleary*, [1923] 1 Ir. R. 16 (residence); *Re Reich*, 40 T. L. R. 398 (profession); and the cases on conditions requiring residence, *post*, p. 1518.
(*r*) *Re Viscount Exmouth*, 23 Ch. D. 158.
(*s*) *Re Moore's Trusts*, 96 L. T. 44.
(*t*) *Ante*, p. 349.
(*u*) *Re Tyler*, [1891] 3 Ch. 252, *ante*, p. 250. See *Re Beard's Trusts*, [1904] 1 Ch. 270 (gift over of fund for voluntary school).
(*x*) *Re Swain*, [1905] 1 Ch. 669.
(*y*) Shep. Touch. 132.
(*z*) *Re Knox*, [1912] 1 Ir. R. 288.

To assume arms.

A condition to assume arms which the College of Arms would refuse to grant is an impossible one (*a*).

Inconsistent conditions.

(v) *Inconsistent Conditions.*—If a testator imposes two conditions in such a way that on breach of one the property is to go to A, and on the breach of the other it is to go to B, and a breach of both takes place simultaneously, no forfeiture is incurred, and the original gift becomes absolute (*b*).

Repugnant conditions.

(vi) *Repugnant Conditions.*—"Conditions that are repugnant to the estate to which they are annexed, are," says Mr. Jarman (*c*), "absolutely void. Thus, if a testator, after giving an estate in fee, proceeds to qualify the devise by a proviso or condition, which is of such a nature as to be incompatible with the absolute dominion and ownership, the condition is nugatory, and the estate absolute. Such would, it is clear, be the fate of any clause providing that the land should for ever thereafter be let at a definite rent (*d*), or be cultivated in a certain manner (*e*); this being an attempt to control and abridge the exercise of those rights of enjoyment which are inseparably incident to the absolute ownership. But, of course, a direction that the rents of the *existing* tenants should not be raised, or

(*a*) *Re Berens*, [1926] Ch. 596.

(*b*) *Ormerod* v. *Riley*, 12 Jur. (N.S.) 112, stated *ante*, p. 1323.

(*c*) First ed., p. 809.

(*d*) *Att.-Gen.* v. *Catherine Hall*, Jac. 395; *Att.-Gen.* v. *Greenhill*, 33 Bea. 193. "To this principle, it is conceived, may be referred the case of *Inskip* v. *Lade*, in Chancery, 16th June, 1741, [1 W. Bl. 428, Amb. 479, Butler's note to Fearne C. R. 530,] where a testator, Sir John Lade, by will dated the 17th August, 1739, devised all his real estate to trustees, their heirs and assigns, to the use of his cousin John Inskip for life, with remainder to the use of the trustees for the life of John Inskip to preserve contingent remainders, with remainder to the use of the first and other sons of John Inskip in tail male, with remainder to the use of several other persons and their issue, in strict settlement, in like manner; and the testator directed, that while John Inskip should be under the age of twenty-six, *and so often and during the time as the person for the time being, in case he had not otherwise directed, would, by virtue of his will, have been entitled to the said devised premises, or the trust thereof, as tenant for life in his own right, or tenant in tail male, should be severally under the age of twenty-six years*, his said trustees should enter upon the same premises, and receive the rents and profits thereof, and should pay and apply the same in manner therein mentioned. On the 14th of November, 1760, Lord Northington sent a case to the Court of K. B., with the question, whether upon the death of John Inskip the cousin, leaving his eldest son under the age of twenty-six, the trustees took any and what estate under the proviso. The answer of the Judges was in the negative; and their certificate was confirmed by the L.C.

"It does not appear what was the precise ground of the decision—whether the proviso was adjudged to be invalid, as being repugnant to the several estates conferred by the devise, or as being obnoxious to the rule against perpetuities: on either ground, it seems open to exception." (Note by Mr. Jarman.) The latter appears to be the true ground; see Butler's note cited above. The trusts included the accumulation of surplus rents, and the purchase of other lands therewith.

(*e*) Compare *Brown* v. *Burdett*, 12 Ch. D. 667, *ante*, p. 682.

that certain persons should be continued in the occupation (*f*), would be valid; as this merely creates a reservation or exception out of the devise in favour of those individuals."

Condition not to bar estate-tail.

In *Sir Anthony Mildmay's Case* (*g*) it was resolved that if a man makes a gift in tail, on condition that he [the donee] shall not suffer a common recovery, that this condition is repugnant to the estate-tail, and against law. "For there are divers incidents to an estate-tail. (1) To be dispunished for waste. (2) That his wife shall be endowed. (3) The husband of a woman tenant in tail after issue, shall be tenant by the courtesy. (4) That tenant in tail may suffer a common recovery, and thereby bar the estate-tail and the reversion or remainder also. And these inseparable incidents which the law annexes to an estate-tail cannot be prohibited by condition" (*h*).

If there is a devise to a person in fee subject to a condition, with a gift over on breach to the person "next in remainder," this gift over is void, because there cannot be any such person (*i*).

The most important class of conditions void for repugnancy are those designed to restrain alienation, and to protect a beneficiary against the bankruptcy laws. These are considered in a subsequent part of this chapter (*k*).

Legacy given on condition.

Cases have occurred in which a testator has bequeathed a legacy to A upon the condition that if he succeeds to a certain estate the legacy is to be null and void: it has been held that in such a case A is entitled to payment of his legacy, without security (*l*), from which it would appear that the condition is considered to be valid (*m*). On principle it would seem that such a condition is repugnant to the nature of a pecuniary legacy and therefore void. The proper way of effecting the desired object is by means of a trust (*n*).

Re Wharton.

In *Re Wharton* (*o*), a legacy was left to a married woman "so as to be free from any covenant contained in her marriage settlement to settle after-acquired property." It was held that the legacy was bound by the covenant.

(*f*) *Tibbits* v. *Tibbits*, 19 Ves. 656.

(*g*) 6 Rep. 40 a, at p. 41 a. See also *Mary Portington's Case*, 10 Rep. 35 b; *Seymour* v. *Vernon*, 33 L. J. Ch. 690.

(*h*) That this is still the law (except, since 1925, as to dower) appears from *Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318; 4 A. C. 51. See as to conditions attempting to restrain alienation by a tenant in tail, *post*, p. 1466.

(*i*) *Musgrave* v. *Brooke*, 26 Ch. D. 792.

(*k*) *Post*, p. 1475.

(*l*) As to the cases in which security may be required, see *post*, p. 1451.

(*m*) *Fawkes* v. *Gray*, 18 Ves. 131, following *Griffiths* v. *Smith*, 1 Ves. jun. 97, where there was a gift over. Compare *Peyton* v. *Bury*, 2 P. W. 626, *post*, p. 1447, and see Roper Leg. 864.

(*n*) As in *Lloyd* v. *Branton*, 3 Mer. 108.

(*o*) 102 L. T. 531.

Conditions *in terrorem*.

(vii) *Conditions in terrorem.*—In certain cases, to be presently mentioned, a condition in restraint of marriage or a condition not to dispute a will, may be annexed to a testamentary gift, but where the subject of gift is personalty, such a condition must, as a general rule, be accompanied by a gift over, otherwise the condition will be treated as merely *in terrorem*, and therefore void. It will be seen, however, that there is some doubt as to the application of the doctrine to conditions precedent in partial restraint of marriage (*p*).

Personal estate.

Real estate.

The doctrine does not apply to real estate (*q*).

As to other cases of personal estate.

And even with regard to personal estate, the *in terrorem* doctrine is not admitted in cases arising on other conditions than those relating to marriage and disputing a will. Thus, in *Re Dickson's Trust* (*r*), where a testator bequeathed to his daughter a life interest in £10,000, and by a codicil provided that if she should become a nun she should forfeit the legacy: there was no gift over; but Rolfe, V.-C. (afterwards Lord Cranworth), held that the condition being legal was effectual, and that the daughter having become a nun had forfeited the legacy. So, in the earlier case of *Colston* v. *Morris* (*s*), where a testator gave a legacy, and declared that if the legatee should ever interfere with the management of trustees appointed for the education of the legatee's daughter, then he revoked the legacy: there was no gift over, and it was argued that the declaration or condition was therefore *in terrorem* only; but it was held by Sir J. Leach, V.-C., that the legatee was not entitled to the legacy unless he undertook to comply with the condition.

Remarks on the doctrine.

With reference to the case of *Cooke* v. *Turner* (*t*), it was remarked in an earlier edition of this work (*u*): "The argument and judgment both turned on the legality of the condition, and no doubt seems to have been entertained that if it was legal it must also be effectual. That this ought to be the sole criterion in all cases where the effect of a condition is brought in question, can scarcely be doubted; and that as no gift over will give effect to a condition in itself illegal (as a condition in total restraint of marriage (*x*)), so a legal condition should never be rendered ineffectual by the absence of such a gift."

(*p*) *Post*, p. 1496.

(*q*) *Post*, p. 1511. The reason for this seems to be that at common law where a condition was annexed to a devise of land, the heir of the testator could enter on breach of the condition.

(*r*) 1 Sim. (N.S.) 37.

(*s*) 6 Mad. 89.

(*t*) 15 M. & W. 727, *post*, p. 1521.

(*u*) Third ed., by Messrs. Wolstenholme and Vincent, Vol. ii, p. 53.

(*x*) *Morley* v. *Rennoldson*, 2 Ha. 570; *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255.

The unsatisfactory nature of the doctrine has also been repeatedly pointed out by eminent Judges (*y*), but it is now too late to question it.

Whether revocation is as effective as a gift over.

In *Re Dickson's Trust* (*z*), the testator gave a legacy to his daughter; by a codicil he declared that finding that she intended to become a nun, he revoked the bequest in the event of her carrying her intention into effect. The decision was based on the principle that the *in terrorem* doctrine does not apply to such a condition, but in *Re Catt's Trusts* (*a*), Wood, V.-C., treated it as laying down the principle, as applicable to gifts on condition, that "if a testator desires a gift to be revoked, the mere fact that there is no gift over will not prevent the revocation from taking effect." And he referred to the observations of Turner, L.J., in *Rochford* v. *Hackman* (*b*), as supporting that principle. It certainly would be somewhat absurd if a clause of revocation were held to be less effectual than a gift over in excluding the doctrine of *in terrorem*.

Proviso for cesser.

A proviso for cesser, if annexed to an annuity or other life interest, seems to have the same effect as a gift over (*c*).

Result if condition void.

(viii) *Result of Condition being Void.*—If a condition is void in its creation, the result varies according to the nature of the property and the nature of the condition.

Land.

Where land is devised upon a void condition, and the condition is precedent, the devise is itself void (*d*); if the condition is subsequent, the devise is absolute (*e*).

Distinctions in case of personal bequest.

Where personal estate is bequeathed on a void condition, if the condition is subsequent, the same rule applies as in the case of a devise of land, that is to say, the bequest is absolute (*f*). But the civil law, which in this respect has been adopted by Courts of Equity, differs in some respects from the common law in its treatment of conditions precedent (*g*); the rule of the civil law being that where a condition precedent is originally impossible (*h*), or is illegal as involving *malum prohibitum* (*i*), the

(*y*) *Per* Lord Cranworth, in *Re Dickson's Trust*, 1 Sim. (N.S.), at p. 44, and see *per* Wood, V.-C., in *Re Catt's Trusts*, 2 H. & M., at p. 52, and the judgment in *Evanturel* v. *Evanturel*, L. R. 6 P. C. 1.

(*z*) 1 Sim. (N.S.) 37; *ante*, p. 1442.

(*a*) 2 H. & M. 52.

(*b*) 9 Ha., at p. 481.

(*c*) See *Adams* v. *Adams*, [1892] 1 Ch. 369.

(*d*) Shep. Touch., pp. 132, 133.

(*e*) *Ib.*, Co. Litt. 206.

(*f*) *Poor* v. *Mial*, 6 Mad. 32.

(*g*) *Reynish* v. *Martin*, 3 Atk. 330.

(*h*) *Lowther* v. *Cavendish*, 1 Ed., at p. 116.

(*i*) *Brown* v. *Peck*, 1 Ed. 140; *Harvy* v. *Aston*, Com. Rep. 726; *Wren* v. *Bradley*, 2 De G. & S. 49. See *Re Moore*, 39 Ch. D. 116, as to the distinction between gifts on condition of this nature, which condition may be rejected, and gifts by limitation in a way not permitted by law, which are absolutely void; *ante*, p. 1438.

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bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest (*k*), or its impossibility was unknown to the testator (*l*), or the condition which was possible in its creation has since become impossible by the act of God (*m*), or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gift and condition void (*n*).

Rule where legacy comes out of both realty and personalty.

Where a legacy is charged both on the real and personal estate it will, so far as it is payable out of each species of property, be governed by the rules applicable to that species (*o*).

Condition impossible by act of testator.

As regards personalty a condition precedent which becomes impossible by the act of the testator is discharged (*p*); but this does not apply to real estate (*q*).

Conditions precedent and subsequent.

III.—Conditions, whether Precedent or Subsequent.—"Conditions," as Mr. Jarman points out (*r*), "are either precedent or subsequent; in other words, either the performance of them is made to *precede* the vesting of an estate, or the non-performance to *determine* an estate antecedently vested. But though the distinction between these two classes of cases is sufficiently obvious in its consequences; yet it is often difficult, from the ambiguity and vagueness of the language of the will, to ascertain whether the one or the other is in the testator's contemplation; *i.e.*, whether he intend that a compliance with the requisition which he has chosen to annex to the enjoyment of his bounty, shall be a condition of its *acquisition*, or merely of its *retention*.

"As on questions of this nature general propositions afford but little assistance in dealing with particular cases of difficulty (*s*), we shall proceed to the immediate consideration of the cases; adducing some instances, first, of conditions precedent; and, secondly, of conditions subsequent.

Instances of conditions precedent.

"In an early case (*t*), where a man devised a term to A. if he lived to the age of twenty-five, and paid to his eldest brother a certain sum of money; it was agreed that no estate passed until that age and payment of the money.

(*k*) Wms. Exec. (6th ed.), p. 1174; *Rishton* v. *Cobb*, 5 My. & C. 145.

(*l*) 1 Swinb., pt. iv, s. vi, pl. 8, 9.

(*m*) 1 Swinb., pt. iv, s. vi, pl. 14. *Lowther* v. *Cavendish*, 1 Ed. 99; 1 Rop. Leg. 755 (4th ed.). *Priestley* v. *Holgate*, 3 K. & J. 286; *Patching* v. *Barnett*, 51 L. J. Ch. 74.

(*n*) 1 Swinb., pt. iv, s. vi, pl. 16. The passage in the text is quoted by Cotton, L.J., in *Re Moore*, 39 Ch. D., at pp. 128, 129, from the 4th edition of this work.

(*o*) *Reynish* v. *Martin*, 3 Atk., at p. 335.

(*p*) *Darley* v. *Langworthy*, 3 B. P. C. 359; *Gath* v. *Burton*, 1 Bea. 478; *Walker* v. *Walker*, 2 D. F. & J. 255.

(*q*) *Re Turton*, [1926] 1 Ch. 96. (*r*) First ed., p. 796.

(*s*) But see some general rules laid down by Willes, C.J., in *Acherley* v. *Vernon*, Willes, 153, *post*, p. 1445.

(*t*) *Johnson* v. *Castle*, cit. Winch, 116, 8 Vin. Ab. 104, pl. 2.

Legacy charged on land given upon marriage with consent.

" So where (*y*) A. charged his real estate with £500 to be paid to his sister H. within one month after her marriage, but so as she married with the approbation of his brother J., if living; and, in case she married without his consent, the £500 was not to be raised. H. married in the lifetime of J., and without his consent; and it was held that, this being a condition precedent, nothing vested.

Rentcharge upon condition that the devisee releases.

" Again, where (*z*) V. devised to his sister A. a rentcharge, to be paid half-yearly out of the rents of his real estate, during her life; and, by a codicil, declared that what he had given to her should be accepted in satisfaction of all she might claim out of his real or personal estate, and upon condition that she released all her right or claim thereto to his executors. The Court held it was a condition precedent, and that an action, which the husband as administrator had brought for the arrears, could not be sustained. Willes, C.J., observed, that no words necessarily made a condition precedent; but the same words would make a condition either precedent or subsequent, according to the nature of the thing and the intent of the parties. If, therefore, a man devised one thing in lieu or consideration of another, or agreed to do anything, or pay a sum of money in consideration of a thing to be done, in these cases that which was the consideration was looked upon as a condition precedent. There was (he said) no pretence for saying, in the present case, that the devisee could not perform the condition before the time of payment of the annuity; for the first payment was not to be until six months after the testator's decease, and she might as well release her right in six months, as at any future time. Besides, the penning of the clause afforded another very strong argument that this was intended to be a condition precedent; for all the words were in the present tense. The testator willed that this annuity be accepted in satisfaction and upon condition that ' she release,' which is just the same as if he had said, ' I give her the annuity, she releasing,' which expression had been always holden to make a condition precedent, as appeared from *Large* v. *Cheshire* (*a*), where a man agreed to pay J. S. £50, he making plain a good estate in certain lands (*b*).

What makes a condition precedent.

(*y*) *Reves* v. *Herne*, 5 Vin. Ab. 343, pl. 41.

(*z*) *Acherley* v. *Vernon*, Willes, 153. See also *Gillet* v. *Wray*, 1 P. W. 284; *Harvey* v. *Aston*, 1 Atk. 361, Com. Rep. 726; *Re Welstead*, 25 Bea. 612; *ante*, p. 1436.

(*a*) 1 Vent. 147.

(*b*) A condition requiring a legatee to claim the benefit given him by the will within a certain time is *prima facie* precedent: *Horrigan* v. *Horrigan*, [1904] 1 Ir. R. 271. See the other cases on this kind of condition, cited *post*, and compare *Murphy* v. *Broder*, Ir. R. 9 C. L. 123, where a condition of returning was held to be subsequent.

Other cases of conditions precedent.

" Again, in the case of *Randal* v. *Payne* (*c*), where a testator, after giving certain legacies to J. and M. added, ' If either of these girls should marry into the families of G. or R., and have a son, I give all my estate to him for life (with remainder over); *and if they shall not marry*,' then he gave the same to other persons. Lord Thurlow held this to be a condition precedent; and that nothing vested [in the devisees over] while the performance of the condition by J. or M. was possible, which was during their whole lives (*d*); and that their having married into other families did not preclude the possibility of their performing the condition, as they might survive their first husbands.

" So in the case of *Lester* v. *Garland* (*e*), where L., by his will, bequeathed the residue of his personal estate to trustees, upon trust, that in case his sister S. should not intermarry with A. before all or any of the shares thereafter given to her children should become payable; and in case his sister should, within six calendar months after his decease, give such security as his trustees should approve of, that she would not intermarry with A. or in case she should so marry, after all or any of the shares bequeathed to her children, should be paid to him, her, or them, that she would, within six calendar months after such marriage, pay the amount, or cause such child or children who should have received his, her, or their share or shares, to refund; *then, and not otherwise*, the trustees were directed to pay such residuary estate to the eight children of P. at the age of twenty-one, or marriage, with benefit of survivorship; and the testator provided, that in case his said sister should intermarry with A. before all or any of the shares should be payable, or should refuse to give such security as the aforesaid, then he directed £1,000 a-piece only to be paid to the children; and, subject thereto, gave his residuary estate to the children of another sister. It was agreed that this was a condition precedent; and the only question was whether the computation of the six months was *inclusive* or *exclusive* of the day of the testator's decease, he having died on January 12, and the security having been given on July 12. Sir W. Grant, M.R., considered that the reason of the thing required the exclusion of the day, as the legatee could not reasonably be supposed to have any opportunity of beginning on the day of L.'s death, the deliberation which was to govern the election ultimately to be made (*f*).

Computation of time.

Period allowed for performing condition, held to be exclusive of the day of testator's death.

(*c*) 1 B. C. C. 55; *Beaumont* v. *Squire*, 17 Q. B. 905.

(*d*) As to this, see *Page* v. *Hayward*, 2 Salk. 570, stated *post*, p. 1448; *Lowe* v. *Manners*, 5 B. & Ald. 917; *Davis* v. *Angel*, 4 D. F. & J. 524, *post*, p. 1506.

(*e*) 15 Ves. 248.

(*f*) See also *Gorst* v. *Lowndes*, 11 Sim. 434.

" So, in *Ellis* v. *Ellis* (*g*), where a testator bequeathed to his grand-daughter, 'if she be unmarried, and does not marry without the consent of my trustees,' the sum of £400; one moiety to be paid upon her marriage, if her marriage should be made with consent, and the other in one year afterwards; but if she were then married, or should marry without such consent, then the £400 to 'sink in the personal fortune.' Lord Redesdale was of opinion that marriage was a condition precedent, and that the legacy was wholly contingent until that event.

Cases of condition subsequent.

" One of the earliest examples of a condition subsequent in wills, is afforded by *Woodcock* v. *Woodcock* (*h*), where W. devised a leasehold house to J. for her life; and if she died before S., then that S. should have it upon such reasonable composition as should be thought fit by his overseers (*i.e.*, his executors), allowing to his other executors such reasonable rates as should be thought meet by his overseers. It was agreed by the Court that this condition was subsequent, as the overseers might make agreement with him at any time.

" So, in *Popham* v. *Bampfield* (*i*), where one R. devised real estate to trustees for payment of debts, and, after his debts paid, then in trust for A. and his heirs male; but declared that A. should have no benefit of this devise, unless his father should settle upon him a certain estate; and in default thereof, or if A. died without issue, then over. It was held, that this was a condition subsequent, and was performed by the father *devising* his estate to the son.

Peyton v. *Bury.*

" So, in the case of *Peyton* v. *Bury* (*j*), where one bequeathed the residue of his personal estate to S., provided she married with the consent of A and B, his executors in trust, and if S. should marry otherwise, he bequeathed the said residuum to W. A died; after which S. married without the consent of B. The M.R. observed, it was very clear that, in the nature of the thing, and according to the intention of the testator, this could not be a condition precedent; for, at that rate, the right to the residue might not have vested in any person whatever for twenty

(*g*) 1 Sch. & Lef. 1. Cf. *Wheeler* v. *Bingham*, 3 Atk. 364. See further, as to conditions precedent: *Fry* v. *Porter*, 1 Ch. Cas. 138; *Bertie* v. *Faulkland*, 3 Ch. Cas. 129; *Falkland* v. *Bertie*, or *Cary* v. *Bertie*, 2 Ver. 333; *Semphill* v. *Bayly*, Pre. Ch. 562; *Pulling* v. *Reddy*, 1 Wils. 21; *Elton* v. *Elton*, *ib.*, 159; *Garbut* v. *Hilton*, 1 Atk. 381; *Reynish* v. *Martin*, 3 Atk. 330; *Long* v. *Dennis*, 4 Burr. 2052; *Stackpole* v. *Beaumont*, 3 Ves. 89; *Latimer's Case*, Dyer, 59b; *Atkins* v. *Hiccocks*, 1 Atk. 500; *Morgan* v. *Morgan*, 20 L. J. Ch. 109; *Fitzgerald* v. *Ryan*, [1899] 2 Ir. R. 637; *Re Nourse*, [1899] 1 Ch. 63.

(*h*) Cro. Eliz. 795.

(*i*) 1 Vern. 79, 1 Eq. Ca. Ab. 108, pl. 2.

(*j*) 2 P. W. 626. See also *Gulliver* v. *Ashby*, 4 Burr. 1929, *post*, p. 1452; *Duddy* v. *Gresham*, 2 L. R. Ir. 442.

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or thirty years after the testator's death, since both of the executors might have lived, and S. have continued so long unmarried, during all which time the right to the residue could not be said to be [beneficially] in the executors, they being expressly mentioned to be but executors in trust (*k*). In this case, he observed, the bequest over showed what the testator meant by making marriage without consent a condition in the previous gift, namely, that marriage without consent was to be a forfeiture (*l*). The case seems somewhat analogous, in principle, to those (*m*) in which a devise or bequest, if the object shall attain a certain age, with a gift over in case he shall die under that age, has been held to be immediately vested.

Page v. *Hayward.*

"Again, in *Page* v. *Hayward* (*n*), where a testator devised lands to M. and the heirs male of her body, upon condition that she married [and had issue male by] a Searle; and, in default of both conditions, he devised the lands to E. in the same manner, with remainders over: it was held, that M. and E. took estates tail, which did not determine by marrying another person, inasmuch as they might survive their first husband, and marry a Searle. In this case, the limitation was, in effect, and seems to have been regarded by the Court, as a devise in special tail to M. and E. successively, *i.e.*, to them, and the heirs male of their bodies, begotten by a Searle (*o*).

Aislabie v. *Rice.*

"So, in the more recent case of *Aislabie* v. *Rice* (*p*), where a testator devised certain lands and furniture to H. and her assigns for her life, in case she continued unmarried; and, after her decease, he devised the lands and furniture to such persons as she should by deed or will appoint, and, for want of appointment, then over; but in case H. should marry in the lifetime of the testator's wife, and with her consent, or, after her death, with the consent of A and B or the survivor, then H. should enjoy the lands and furniture in the same manner as she would have done if she had continued unmarried. The testator's wife, and A and B all died; after which H. married. She and her husband sold the property in question; and the purchaser objecting to the title, Sir W. Grant, M.R., sent a case to the Common Pleas, on the question as to what estate H took under the will. The Court certified that H. took an estate for life, with

(*k*) Nor would the intermediate beneficial interest have belonged to them if they had not. It would have gone in augmentation of the contingently disposed-of residue.

(*l*) *Knight* v. *Cameron*, 14 Ves. 389.

(*m*) *Ante*, p. 1349.

(*n*) 2 Salk. 570.

(*o*) *Pelham Clinton* v. *Duke of Newcastle*, [1902] 1 Ch. 34; [1903] A. C. 111, was a somewhat similar case: see *ante*, p. 1436.

(*p*) 3 Mad. 256.

a power of appointment over the fee, subject, as to her life estate only, to the condition of her remaining sole and unmarried, which condition was qualified by the proviso, that a marriage with the consent of the persons mentioned should not determine her life estate; that the condition was a condition subsequent, and as the compliance with it was, by the deaths of those persons, become impossible by the act of God, her estate for life became absolute (*q*), and she might execute the power. Sir J. Leach, V.-C., in conformity to this certificate, decreed a specific performance of the contract. The Court must, in this case, have considered the limitation as being, in effect, a devise of an entire estate for life, subject to the condition of marrying (if at all) with consent, which being rendered impracticable by the death of the persons whose consent was required, the estate became absolute; not (as the language would seem to imply) a devise of two distinct estates, the one to cease on marriage under *any* circumstances, and the other to commence on marriage with consent.

Remark on *Aislabie* v. *Rice*.

"Of course, where an interest is given to certain persons, with a direction that, on a prescribed event, as their marriage without consent, it shall be forfeited; such a direction operates merely to divest, and not to prevent the vesting of the interest so given" (*r*).

So where a rentcharge was given to A for life, or as long as her conduct was discreet and approved by B, it was held, that the gift was vested and that the condition was subsequent (*s*). And a condition may be subsequent though the estate or interest which it is to defeat is contingent, and can in no case vest before the condition takes effect; for a contingent gift or interest has an existence capable, as well as a vested interest or estate, of being made to cease and become void (*t*).

Mr. Jarman continues (*u*): "It would seem, from the preceding cases, that the argument in favour of the condition being precedent, is stronger where a gross sum of money is to be raised out of land (*v*), than where it is a devise of the land itself;

Conclusions from the preceding cases.

(*q*) As to this, see *post*, p. 1458.

(*r*) *Lloyd* v. *Branton*, 3 Mer. 108.

(*s*) *Wynne* v. *Wynne*, 2 M. & Gr. 8. See *Webb* v. *Grace*, 2 Phill. 701.

(*t*) *Egerton* v. *Earl Brownlow*, 4 H. L. C. 1. This case (which involved also a question of public policy) was decided by D. P., upon the advice of Lords Lyndhurst, Brougham, Truro, and St. Leonards, against the opinion of all but two of the Judges, and overruling the decision of Lord Cranworth, V.-C. (1 Sim. (N.S.) 464), who as L.C. retained his original opinion. The case is distinguished in *Caithness* v. *Sinclair*, [1912] S. C. 79.

(*u*) First ed., p. 804.

(*v*) Indeed, such cases seem to fall *a fortiori* under the principle of the cases (referred to *ante*, p. 1367), in which such charges were held to fail, by the death of the devisee before the time of payment.

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where a pecuniary legacy is given, than a residue (*w*); where the nature of the interest is such as to allow time for the performance of the act before its usufructuary enjoyment commences, than where not (*x*); where the condition is capable of being performed *instanter*, than where time is requisite for the performance (*y*); while, on the other hand, the circumstance of a definite time being appointed for the performance of the condition, but none for the vesting of the estate, favours the supposition of its being a condition subsequent" (*z*).

Presumption in favour of conditions subsequent.

The question whether a condition is precedent or subsequent often arises in the case of name and arms clauses (*a*) and provisos requiring a devisee or legatee to execute a release (*b*). In the absence of clear words, the inclination of the Courts is to treat a name and arms clause as imposing a condition subsequent (*c*). Indeed, in *Re Greenwood* (*d*), the Court laid this down as a general proposition applying to all conditions.

Conditions subsequent are construed strictly.

Conditions subsequent which are intended to defeat a vested estate or interest, are always construed strictly, and must therefore be so expressed as not to leave any doubt of the precise contingency intended to be provided for. This is a clearly established rule which we have already seen illustrated in a former chapter (*e*); it will suffice here to refer to some of the later cases, in which it has been asserted and followed (*f*).

Pecuniary legacy subject to condition subsequent.

Most of the cases involving conditions subsequent relate to land or (in the case of personalty) to property held upon trust, so that in either case there is no difficulty in giving effect to the

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(*w*) *Peyton* v. *Bury*, 2 P. W. 626; *ante*, p. 1447.

(*x*) *Acherley* v. *Vernon*, Willes, 153.

(*y*) *Gulliver* d. *Corrie* v. *Ashby*, 4 Burr., at p. 1940.

(*z*) *Thomas* v. *Howell*, 1 Salk. 170, as to which, see *post*, p. 1458; and see *per* Lord Hardwicke, *Avelyn* v. *Ward*, 1 Ves. Sen., at p. 422; *Walker* v. *Walker*, 2 D. F. & J. 255; 29 L. J. Ch. 856. See, however, *Roundel* v. *Currer*, 2 B. C. C. 67; *Robinson* v. *Wheelwright*, 6 D. M. & G. 535.

(*a*) *Post*, p. 1514.

(*b*) *Re Staveleys' Trust*, 124 L. T. 466. See *Tanner* v. *Tebbutt*, 2 Y & C. C. C. 225, *post*, p. 1453, and *Earl of Northumberland* v. *Granby*, 1 Ed. 489, *S. C. sub nom. Earl of Northumberland* v. *Aylesford*, Amb. 540, 657, where a proviso requiring a legatee to execute a release was held by Lord Henley (afterwards Lord Northington) to create a condition precedent, and by Lord Camden to be "a condition annexed to the body of the gift"; see *Simpson* v. *Vickers*, 14 Ves. 341.

(*c*) *Gulliver* v. *Ashby*, 4 Burr. 1929, *post*, p. 1452 *Bennett* v. *Bennett*, 2 Dr. & Sm. 266; *Woodhouse* v. *Herrick*, 1 K. & J. 352; *Re Greenwood*, [1903] 1 Ch. 749; David's Conv. iii, 357, note; *Re Edwards*, [1910] 1 Ch. 541.

(*d*) [1903] 1 Ch. 749.

(*e*) *Ante*, p. 1339.

(*f*) *Clavering* v. *Ellison*, 3 Drew. 451; 7 H. L. C. 707; *Kiallmark* v. *Kiallmark*, 26 L. J. Ch. 1; *Bean* v. *Griffiths*, 1 Jur. (N.S.) 1045; *Langdale* v. *Briggs*, 8 D. M. & G., pp. 429, 430; *Hervey-Bathurst* v. *Stanley*, 4 Ch. D., at p. 272. It is essential to the validity of such conditions that they should be so framed as to render it capable of ascertainment at any given moment of time whether the condition has or has not taken effect: see *Re Viscount Exmouth*, 23 Ch. D. 158; *ante*, p. 1439.

condition. But in some cases a pecuniary legacy has been given subject to a condition subsequent, and then the question arises how effect is to be given to it. It seems that where a legacy is given upon a condition to do or abstain from a certain act, the Court will require security from the legatee for the observance of the condition (*g*), as in *Colston* v. *Morris* (*h*), where the legacy was given to a father upon condition that he did not interfere with the education of his daughter. But if the act on which the forfeiture or gift over is to take effect does not depend on the volition of the legatee, then he is entitled to be paid his legacy without security (*i*).

Continuing conditions.

In *Re Robinson* (*j*), a testatrix bequeathed a sum of money towards the endowment of a church upon certain conditions, one of which was "the abiding condition" that the black gown should be used in the pulpit; it was held that this was a continuing condition so as to entitle the incumbent of the church to the income of the fund so long as he performed the condition.

Conditions as to residence, name and arms, etc.

To this class seem to belong conditions requiring a devisee to reside in a particular house, or to use and bear the name and arms of the testator, etc. (*k*). Strictly speaking, however, continuing conditions are merely a variety of conditions subsequent (*l*).

When acceptance of gift makes the annexed condition binding.

IV.—Acceptance of Conditional Gift.—Where the legatee has taken his legacy with a legal condition of any kind annexed, he is estopped by his own act from afterwards insisting on rights, which by the terms of the condition he is bound to release (*m*), or from declining a duty which he is thereby required to perform. This principle was applied in *Att.-Gen.* v. *Christ's Hospital* (*n*), where a testator bequeathed to the governors of the hospital (who had power to accept such gifts) an annuity of £400 for ever, upon condition that his trustees should be at liberty to send a certain number of children to be educated at the school; and in case and as often as the governors should refuse to admit the children, the trustees were empowered to apply the annuity towards the education of the children elsewhere. For some

(*g*) Roper Leg. 865.

(*h*) 6 Mad. 89; *Aston* v. *Aston*, 2 Vern. 452.

(*i*) *Griffiths* v. *Smith*, 1 Ves. jun. 97; *Fawkes* v. *Gray*, 18 Ves. 131. As to these cases, see *ante*, p. 1441.

(*j*) [1892] 1 Ch. 95; [1897] 1 Ch. 85; [1923] 2 Ch. 332.

(*k*) See *post*, Sects. XI and XII.

(*l*) See *Clavering* v. *Ellison*, 7 H. L. C. 707, where a condition requiring children to be educated in a particular way was treated as an ordinary condition subsequent.

(*m*) *Egg* v. *Devey*, 10 Bea. 444. See *Northumberland* v. *Aylesford*, Amb. 540, 657; *Northumberland* v *Granby*, 1 Ed. 489; *Simpson* v. *Vickers*, 14 Ves. 341.

(*n*) Taml. 393.

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years the governors of the hospital received the annuity and admitted the children, but afterwards resolved to do so no longer. Sir J. Leach, M.R., said, the question was whether this was a gift of the annual sum so long as they should receive the children, or a gift upon condition that they should receive them. He thought it clear the latter was the true construction, and that having accepted it they were bound by the condition. The proviso gave an authority to the trustees, without releasing the governors from their engagement. And in *Gregg* v. *Coates* (*o*), a person who had accepted a devise of buildings for so long as he should think proper to occupy them, "he keeping them in good and tenantable repair," was held bound to reinstate them at his own expense when they were burnt down.

Period allowed for performance of condition.

V.—Performance of Conditions.—(i) *Period allowed.*—It is often difficult, from the absence of declared intention on the point, or from the ambiguity of the testator's language (*p*), to determine what is the period allowed for the performance of a condition, *i.e.*, whether the devisee or legatee is bound to perform the act within a convenient time, or has his whole life for its performance. The question was raised but not decided in *Gulliver* v. *Ashby* (*q*).

The general rule seems to be that if a condition is imposed on a devisee for the benefit of A (as to pay A £500), and no time is specified for its performance, he is bound to perform it as soon as demand is made by A (*r*). In other cases it seems that the condition must be performed within a reasonable time. Thus, in *Davies* v. *Lowndes* (*s*), a testator devised land to W. L. "on condition he changes his name to S." : there was litigation, which lasted two or three years, and W. L. did not change his name until after a final decree was made, giving him the possession of the property; it was held that he had a reasonable time within which to comply with the condition, and that he had complied with it. As to the computation of time when the testator fixes the period, see *Lester* v. *Garland* (*t*).

Name and arms clause.

As a general rule, a person to whom property is devised on condition of his taking some particular name and arms, is not

(*o*) 23 Bea. 33; *Re Loom*, [1910] 2 Ch. 230.

(*p*) See *Langdale* v. *Briggs*, 3 Sm. & G. 255; 8 D. M. & G. 391; *Blagrove* v. *Bradshaw*, 4 Drew. 230.

(*q*) 1 W. Bl. 607.

(*r*) Shepp. Touch. 134. See n. (T. 1), 1 Rep. 25 b; Co. Litt. 208 a, where some fine distinctions are taken with reference to conditions in feoffments and bonds.

(*s*) 2 Scott, 71. See *Bennett* v. *Bennett*, 2 Dr. & Sm. 266.

(*t*) 15 Ves. 248, stated *ante*, p. 1446; and *Riggs-Miller* v. *Wheatley*, 28 L. R. Ir. 144.

bound to perform the condition until he becomes entitled in possession (*u*).

Condition of marriage.

The question whether a person to whom property is given on condition of his marrying in a particular way has his whole life in which to perform the condition, or whether he commits a breach by marrying in a different way, is considered in a subsequent part of this chapter (*v*).

Mode of performance.

(ii) *Mode of Performance.*—As a general rule, a condition can only be performed by a substantial compliance with its terms. Thus a condition requiring a devisee or legatee to disentail lands and settle them to certain uses is not satisfied by his disentailing them and settling them to other uses (*x*). Again, a condition precedent requiring a legatee to "return to England" is not complied with by the legatee embarking on a British ship to return to England, the ship and passengers being lost on the voyage (*y*). And a condition requiring a sum of £10,000 to be applied in a certain manner is not satisfied by the application of a smaller sum : such a condition is not apportionable (*z*). A condition requiring a release within a given time must be complied with within that time (*a*).

What is a substantial compliance.

But where property was devised to a person upon condition that she should personally appear before the executors and deliver to them a testimonial of her identity, and she was too aged and infirm to do so, it was held that the condition was complied with by one of the executors and the agent of the other attending the devisee at her house and receiving satisfactory proofs of her identity (*b*). In *Evans* v. *Stratford* (*c*), property was limited to A for life, with remainder to X and Y, and the will gave B an option of purchase within a year after A's death : A predeceased the testatrix by two years, and it was held that the option could be exercised within a year after the testatrix's death, that being the obvious intention of the will. So where a legacy is bequeathed to an infant on condition of his giving the executors a good and valid discharge, he can satisfy the condition by the institution of an administration

(*u*) *Re Greenwood*, [1903] 1 Ch. 749. See *Re Finch*, 17 Ch. D. 211. As to the cases on wills which fix a time, see *post*, pp. 1515 *seq.*

(*v*) *Post*, p. 1504.

(*x*) *Duke of Montagu* v. *Lord Beaulieu*, 3 Br. P. C. 277. As to what are "hereditaments" within the meaning of a condition to resettle, see *Re Gosselin*, [1906] 1 Ch. 120. As to performance of such a condition, see *Scarlett* v. *Lord Abinger*, 34 Bea. 338.

(*y*) *Priestley* v. *Holgate*, 3 K. & J. 286. Compare *Re Arbib and Class*, [1891] 1 Ch. 601. See also *Tulk* v. *Houlditch*, 1 V. & B. 248.

(*z*) *Caldwell* v. *Cresswell*, L. R. 6 Ch. 278.

(*a*) *Simpson* v. *Vickers*, 34 Ves. 341.

(*b*) *Tanner* v. *Tebbutt*, 2 Y. & C. C. C. 225.

(*c*) 2 H. & M. 142.

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action (*d*). And a gift to a person on condition that he should at a specified time be "living" in a particular country or place, would probably be satisfied if he had a place of residence in that country or place, although at the particular time he might be travelling somewhere else (*e*). Other cases in which the question has arisen how certain conditions ought to or may be performed will be found in the footnote (*f*).

Conditions of residence are considered more in detail in Section XII of this chapter; conditions requiring the assumption of name of arms in Section XI.

"Refusal" or "neglect."

In some of the cases where a condition as to residence was imposed, the gift over was to take effect in the event of the devisee "refusing" to reside. In *Doe* v. *Beauclerk* (*g*), Lord Ellenborough said that "a refusal imports that the thing refused was proposed to the refusing party," but in *Doe* v. *Hawke* (*h*), Lawrence, J., said: "the word 'refused' is only a figurative expression: meaning, if the first taker ceased to dwell there. There was certainly no occasion for any person previously to enquire of him, whether he would reside there or not: and that he should expressly refuse it." A gift over in the event of a person "refusing or neglecting" to reside in a house does not take effect where the devisee is an infant, because an infant cannot choose his place of residence (*i*). But a person, however, who is ignorant of the existence of a will with a name and arms clause cannot be said to "refuse or neglect" to comply with it (*k*).

The manner in which conditions requiring a devisee or legatee to assume the testator's name must be complied with is considered in a later part of this chapter (*l*).

Ignorance of condition.

(iii) *When Performance excused.*—As a general rule, ignorance of a condition annexed to a devise or bequest does not protect the devisee or legatee from the consequences of non-performance, at all events where there is a gift over (*m*).

(*d*) *Ledward* v. *Hassells*, 2 K. & J. 370. As to an administration action being equivalent to a claim, see *Tollner* v. *Marriott*, 4 Sim. 19.

(*e*) See *Woods* v. *Townley*, 11 Ha. 314.

(*f*) *Franco* v. *Alvares*, 3 Atk. 342 (accepting composition within a certain time); *Galway* v. *Barden*, [1899] 1 Ir. R. 508 (entering into a profession, trade, or calling); *Re Goodwin*, [1924] 2 Ch. 26 (condition performed by legatee's executors); *Re Packard*, [1920] 1 Ch. 596 (limit of time not of the essence).

(*g*) 11 East, 657. See *O'Higgins* v. *Walsh*, [1918] 1 Ir. R. 126.

(*h*) 2 East, 481; Le Blanc, J., agreed. See *Dunne* v. *Dunne*, 7 D. M. & G. 207; and other cases cited, *post*, p. 1519.

(*i*) *Partridge* v. *Partridge*, [1894] 1 Ch. 351; *Re Edwards*, [1910] 1 Ch. 541 (name and arms).

(*k*) *Re Quintin Dick*, [1926] Ch. 992.

(*l*) *Post*, pp. 1514 *seq.*

(*m*) *Fry* v. *Porter*, 1 Ch. Cas. 138; 1 Mod. 300; *Lady Anne Fry's Case*,

But under the old law this rule was subject to an exception, which is thus stated by Mr. Jarman (*n*): "Here it may be observed that where the devisee, on whom a condition affecting real estate is imposed, is also the heir-at-law of the testator, it is incumbent on any person who would take advantage of the condition, to give him notice thereof; for as he has, independently of the will, a title by descent, it is not necessarily to be presumed, from his entry on the land, that he is cognisant of the condition (*o*); and the fact of notice must be proved; it will not be inferred" (*p*). This doctrine would appear to have been abrogated by the Land Transfer Act, 1897 (*q*), in the case of persons dying since 1897.

Devisee, if heir of the testator, must have notice of the condition.

Infancy is a ground for excusing a devisee or legatee from performance of a condition requiring residence (*r*), but not from performance of a condition precedent requiring him to assume a name or arms (*s*); but an infant cannot "refuse or neglect" (*t*).

Infancy.

In *Robinson* v. *Wheelwright* (*u*), a legacy was bequeathed to A, a married woman, upon condition that within a certain time she conveyed an estate to B; the estate was settled upon A for her separate use without power of anticipation: it was held that the Court could not release the restraint so as to enable A to comply with the condition, and she therefore forfeited the legacy.

Restraint on anticipation.

The Court can enable a lunatic to perform a condition (*x*).

Lunacy.

It has been already mentioned that a condition subsequent which is illegal or impossible *ab initio*, or otherwise void, is treated as non-existent (*y*).

Illegal or impossible *ab initio*.

Performance of a condition precedent as to personalty is excused if it is made impossible by the act or default of the

Impossible by act of testator or Court.

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1 Vent. 199; *Burgess* v. *Robinson*, 3 Mer. 7; *Carter* v. *Carter*, 3 K. & J. 617; *Chauncy* v. *Graydon*, 2 Atk. 616; *Hawkes* v. *Baldwin*, 9 Sim. 355; *Re Hodges' Legacy*, L. R. 16 Eq. 92; *Powell* v. *Rawle*, L. R. 18 Eq. 243; *Astley* v. *Earl of Essex*, *ib.*, 290. In *Re Lewis*, [1904] 2 Ch. 656, the executor was entitled under the gift over, but it was held that he was not bound to inform the legatee of the fact: see, however, *Re Mackay*, [1906] 1 Ch. 25, where *Brittlebank* v. *Goodwin*, L. R. 5 Eq. 545, is commented on.

(*n*) First ed., p. 809.

(*o*) *Doe* d. *Kenrick* v. *Lord Beauclerk*, 11 East, 657.

(*p*) *Doe* d. *Taylor* v. *Crisp*, 8 Ad. & El. 779.

(*q*) Now replaced by the Administration of Estates Act, 1925.

(*r*) *Parry* v. *Roberts*, 19 W. R. 1000; *Partridge* v. *Partridge*, [1894] 1 Ch. 351.

(*s*) *Doe* d. *Luscombe* v. *Yates*, 5 B. & Ald. 544; *Bevan* v. *Mahon-Hagan*, 31 L. R. Ir. 342; *Partridge* v. *Partridge*, [1894] 1 Ch. 351.

(*t*) *Re Edwards*, [1910] 1 Ch. 541.

(*u*) 6 D. M. & G. 535. See now section 169 of the Law of Property Act, 1925, replacing Conveyancing Act, 1881, s. 39.

(*x*) *Re Earl of Sefton*, [1898] 2 Ch. 378.

(*y*) *Ante*, p. 1443.

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testator (*z*), or by the act of the Court (*a*). This does not apply to realty (*b*).

"Reasonable impossibility."

In *Re Conington's Will* (*c*), property was given for the benefit of the vicar for the time being of a parish church upon condition of his holding certain services on certain days throughout the year, and the testator declared that every vicar who failed to observe the condition should receive no benefit from the endowment: owing to the failure of the parishioners to attend the services it was held by Wood, V.-C., that it was not necessary for the vicar to go through the form of attending on each of the days, and that there had been no forfeiture, there being no reasonable possibility of performing the condition: an inquiry was directed whether the intention of the testator could be carried out in some other way (*d*).

General rule as to conditions becoming impossible *ex post facto*.

In cases not falling within the special rules above stated, conditions precedent and subsequent differ considerably in regard to the effect of events rendering the performance of them impracticable (*e*).

Collusion.

(iv) *Relief against Forfeiture.*—If property is given to tenant for life and remainderman subject to a condition, with a gift over on default to C, and the tenant for life collusively agrees with C to make default, relief against the forfeiture will be granted to the remainderman (*f*).

Relief against forfeiture.

Where there is no gift over and no clause of revocation, and the condition is of a nature to admit of compensation being made, equity will, on subsequent performance, relieve against a forfeiture incurred. There are numerous old cases in which the heir has been prevented from taking advantage of a forfeiture incurred by non-compliance with a condition for payment of money within a certain time (*g*), or for the execution of a release (*h*).

(*z*) *Darley* v. *Langworthy*, 3 Br. P. C. 359; *Gath* v. *Burton*, 1 Bea. 478. See *Wedgwood* v. *Denton*, L. R. 12 Eq. 290; *Middleton* v. *Windross*, L. R. 16 Eq. 212.

(*a*) *Croskery* v. *Ritchie*, [1901] 1 Ir. R. 437, where there was a devise of a farm to A with a gift over to B conditionally on his returning and settling in his native country: the farm was sold by order of the Court, and subsequently the proceeds were paid over to B.

(*b*) *Re Turton*, [1926] Ch. 96.

(*c*) 6 Jur. (N.S.) 992.

(*d*) Compare the cases referred to *ante*, p. 861, where performance of a trust becomes impossible.

(*e*) A donee cannot, of course, take advantage of his own acts rendering performance impossible: *Philips* v. *Walter*, 2 Br. P. C. 250.

(*f*) *Hayes* v. *Hayes*, Finch, 231.

(*g*) *Salmon* v. *Vaux*, Toth. 105; *Underwood* v. *Swain*, 1 Rep. Ch. 161; *Barnardiston* v. *Fane*, 2 Vern. 366; *Grimston* v. *Bruce*, *ib.*, 594; *Wallis* v. *Crimes*, 1 Ch. Ca. 89; *Paine* v. *Hyde*, 4 Bea. 468.

(*h*) *Cage* v. *Russel*, 2 Vent. 352; *Taylor* v. *Popham*, 1 Br. C. C. 168; *Simpson* v. *Vickers*, 14 Ves. 341; *Hollinrake* v. *Lister*, 1 Russ. 500. On these cases see *Re Packard*, [1920] 1 Ch. 596. See *Steuart* v. *Frankland*,

But this rule does not apply to conditions not admitting of after-satisfaction, such as a condition requiring marriage with consent (*i*), or forbidding the legatee to become a nun (*k*).

Conditions becoming incapable of performance.

VI.—Conditions Incapable of Performance.—" It is clear," as Mr. Jarman points out (*l*), " that where a condition *precedent* becomes impossible to be performed, even though there be no default or laches on the part of the devisee himself, the devise fails (*m*).

If condition be precedent, estate never arises.

" Thus, where (*n*) a testator being seised in fee of certain lands, and of other lands for life, under the will of C., devised both estates to trustees, to be conveyed to other trustees, to the use of R. (who was tenant in tail next in remainder under the will) for life; remainder to his first and other sons in tail male, remainders over. The devise was upon express condition that R. should within six months suffer a recovery, and bar the remainders in C.'s will, and convey all her estates to such uses, etc., as were declared by his (testator's) will, as to his own estates, *and no conveyance of his estates was to be made before R. had suffered the recovery*; and, in default of his suffering such recovery, to convey his (testator's) estates to other uses. He also directed R. to take the name of C., and declared this to be a condition precedent to the vesting of his estate. R., on the testator's death, entered, and was preparing to suffer the recovery, when he died. Sir Ll. Kenyon, M.R., appeared to consider this to be in the nature of a condition precedent; and decreed that, the act directed by the testator not being done, the estates created by him never arose. In answer to the argument that there was scarcely an opportunity, and that there was no neglect, and that if it was prevented by the act of God, it should be held as done, his Honor said that there were many cases where the act is rendered impossible to be done, and yet the estate should not vest; as an estate given to A, on condition that he shall enfeoff B of Whiteacre, and B refuses to accept, the estate would not vest in A (*o*).

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16 Jur. 738 (where an effectual release could not be given, one of the *cestuis que trustent* being a married woman), and *O'Callaghan* v. *Cooper*, 5 Ves. 117, stated *post*, p. 1510.

(*i*) *Cage* v. *Russel*, *supra*. In *Fry* v. *Porter*, 1 Ch. Cas. 138, 1 Mod. 300, there was a gift over, but the decision would, *semble*, have been the same without it.

(*k*) *Re Dickson's Trust*, 1 Sim. (N.S.) 37.

(*l*) First ed., p. 805.

(*m*) Co. Litt. 206 b.

(*n*) *Roundel* v. *Currer*, 2 B. C. C. 67; 1 Swanst. 383, n. See also *Bertie* v. *Falkland*, 3 Ch. Cas. 129, 2 Vern. 333, 1 Eq. Ca. Ab. 110, pl. 10. *Robinson* v. *Wheelwright*, 6 D. M. & G. 535; *Earl of Shrewsbury* v. *Scott*, 29 L. J. (C. P.) 34.

(*o*) Compare *Boyce* v. *Boyce*, 16 Sim. 476, where a testator devised his houses to trustees, in trust to convey to his daughter M. such one of the

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If condition subsequent is incapable of performance, estate becomes absolute.

"On the other hand, it is clear that if performance of a condition *subsequent* be rendered impossible, the estate to which it is annexed becomes by that event absolute.

"Thus, in the case of *Thomas* v. *Howell* (*p*), where one devised to his eldest daughter, on condition that she should marry his nephew on or before she attained the age of twenty-one years. The nephew died young; and after his death, the devisee, being then under twenty-one, married another. It was held, that the condition was not broken, its performance having become impossible by the act of God. It is not, indeed, expressly stated in this case that the Court held the condition to be subsequent; but, as it seems fairly to bear that construction, and the decision would otherwise stand opposed to the doctrine under consideration, it may reasonably be inferred that such was the opinion of the Court."

Name and arms clauses.

So, in *Re Greenwood* (*q*), a testator devised real estate upon trust for his daughter for life and after her death for her children, and if she had no child, he devised his real estate to N. in fee upon condition that N. should "take and use" the testator's name; N. died during the testator's lifetime without having taken the testator's name; it was held that the condition was subsequent: that it was only to operate upon N. becoming entitled in possession: and that performance having become impossible by the act of God, the devise to N. was absolute. And if a condition subsequent requiring a devisee to assume a coat of arms becomes impossible because the College of Arms refuses to grant it, the devisee is discharged from complying with it (*r*).

Distinction suggested where there is a gift over.

"It is far from clear, however," says Mr. Jarman (*s*), "that this principle applies even to conditions subsequent, *if the property be given over on non-performance*. The rule, indeed, has been often laid down in very general terms; and the case of *Graydon* v. *Hicks* (*t*) might seem to countenance its application

houses as she should choose, and to convey and assure all the others which M. should not choose to his daughter C.; M. died in the testator's lifetime, and Sir L. Shadwell, V.-C., considering the gift to C. to be of those houses that should remain provided M. should choose one of them (*ante*, p. 442), held that the condition having become impossible by M.'s death, the gift to C. failed. See also *Philpott* v. *St. George's Hospital*, 21 Bea. 134; *Evans* v. *Stratford*, 2 H. & M. 142; and *Doe* d. *Davies* v. *Davies*, 16 Q. B. 951, *post*, p. 1461.

(*p*) 1 Salk. 170. See also *Aislabie* v. *Rice*, 3 Madd. 256, 2 J. B. Moo. 358; *Burchett* v. *Woolward*, T. & R. 442; *Walker* v. *Walker*, 2 D. F. & J. 255; 29 L. J. Ch. 856 (legacy); *Re Bird*, 8 R. 326, *post*, p. 1460.

(*q*) [1903] 1 Ch. 749.

(*r*) *Re Croxon*, [1904] 1 Ch. 252, *post*, p. 1516.

(*s*) First ed. p. 807. Mr. Jarman's remarks on this point have been retained notwithstanding the decisions in *Collett* v. *Collett* and *Re Bird* (*post*, p. 1460), because there seems, on principle, much to be said for Mr. Jarman's contention.

(*t*) 2 Atk. 16. Also *Peyton* v. *Bury*, 2 P. W. 626; but see *infra*.

even to such a case. A testator there gave £1,000 to his only daughter M. to be paid at her age of twenty-one, or day of marriage, provided she married with the consent of his executors; but, in case she died before the money became payable upon the conditions aforesaid, then he gave the same over. The executors died. M. afterwards married; and Lord Hardwicke held that the death of the persons whose consent was necessary relieved her from the restriction.

Remarks on *Graydon* v. *Hicks*.

"It does not appear whether the claimant had reached the age of twenty-one: but it will be observed that marriage with consent was not the only condition on which the legacy was to be payable (*u*); it only accelerated the payment; so that it was impossible for the Court to declare, as was asked, that the legacy was forfeited by marriage without consent. This case, therefore, leaves the question untouched. Unless a direct authority can be shown for extending to the cases suggested, the doctrine, that estates subject to conditions subsequent, become absolute by the effect of events rendering the performance impracticable, it is conceived the Courts would be reluctant to apply it to such cases. Where property is devised to a person, with a proviso divesting his estate in favour of another, if he (the first devisee) do not marry A, or do not enfeoff A of Whiteacre, within a given period, and A in the meantime dies, or refuses to marry the devisee, or be enfeoffed of Whiteacre, these are contingencies inseparably incident to such a condition, and may therefore be supposed to have been in the testator's contemplation when he imposed it; and having said that the estate shall be divested in case the act be not performed, (not merely on its not being *attempted* to be performed,) he is presumed to mean that it shall be divested if the act, under whatever circumstances, is not performed, though it may have been rendered impracticable by events over which the devisee has no control. But it may be said that this reasoning applies to *all* cases of conditions subsequent, as well those which are *not*, as those which *are*, accompanied by a gift over; and that, in regard to the former, the doctrine in question is fully established. The stronger argument, therefore, in favour of the distinction suggested, because it is applicable exclusively to the latter class of cases, is, that where there is a devise over on non-performance, the Court, by making the estate of the first devisee absolute, would *take the property from the substituted devisee in an event in which the testator has given it to him.* If the gift had been simply to B, in case A do not marry C, or enfeoff C of Whiteacre, it could not have been maintained for an instant that

Conditions subsequent how affected by devise over.

(*u*) See *King* v. *Withers*, 1 Eq. Ca. Ab. 112, pl. 10.

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B's estate did not arise, in the event of the death or refusal of C; and why should the result be different because A happens to be the prior devisee? There seems to be no solid ground for treating, with such unequal regard, these respective objects of the testator's bounty: and the cases on marriage conditions afford (as we shall presently see) abundance of authority for the principle which ascribes this kind of efficiency to a bequest over."

Collett v. *Collett.*

Mr. Jarman's view, however, has not found favour with the Courts. Thus, in *Collett* v. *Collett* (*v*), a testator gave a share of his real and personal estate to his daughter, her heirs, executors, etc., and declared that it should become payable at her age of twenty-one or day of marriage, provided such marriage should be with the consent of his wife; but in case of the daughter's death "without having attained twenty-one or been *so* married," then over. The wife died; after which the daughter married, and was still under age. Lord Romilly said the question depended on whether the condition requiring consent was precedent or subsequent. He thought it was subsequent; that the death of the wife having made it impossible, compliance was dispensed with; and that the gift over (in which he read "or" as "and") did not take effect. A doubt had been expressed (he said) whether, in the case of a gift over, the gift over would not take effect if the condition, though a condition subsequent, were not specifically performed, whatever might be the reason of the failure. But he thought *Graydon* v. *Hicks* was an authority to show that the gift over would not take effect if the performance of the condition had become impossible by the act of God. It would, therefore, seem that the M.R., in coming to this decision, was largely influenced by the authority of *Graydon* v. *Hicks*; but as Mr. Jarman points out (*x*), if the claimant in that case had attained the age of twenty-one, it was immaterial whether she married with consent or not, and from the way in which the cross bill was brought, it is clear that she had attained twenty-one and was therefore entitled to the legacy.

Re Bird.

Again, in *Re Bird* (*y*), a testator made a bequest subject to a proviso that if the legatee, who was abroad, did not within a certain period return to England and appear before the trustees of the will, he should forfeit the bequest. The legatee became a lunatic, but had within the period lucid intervals, during any of which he might have returned, but did not. It was held that he was not bound to seize the first opportunity, afforded by a

(*v*) 35 Bea. 312.
(*y*) 8 R. 326.
(*x*) *Ante*, p. 1459.

lucid interval, of complying with the condition, and that as compliance was ultimately made impossible by the act of God, the principle of *Graydon* v. *Hicks* applied, and that the bequest was not forfeited.

The doctrine laid down in this case does not apply to conditions precedent, for it is clear that if an estate is given to A upon condition that he tenders a certain deed to B for execution, and B dies before the deed is tendered to him, A cannot claim the estate (*z*).

Effect of gift over.

Gift over.—The general rule (*a*) is that where property is given upon a condition subsequent with a gift over in default of performance, and default is made, the gift over takes effect, whatever may be the nature of the property or of the act which is enjoined or prohibited (*b*).

Effect of residuary gift.

A direction that on non-compliance with the condition the property shall fall into residue, is a gift over, for the purposes of this doctrine, but a mere residuary gift, it seems, is not (*c*).

Gift over not implied.

A gift over will not be implied (*d*).

Ineffectual gift over.

If a gift over is so framed as not to fit the condition, the clause of cesser or defeasance is ineffectual and the gift is absolute; as where a testator declares that in the event of a legatee failing to comply with a condition the property bequeathed shall go as if he were dead (*e*). As to revocation, see *Re Dickson's Trust* (*f*).

General principle.

VII.—Conditions Restrictive of Voluntary Alienation.—" An attempt to vest in a person an interest which shall adhere to him, in spite of his own voluntary acts of alienation, is," as Mr. Jarman points out (*g*), " no less nugatory and unavailing than is, we have seen, the endeavour to create an interest which shall be unaffected by bankruptcy or insolvency (*h*), as the law

(*z*) *Doe* d. *Davies* v. *Davies*, 16 Q. B. 951.

(*a*) The general rule does not, of course, apply where the condition is void, *ante*, p. 1443, and according to *Collett* v. *Collett*, 35 Bea. 312, it also does not apply where performance has been impossible by the act of God: *ante*, p. 1460.

(*b*) *Cleaver* v. *Spurling*, 2 P. W. 526; *Duke of Montagu* v. *Lord Beaulieu*, 3 Br. P. C. 277; *Simpson* v. *Vickers*, 14 Ves. 341; *Tulk* v. *Houlditch*, 1 V. & B. 248; *Burgess* v. *Robinson*, 1 Mad. 172, 3 Mer. 7.

(*c*) *Lloyd* v. *Branton*, 3 Mer. 108, where the earlier cases of *Harvey* v. *Aston*, 1 Atk. 361; *Wheeler* v. *Bingham*, 3 Atk. 364; *Scott* v. *Tyler*, 2 Br. C. C. 431; and *Garret* v. *Pritty* (or *Pretty*), 2 Vern. 293; 3 Mer. 119, n., are referred to.

(*d*) *Gulliver* v. *Ashby*, 1 W. Bl. 607; *Re Evans' Contract*, [1920] 2 Ch. 469.

(*e*) *Re Catt's Trusts*, 2 H. & M. 46; *Musgrave* v. *Brooke*, 26 Ch. D. 792.

(*f*) 1 Sim. (N.S.) 37; *ante*, p. 1443.

(*g*) First ed. p. 830.

(*h*) " But, of course, as a life interest may be made to cease on bankruptcy or insolvency, so it may be determined on voluntary alienation " (note by Mr. Jarman). As to this, and as to forfeiture on bankruptcy, etc., see the next Section.

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of England does not (like that of Scotland (*i*)) admit of the creation of personal inalienable trusts, for the purpose of maintenance, or otherwise, except in the case of women under coverture, who it is well known may be restrained from anticipation (*k*). But this doctrine is not applicable to unmarried women, a restriction on the aliening power of a woman not under coverture being no less inoperative than a similar restraint on the *jus disponendi* of a person of the male sex" (*l*). And when a married woman becomes discovert by the death of her husband, the restraint on anticipation is suspended until she marries again (*m*); or she may, while discovert, so deal with the property as to extinguish the restraint (*n*).

Exception in the case of married women.

The general rule that a restriction on alienation is void rests on the principle of repugnancy which has been already considered (*o*).

General restraint on alienation by devisee in fee is void.

(i) *Estates in Fee.*—The general rule is thus stated by Mr. Jarman (*p*): "A power of alienation is necessarily and inseparably incidental to an estate in fee. If, therefore, lands be devised to A and his heirs, upon condition that he shall not alien, the condition is void (*q*).

So of alienation in specified mode.

"And a condition restraining the devisee from aliening by any particular mode of assurance is bad. Thus, where (*r*) a testator devised lands to A and his heirs for ever, and in case he offered to mortgage or suffer a fine or recovery of the whole or any part, then to B and his heirs: it was held, that A took an absolute estate in fee, without being liable to be affected by his mortgaging, levying a fine, or suffering a recovery." And a condition not to alien except by way of exchange or for reinvesting in other land (*s*), or forbidding the devisee to charge the land with an annuity (*t*), is equally bad.

The invalidity of executory gifts intended to take effect on alienation by a person to whom an absolute interest is given, has been already discussed (*u*).

(*i*) See *Re Fitzgerald*, [1904] 1 Ch. 573.
(*k*) As to this, see *post*, p. 1490.
(*l*) *Barton* v. *Briscoe*, Jac. 603; *Jones* v. *Salter*, 2 R. & My. 208; *Woodmeston* v. *Walker*, 2 R. & My. 197; *Re Wheeler's Settlement Trusts*, [1899] 2 Ch. 717.
(*m*) See *Tullett* v. *Armstrong*, and the other cases cited *post*, p. 1491.
(*n*) *Buttanshaw* v. *Martin*, John. 89.
(*o*) *Ante*, p. 1440.
(*p*) First ed., p. 811.
(*q*) Co. Litt. 206 b. 223 a. The general principle was discussed in *Re Dugdale*, 38 Ch. D. 176; *Corbett* v. *Corbett*, 14 P. D. 7.
(*r*) *Ware* v. *Cann*, 10 B. & Cr. 433.
(*s*) *Hood* v. *Oglander*, 34 Bea. 513.
(*t*) *Willis* v. *Hiscox*, 4 My. & Cr. 197.
(*u*) *Ante*, Chap. XVII, p. 539.

The general principle applies to equitable as well as to legal interests (*x*).

Equitable interests.

In *Re Rosher* (*y*) a condition that a devisee in fee, if he desired to sell, should offer the estate to a particular person at a fixed price below its full value, was held to be void as being repugnant to the devise. In that case a testator devised his real estates to his son in fee, provided always, that if his said son, his heirs, or devisees, or any person claiming through or under him or them, should desire to sell the estates or any parts thereof in the lifetime of the testator's wife, she should have the option to purchase the same at the price of £3,000 for the whole, and a proportionate price for any part or parts thereof, and the same should accordingly be first offered to her at such price or proportionate price or prices: it was admitted in the special case that the value of the estates was at the date of the will, and the time of the testator's death, £15,000 and upwards: it was held by Pearson, J., that the condition was in effect an absolute restraint on sale during the life of the widow; that, notwithstanding the limitation in point of time, the restraint was repugnant to the devise, and void accordingly; and that the son was entitled to sell the estates as he pleased without first offering them to the widow at the price named in the will. It is not easy to see why the learned Judge laid so much stress on the difference between the £3,000 and the £15,000: if the condition was void for repugnancy, it would, it is submitted, have been void whatever the price fixed by the testator might have been.

Condition to offer estate to a particular person at a fixed price.

In *Re Elliot* (*z*) a condition requiring a devisee, in the event of her selling the property, to pay a certain sum out of the proceeds of sale, was held repugnant and void.

But a partial restraint on the disposing power of a tenant in fee may be imposed to this extent, that he shall not alien to such a one, or to the heirs of such a one, or that he shall not alien in mortmain (*a*).

Restraints on alienation by devisees in fee, how far valid.

It seems, too, that a condition imposed on a devisee in fee not to alien except to a particular class of persons is good, provided the class is not too restricted. Thus, where (*b*) a testator devised to his two daughters A. and H. his lands in the county of Y. (subject to some legacies), to hold to them, their heirs and assigns, as tenants in common "upon this special proviso and

Doe v. *Pearson.*

(*x*) *Corbett* v. *Corbett*, 14 P. D. 7.
(*y*) 26 Ch. D. 801; *Re Cockerill*, [1929] 2 Ch. 131.
(*z*) [1896] 2 Ch. 353, *ante*, p. 539.
(*a*) Co. Litt. 223 a. As to *Ludlow* v. *Bunbury*, 35 Bea. 36, *qu.*
(*b*) *Doe* d. *Gill* v. *Pearson*, 6 East, 173, citing *Daniel* v. *Ubley*, Sir W. Jones, 137, Latch, 9, 39, 134; and a case in Dalison, 58.

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condition," that in case his said daughters, or either of them, should have no lawful issue, that then, and in such case, they or she, having no lawful issue as aforesaid, should have no power to dispose of her share in the said estates so above given to them, except to her sister or sisters, or to their children; and the testator devised the residue of his real estate to his said two daughters in fee. A. married W., and levied a fine of her moiety, declaring the uses in trust for W. in fee, and died without having had any issue. It was held, that this occasioned a forfeiture entitling the heir to enter.

Condition to alien to none but A, bad: *Muschamp* v. *Bluet*.

But the limit within which a restraint of this nature is good, is shown by *Muschamp* v. *Bluet* (*c*), where it was held, that a condition not to alienate to any but J. S., imposed on a devisee in fee simple, was void: "for," it was said, "to restrain generally, and that he shall alien to none but J. S., is all one; for then feoffor may restrain from aliening to any but himself, or such other person by name whom [*sic*] he may well know cannot, nor never will, purchase the land. . . . Neither is there any authority to warrant this restraint, for Littleton leaves the feoffee at liberty to alien to any but J. S."

Attwater v. *Attwater*.

In *Attwater* v. *Attwater* (*d*), Romilly, M.R., held that this principle was applicable to a devise of land to A in fee subject to "an injunction never to sell it out of the family, but if sold at all it must be to one of A's brothers hereafter named," and that "notwithstanding *Doe* v. *Pearson*" (*e*), the condition was void.

Attwater v. *Attwater* questioned.

There is certainly a distinction between a case like *Doe* v. *Pearson*, where alienation is restricted to an unascertained class, and one like *Attwater* v. *Attwater*, where it is restricted to named or ascertained persons; for in the latter case all might be selected paupers. But though the condition in *Daniel* v. *Ubley* (*f*) was of the latter kind ("to dispose of to such of my sons as she thinks best"), the Judges took no objection to it, as a condition, on that ground; and in *Re Macleay* (*g*), Jessel, M.R., while apparently approving of the principle of *Muschamp* v. *Bluet* (since you might not do that indirectly which you might not do directly), dissented from his predecessor's application of it. According to the old books, he said, the test was whether the condition took away the whole power of alienation substantially. The condition before him (*viz.*, "not to sell out of the family")

Re Macleay.

(*c*) J. Bridgm. pp. 132, 137; *Re Cockerill*, [1929] 2 Ch. 131.
(*d*) 18 Bea. 330. Compare *Crofts* v. *Beamish*, [1905] 2 Ir. R. 349, a somewhat similar case.
(*e*) 6 East, 173.
(*f*) Sir W. Jones, 137.
(*g*) L. R. 20 Eq. 186.

did not do so; for it permitted of a sale (*h*), not to one person only, but to a class, many of whom were named in the will; it was probably a large class, and was certainly not small: the restriction was therefore limited, and consequently valid. This reasoning, however, is not altogether satisfactory, and the question cannot be regarded as settled (*i*).

Restraint on alienation limited to a stated period, whether valid.

On the principle that a restraint is good which does not substantially take away all power of alienation, it has been thought on the authority of some early decisions that a condition might be supported which prohibits alienation until after a defined and not too remote period of time (*k*), that is to say, a reasonable time, not trenching on the Rule against Perpetuities (*l*). But *Large's Case* (*m*), which is generally cited as supporting the doctrine in question, seems really to have been decided on the ground that the interest to which the condition was annexed was contingent. And in *Re Rosher* (*n*) a condition against alienation was held by Pearson, J., to be void, although its operation was limited to the life of a living person, who was not the devisee.

Condition requiring alienation within a given time.

It has been already mentioned (*o*) that if land is given to a person in fee, with a gift over if he does not alienate in his lifetime, the gift over is void, and it would seem to follow that a condition requiring alienation within a given time is void, *e.g.*, a condition that A and B, tenants in common in fee, shall make partition during their joint lives; for it is a right incident to their estate to enjoy in undivided shares (*p*).

Contingent interest.

An exception to the general rule that a condition against alienation following a devise in fee is repugnant and void, occurs where a contingent interest is devised, for in such a case it seems that a condition against alienation during the period of contingency may be attached to the devise (*q*).

(*h*) The M.R. observed it was a limited restriction in this also, that a sale only and not any other mode of alienation was prohibited. But see *Ware* v. *Cann*, 10 B. & Cr. 433, cited above.

(*i*) See the observations of Pearson, J., in *Re Rosher*, 26 Ch. D. 801.

(*k*) *Large's Case*, 2 Leon, 82, 3 Leon, 182; *Barnett* v. *Blake*, 2 Dr. & Sm. 117.

(*l*) See Mr. Preston's note to Shep. Touchst. (7th ed.), p. 130.

(*m*) *Supra*. Compare the cases on gifts of personal estate, *post*, p. 1469. It is said in *Churchill* v. *Marks*, 1 Coll., at p. 445, that an eminent conveyancer, in answer to a question put to him by the Court, stated his opinion to be that a gift to A in fee with a proviso that if A aliens in B's lifetime, the estate shall shift to B, is valid. But this doctrine has been questioned, see Davidson's Conveyancing (3rd ed.), Vol. iii, Pt. 1, p. 111, n.

(*n*) 26 Ch. D. 801, stated *ante*, p. 1463. See *Renaud* v. *Tourangeau*, L. R. 2 P. C. 4, 18; *Re Dugdale*, 38 Ch. D. 176; *Powell* v. *Boggis*, 35 Bea. 535.

(*o*) *Ante*, p. 537.

(*p*) *Shaw* v. *Ford*, 7 Ch. D. 669. See *Re O'Hare*, [1918] 1 Ir. R. 160 (gift over on dying childless valid).

(*q*) *Large's Case*, 2 Leon. 82, 3 Leon. 182. As to this case, which is obscurely reported, see *Re Rosher*, 26 Ch. D. 801, and compare the cases on

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Settled Land Act, 1925.

Reference may here be made to section 106 of the Settled Land Act, 1925, under which every condition, gift over, or other provision is void so far as it tends to prevent a tenant for life from exercising his statutory powers of alienation (*r*).

Restraints on alienation by tenant in tail invalid.

(ii) *Estates-tail.*—Mr. Jarman continues (*s*): "Conditions restraining alienation by tenant in tail are also void, as repugnant to his estate (*t*), to which a right to bar the entail by means of a fine with proclamations, and the entail and the remainders, by suffering a common recovery, was, before the abolition of these assurances inseparably incident (*u*); but it was held, that a tenant in tail might be restrained from making a feoffment or levying a fine at common law, *i.e.* without proclamations, or any other tortious alienation; and also, it seems, from granting leases under the stat. 32 Hen. 8, c. 28 (*x*). The invalidity of any restraint on the power of a tenant in tail to enlarge his estate into a fee simple, however, being once established, it is of little avail to fetter him even with such conditions as are consistent with his estate, since he may at any time, by barring the entail, emancipate himself from all restrictions annexed to it. At one period, the attempts to restrain the aliening power of a tenant in tail were numerous; and it was apparent that it was too late to defeat the estate tail on the suffering of the recovery, since by that act the condition itself was defeated, the next contrivance was to declare the estate to be determined, on the tenant in tail taking any preparatory steps for the purpose, as agreeing or assenting to, or going about, any act, etc. (*y*), but which, of course, was equally void on the principle already stated.

Trust to charge lands on alienation by tenant in tail, void.

"One of the latest attempts to interfere indirectly with the power of alienation incidental to an estate tail, occurs in *Mainwaring* v. *Baxter* (*z*), where lands were limited by deed to A for life, remainder to trustees for 1,000 years, remainder to B for ninety-nine years, if he should so long live, remainder to trustees during his life, to preserve, etc., remainder to his first and other sons in tail male, with remainders over; and the trusts of the

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gifts of personal property, *post*, p. 1469. The principle above stated is also recognised in *Corbett* v. *Corbett*, 14 P. D. 7.

(*r*) See *Re Ames*, [1893] 2 Ch. 479, and the cases on conditions of residence, discussed below.

(*s*) First ed., p. 813.

(*t*) *Pierce* v. *Win*, 1 Vent. 321, Pollex. 435.

(*u*) 10 Rep. 36, Fea. C. R. 260.

(*x*) Co. Lit. 223 b. Or from granting a lease for his own life: *ib.*

(*y*) *Mary Portington's Case*, 10 Rep. 36; *Corbet's Case*, 1 Rep. 83 b; *Jermyn* v. *Arscot*, cit. 1 Rep. 85 a; *Mildmay's Case*, 6 Rep. 40; *Foy* v. *Hynde*, Cro. Jac. 697; all stated Fea. C. R. 253 *seq.*

(*z*) 5 Ves. 458. "The same principle applies to wills" (note by Mr. Jarman). As to these attempts to create unbarrable entails, or "perpetuities," as they were formerly called, see *ante*, p. 253.

term of 1,000 years were declared to be, to the intent that it should not be in the power of any person to destroy or prevent the estate or benefit of him or them appointed to succeed; and that the trustees, after any contract touching the alienation of the premises, should raise £5,000 for the benefit of the person whose estate was so defeated. It was held by Sir R. P. Arden, M.R., that the trusts of the term were void, as being inconsistent with the rights of the tenants in tail."

Fines and Recoveries Act.

It is hardly necessary to point out that the right of a tenant in tail to bar his entail under the Fines and Recoveries Act, 1833, cannot be restricted by any condition, gift over, or direction, whatever form it may assume (*a*).

Limitation over as if tenant in tail were *dead* (not dead *without issue*).

"Here it may be noticed," says Mr. Jarman (*b*), "that an objection is advanced in some of the early cases, and has been adopted by text writers of high reputation (*c*), to conditions or provisoes which are intended to defeat an estate tail, on the ground that the estate is declared to cease, as if the tenant in tail were dead, not as if he were dead *without issue*; or, as we are told, would be most correct (*d*), as if the tenant in tail were dead, and there was a general failure of issue inheritable under the entail. A limitation over in the terms first mentioned is, it is said, contrariant, and, on that account void, inasmuch as it amounts to saying, that the estate shall be determined as it would be in an event which *might* not determine it. But it seems questionable, whether much reliance can at the present day be placed on the objection. The Courts would, it is conceived, supply the words 'without issue,' as in an early case (*e*) (the principle of which seems not very dissimilar), where a devise to a person in tail, with a limitation over 'if he die,' was read, if he die *without issue*. It is to be observed, too, that in the cases in which the doctrine in question was advanced (*f*), the proviso was void on the ground of repugnancy; and it is remarkable, that even Mr. Fearne, its strenuous advocate, completely disregarded the point in the opinion given by him on Mr. Heneage's will (*g*); the proviso in which, so far as it respected the sons of the tenant for life, was obnoxious to this objection."

(*a*) *Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318, 4 App. Ca. 51. A restraint on alienation does not prevent a married woman from barring an estate tail: *Cooper* v. *Macdonald*, 7 Ch. D. 288.

(*b*) First ed., p. 814.

(*c*) Fea. C. R. 253; Harg. & Butl. Co. Litt. 233 b, note, 132; Sand. Uses, ch. 2, s. iv, 4. See also Vaizey on Settlements, Vol. ii, p. 1289.

(*d*) Mr. Butler's note, Fea. C. R. 254.

(*e*) *Anon.*, 1 And. 33, pl. 84.

(*f*) *Corbet's Case*, 1 Rep. 83 b; *Jermyn* v. *Arscot*, cit. *ib.*, 85 a; *Mildmay's Case*, 6 Rep. 40; *Foy* v. *Hynde*, Cro. Jac. 697.

(*g*) Butl. Fea. 617, App.

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Bird v. *Johnson.*

However, in *Bird* v. *Johnson* (*h*), Sir W. P. Wood, V.-C., treated the objection as valid, and as being applicable to that case, which was as follows: A testator gave personal property in trust for his daughter for life, and after her death for her children, payable at the age of twenty-one, or at the decease of the daughter, which should last happen, with a proviso, that if any of the legatees should become bankrupt before his share was payable, his interest should "cease and determine as if he were then dead"; it was held that a child who became bankrupt in the lifetime of his mother did not thereby forfeit his interest, the terms of the condition not fitting to the previous gift. "If," the V.-C. said, "the interest given had been an annuity, which would naturally be at an end on the death of the annuitant, such a clause would be operative; but here it is an absolute interest which is given, and if the donee were dead, the only effect would be to give the fund to his executors or administrators. . . . As to real estate, the old cases have quite settled the law upon this point. With regard to estates tail, it has been decided that it is a condition repugnant, and therefore void if it does not state that the interest is to cease as if the donee were deceased without issue or without issue heritable under the entail, as the case may be; for that such a condition would not determine the estate tail."

There is, however, an obvious difference between the case of an estate tail where the words "as if," etc., may reasonably be understood as pointing to the regular determination of the estate, and where there is no doubt what words are wanting to express that meaning (*i*), and the case of a fee simple, or perpetual interest in personalty, of which there is no regular determination, and where it is uncertain what other mode of determination is contemplated. In *Astley* v. *Earl of Essex* (*k*), where the devise was to A in tail, with a proviso that in a given event his estate should cease and the property devolve as if he were naturally dead, the words "without issue" were (in

(*h*) 18 Jur. 976; *Re Catt's Trusts*, 2 H. & M. 46, referred to in Chap. XVII, *ante*, p. 541.

(*i*) This construction would of course be excluded if a clear intention were expressed that the interest of the defaulting tenant in tail alone should cease, and not that of the heirs of his body. But the intention would fail of effect, since such a partial defeasance of the estate is not permitted by the law: *Seymour* v. *Vernon*, 33 L. J. Ch. 690. See *ante*, p. 1407, n. (*n*).

(*k*) L. R. 18 Eq., pp. 290, 296. See also *Bund* v. *Green*, 12 Ch. D. 819. In *Jellicoe* v. *Gardiner*, 11 H. L. C. 323, estate X stood settled in remainder on testator's sons in tail male: the testator devised his own estates to his sons in tail *male*, remainders to their children in tail *general*; and provided that, if any of his sons, etc., should become entitled to the X estate, the testator's own estate should shift to the person next in remainder as if the son, etc., so becoming entitled were dead *without issue*. This was read "dead without issue male," so as not to exclude issue female, who were next in remainder, and to whom the X estate could never devolve.

effect) supplied by Jessel, M.R., in order to effect the declared intention that in the case contemplated the estate of A should cease.

As to restraining alienation by legatee of personalty.

(iii) *Absolute Interests in Personal Estate.*—Mr. Jarman continues (*l*): "The principle which precludes the imposition of restrictions on the aliening powers of persons entitled to the inheritance of lands, applies to the entire or absolute interest in personalty (*m*). It is clear, therefore, that if a legacy were given to a person, his executors, administrators, or assigns, with an injunction not to dispose of it, the restriction would be void, and a gift over, in case of the legatee dying without making any disposition, would be also rejected, as a qualification repugnant to the preceding absolute gift" (*n*).

Gift over void for repugnancy.

The general rule that a gift over in the event of the legatee disposing of the property, or dying without disposing of it, or not disposing of the whole of it, is void for repugnancy, has been already considered (*o*), as has also the exception which is allowed in cases where the testator shows an intention that the legatee shall take a life interest, with a power of appointment (*p*).

Contingent or reversionary interest.

An interest which is not absolutely vested in possession may, however, be made subject to a condition against alienation. Thus, in *Re Porter* (*q*), a testator gave his residue to trustees upon trust for certain persons during their lives and then upon trust for his nephews and nieces: the will contained a declaration that if any of the nephews or nieces should during the lives of the tenants for life or the survivor of them, assign or attempt to assign his or her expectant share, he or she should forfeit all benefit under the will, and the share should go to the other nephews and nieces; one of the nieces, during the lifetime of the surviving tenant for life, attempted to assign her share, and it

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(*l*) First ed., p. 815.

(*m*) Co. Litt. 223 a; *Metcalfe* v. *Metcalfe*, 43 Ch. D. 633; *Corbett* v. *Corbett*, 14 P. D. 7.

(*n*) *Bradley* v. *Peixoto*, 3 Ves. 324; *Ross* v. *Ross*, 1 Jac. & W. 154. See *Re Dugdale*, 38 Ch. D. 176, where the general principle is discussed. In *Re Wolstenholme*, 43 L. T. 752, it was held if property is given to a person for life, with a general power of appointment by deed or will, a clause prohibiting alienation of the income during the life of the beneficiary is void, even in the case of a married woman. *Re Vaughan*, [1926] Ir. R. 67.

(*o*) *Ante*, p. 537. The case of *Re Sax*, 62 L. J. Ch. 688, where a gift over to take effect in the event of the legatees ceasing to carry on a business, is referred to *ante*, p. 539, on the question of repugnancy, and *post*, p. 1473, on the question what amounts to an alienation.

(*p*) *Ante*, p. 1168.

(*q*) [1892] 3 Ch. 481; *Campbell* v. *Campbell*, 72 L. T. 294; *Re Galsworthy*, [1922] 2 Ch. 558 (where alienation by way of settlement upon a husband or wife and children was excepted).

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was held that the forfeiture took effect (*r*). But a mere clause of forfeiture without a gift over is inoperative (*s*).

Words required to create forfeiture.

No particular form of words is required to create a condition restrictive of voluntary alienation (*t*). But the intention must be expressed with reasonable clearness. In *Re Carew* (*u*), property was given to A subject to a divesting clause to take effect in the event of his being under "any legal disability" preventing him from taking the property for his own personal and exclusive benefit: it was held that this meant a disability of the person arising from act of law, and did not include liabilities arising from his voluntary acts, such as mortgages.

Life interest cannot be made inalienable,

except in the case of a married woman.

(iv) *Life Interests and Annuities.*—Conditions restraining alienation by a tenant for life of real or personal property are also void, for a power of alienation is as much incident to that kind of interest as it is to an absolute interest (*x*). "The law of England," as Mr. Jarman points out (*y*), "does not (like that of Scotland) (*z*) admit of the creation of personal inalienable trusts, for the purpose of maintenance, or otherwise, except in the case of women under coverture, who, it is well known, may be restrained from anticipation" (*a*).

May be made determinable on alienation.

But a life interest in real or personal property or an annuity may be made determinable on voluntary alienation (*b*) either by

(*r*) See *Churchill* v. *Marks*, 1 Coll. 441; *Re Payne*, 25 Bea. 556 (in both of which the bequeathed interest was during the specified period contingent as well as reversionary); *Kearsley* v. *Woodcock*, 3 Ha. 185; *Kiallmark* v. *Kiallmark*, 26 L. J. Ch. 1; *Pearson* v. *Dolman*, L. R. 3 Eq. 315; *Samuel* v. *Samuel*, 12 Ch. D. 152; *Graham* v. *Lee*, 23 Bea. 388 (in the two last-mentioned cases of which the validity of such a condition was unquestioned). But see *Re Spencer*, 30 Ch. D. 183 (as regards the shares of the unmarried daughters).

(*s*) *Powell* v. *Boggis*, 35 Bea. 535.

(*t*) See *Shee* v. *Hale*, 13 Ves. 404 ("authorise or intend to authorise any person to receive"); *Brandon* v. *Aston*, 2 Y. & C. C. C. 24 ("incumber or anticipate"); *Re Amherst's Trusts*, L. R. 13 Eq. 464; *Re Baker*, [1904] 1 Ch. 157. As to what amounts to an alienation or attempt to alienate, see *post*, p. 1473. As to a condition of forfeiture on the legatee making a composition with his creditors, see *Sharp* v. *Cosserat*, 20 Bea. 470.

(*u*) [1896] 2 Ch. 311.

(*x*) *Brandon* v. *Robinson*, 18 Ves. 429. See this and the other cases cited *post*, pp. 1475 *seq.* In *Lewes* v. *Lewes*, 6 Sim. 304, a declaration that a tenant for life should not have power to alienate his interest, followed by a proviso that if he should in any way "impede or frustrate the trusts" of the will, the income should no longer be paid to him, was held to be equivalent to an interest determinable on alienation. But a clause empowering a trustee to require the personal attendance and receipt of the tenant for life does not make his interest inalienable: *Arden* v. *Goodacre*, 11 C. B. 883.

(*y*) First ed., p. 830.

(*z*) Under a settlement of Scotch property executed in Scotland in Scotch form, a domiciled Englishman may be entitled to an "alimentary provision" which cannot be taken by his general creditors: *Re Fitzgerald*, [1904] 1 Ch. 573. It would seem that a similar result would follow under a Scottish testamentary disposition.

(*a*) *Post*, p. 1490.

(*b*) As to bankruptcy and involuntary alienation, see *post*, p. 1475. And see *Re Carew*, [1896] 2 Ch. 311, above; and *Re Travis*, [1914] W. N. 163 (as to a charge payable after the period of restriction).

being limited until alienation (*c*) or by an express gift over or clause of forfeiture on alienation (*d*). If, however, a life interest is given to a person, followed by limitations or trusts which in effect give him an absolute interest (such as a general power of appointment), then the ordinary rule applies, and any restriction on alienation is void for repugnancy (*e*).

In the case of an annuity, if the annuitant dies before the annuity is purchased, or if the testator's estate is deficient, other considerations arise (*f*).

Purchase of annuity.

Where a sum of money is given to be invested in the purchase, in the names of trustees, of an annuity for the benefit of A during his life, with a gift over on alienation, this gift over is effective (*g*). If, however, there is no gift over, but simply a declaration that in the event of the annuitant aliening his annuity, it shall cease as if he were dead, this, it seems, is merely *in terrorem*, and has no operation (*h*). Or if the testator directs the annuity to be purchased in the name of the annuitant, and declares that he shall not be entitled to have the value of it, and that if he sells his annuity it shall cease and form part of the testator's residuary estate, this is repugnant to the original gift of the annuity, on principles already explained (*i*), and has no operation (*k*).

Reversionary annuity.

What happens when an annuity, determinable on alienation, is directed to be purchased on a future event, and the annuitant dies before the event happens, without having aliened the annuity, is discussed elsewhere (*l*).

Discretionary trusts are considered in Section VII (ii) below.

What will cause a forfeiture.

(v) *What will cause a Forfeiture.*—The cases on this question are, perhaps, not quite consistent, but the following points seem to have been decided.

Ignorance.

Ignorance of the existence of the condition does not prevent a forfeiture from taking effect (*m*).

Instrument not intended to operate as an alienation.

An instrument which is not intended to operate as an assignment unless it can do so without causing a forfeiture, does not

(*c*) As in *Carter* v. *Carter*, 3 K. & J. 617.
(*d*) As in *Wilkinson* v. *Wilkinson*, 3 Sw. 515; *Rochford* v. *Hackman*, 9 Ha. 475; *Hurst* v. *Hurst*, 21 Ch. D. 278.
(*e*) *Re Wolstenholme*, 43 L. T. 752.
(*f*) See *post*, p. 2022.
(*g*) *Shee* v. *Hale*, 13 Ves. 404; *Hatton* v. *May*, 3 Ch. D. 148. See *Day* v. *Day*, 22 L. J. Ch. 878.
(*h*) See *Re Mabbett*, [1891] 1 Ch. 707, citing *Roper* v. *Roper*, 3 Ch. D. 714.
(*i*) *Ante*, p. 537.
(*k*) *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285.
(*l*) *Ante*, p. 1110.
(*m*) *Carter* v. *Carter*, 3 K. & J. 617, *supra*. Compare *Re Baker*, [1904] 1 Ch. 157.

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amount to an alienation (*n*). In *Re Sheward* (*o*), a person signed a document which amounted in terms to an assignment of his life interest, but it was proved that as between him and the creditor the document was not intended to have this effect: it was held by Kekewich, J., that it did not operate as a forfeiture.

Forfeiture not effected by ineffectual attempt to anticipate.

Where there is a gift of a life interest to a married woman without power of anticipation, with a gift over on her death or "on her anticipating" her interest, any attempted assignment of her life interest is simply inoperative, and accordingly does not effect a forfeiture (*p*).

Effect of covenant to settle.

In *Re Smith* (*q*), A by his marriage settlement covenanted to settle all property to which he should become entitled during the marriage not exceeding £1,000. Under the trusts of his father's will A became entitled to receive the income of certain property until any event should happen in consequence of which he would cease to be so entitled. Held that the equitable assignment of A's life interest at the moment of the testator's death would have constituted an event if the covenant applied to it; but that as the effect of the covenant would be to destroy that interest at the moment of its creation the covenant did not apply and there was no forfeiture of the life interest under the will.

An instrument which, but for the condition, would operate as an alienation, is an alienation for that purpose, although the condition prevents it from having any operation (*r*).

No particular form of words is required to effect an alienation within the meaning of a clause of forfeiture (*s*).

Receiver in lunacy.

An order in lunacy appointing a receiver does not operate to cause a forfeiture (*t*).

(*n*) *Samuel* v. *Samuel*, 12 Ch. D. 152. An assignment which constitutes an act of bankruptcy may be a breach of a condition against alienation: *Kearsley* v. *Woodcock*, 8 Jur. 120.

(*o*) [1893] 3 Ch. 502.

(*p*) *Re Wormald*, 43 Ch. D. 630; *Re Adamson*, 109 L. T. 25.

(*q*) [1928] 1 Ch. 10; *Re Crawshay*, [1891] 3 Ch. 176; but a condition that a legacy is not to be subject to a covenant to settle is void: *Re Wharton*, 102 L. T. 531, *ante*, p. 1441.

(*r*) *Hurst* v. *Hurst*, 21 Ch. D. 278; *Re Perkins' Settlement*, 56 Sol. J. 412 (where the settlor had settled the property on himself).

(*s*) See *Re Sheward*, [1893] 3 Ch. 502. A power of attorney given to a creditor to receive dividends is irrevocable, and is therefore a clear violation of a clause against incumbering them: *Wilkinson* v. *Wilkinson*, 3 Sw. 515; unless arrears then due cover the debt: *Cox* v. *Bockett*, 35 Bea. 48; as to which, see *South Western Loan Co.* v. *Robertson*, 8 Q. B. D. 17. So is an authority by agreement with the creditor given to trustees to pay dividends to the creditor: *Oldham* v. *Oldham*, L. R. 3 Eq. 404; and so held notwithstanding an arrangement between the debtor and creditor that the authority should be binding in honour only, this being considered a mere contrivance to evade the condition, *ib.* A covenant to allow a person to receive income is an equitable assignment: *Re Spearman*, 82 L. T. 302.

(*t*) *Re Marshall*, [1920] 1 Ch. 284.

What is an alienation.

An assignment to trustees upon trust for the assignor is not, it is said, such an alienation as to cause a forfeiture, even if the assignor appoints the trustees, his attorneys, to receive the income and pay their expenses out of it (*x*). But if persons entitled to property were to transfer it to an incorporated company, that would no doubt be held to be an alienation, even if they retained the management and owned all the shares (*y*). A letter addressed by the tenant for life to the trustee or custodian of the fund requesting him to pay part of the income when received to a certain person will not cause a forfeiture (*z*).

Taking the benefit of the Insolvents Acts may operate as a forfeiture under a condition restraining voluntary alienation (*a*); and the same result may be produced by a petition by the debtor himself for adjudication or liquidation under the Bankruptcy Act of 1861, or of 1869 (*b*), or of 1883. Adjudication in a hostile bankruptcy does not, as a general rule, have this effect (*c*). And even a declaration of insolvency, leading to an adjudication in bankruptcy, is not a voluntary alienation (*d*).

Nor is a seizure of the property under judicial process (*e*). The appointment of a receiver is not a "charge" within the meaning of a clause of forfeiture (*f*).

Bankruptcy.

In *Re Cotgrave* (*g*), Kekewich, J., decided that where a legatee was adjudicated bankrupt on his own petition, this constituted an alienation. In *Re Griffiths* (*h*), Romer, J., held that a petition in bankruptcy was not an assignment, etc., by "a deed or document." He considered many of the cases referred to in the previous footnotes and found a difficulty in following the reasoning of Kekewich, J.

(*x*) *Re Tancred's Settlement*, [1903] 1 Ch. 715; *Re Swannell*, 101 L. T. 76; *Lockwood* v. *Sikes*, 51 L. T. 562 (settlement).

(*y*) *Re Sax*, 62 L. J. Ch. 688, *ante*, p. 539.

(*z*) *Durran* v. *Durran*, 91 L. T., pp. 187, 819.

(*a*) *Shee* v. *Hale*, 13 Ves. 404; *Martin* v. *Margham*, 14 Sim. 230; *Brandon* v. *Aston*, 2 Y. & C. C. C. 24; *Rochford* v. *Hackman*, 9 Ha. 475; *Churchill* v. *Marks*, 1 Coll. 441. See *Townsend* v. *Early*, 34 Bea. 23 (Colonial Insolvent Act).

(*b*) *Lloyd* v. *Lloyd*, L. R. 2 Eq. 722; *Re Amherst's Trusts*, L. R. 13 Eq. 464.

(*c*) *Wilkinson* v. *Wilkinson*, Coop. 259; *Lear* v. *Leggett*, 2 Sim. 479, 1 R. & My. 690; *Whitfield* v. *Prickett*, 2 Kee. 608; *Pym* v. *Lockyer*, 12 Sim. 394. The decision in *Cooper* v. *Wyatt*, 5 Mad. 482, is *contra*.

(*d*) *Jones* v. *Wyse*, 2 Kee. 285; *Graham* v. *Lee*, 23 Bea. 388. In *Craven* v. *Brady*, L. R. 4 Eq. 209, 4 Ch. 296, marriage was held an act whereby a woman was deprived of "the right to receive or the control over" rents of real estate. But in *Bonfield* v. *Hassell*, 32 Bea. 217, a personal annuity to a woman with a clause prohibiting any act whereby it might "vest or become liable to vest" in any other person, was held not forfeited by marriage. This question cannot now arise in cases within the Married Women's Property Act, 1882, ss. 2 and 5.

(*e*) *R.* v. *Robinson*, Wightw. 386.

(*f*) *Campbell* v. *Campbell*, 72 L. T. 294.

(*g*) [1903] 2 Ch. 705.

(*h*) [1926] Ch. 1007.

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A document authorising the trustees of the will to pay the income to the trustee under a scheme of composition is an equitable assignment which works a forfeiture (*i*). A bankruptcy on a creditor's petition is not an attempt to become bankrupt (*j*).

What is an attempt to alienate.

Negotiations for an assignment or charge do not produce a forfeiture under a clause prohibiting "attempts" to alienate (*jj*). To constitute an "attempt" there must be some act which, but for the clause of forfeiture, or some rule of law, would operate as an alienation (*k*).

Accrued income.

The general rule seems to be that a provision against alienation only applies to future income. "I think that the epoch at which the destination of any instalment of income is to be determined is the moment when that instalment either accrues due or is in the hands of the trustees ready for application in accordance with the trusts of the will. For the present case it is not necessary to determine which. If at that instant the son [the beneficiary] has not by his own act or default or by process or operation of law been deprived of the enjoyment of it, I think he is entitled to receive it. The trustees have not conferred on them by the will any discretion to retain it in their hands with a view to its application at a later period, and it seems to me that the right of the son to receive cannot be affected by subsequent events" (*l*). Accordingly an assignment of accrued income does not operate as a forfeiture under the ordinary form of provision against alienation (*m*). Where the instrument of assignment is ambiguous, the Court will, if possible, construe it as applying to accrued income, so as to avoid a forfeiture (*n*).

Effect of a release or re-assignment.

Where a reversionary interest in property is given to a person subject to a valid provision making his interest liable to forfeiture on future alienation, and he makes an assignment or charge which is got rid of before the interest falls into possession, no forfeiture takes place (*o*). If this is not done, it is not

(*i*) *Re Hamilton*, 65 Sol. J. 173.

(*j*) *Re Evans*, [1920] 2 Ch. 304.

(*jj*) See note (*d*), *ante*.

(*k*) *Graham* v. *Lee*, *supra*, n. (*d*); *Re Wormald*, 43 Ch. D. 630, *ante*, p. 1472; *Re Porter*, [1892] 3 Ch. 481; *Re Tancred's Settlement*, [1903] 1 Ch. 715. Compare *Stephens* v. *James*, 4 Sim. 499, where the forfeiture was to result from any act done "with a view to charge" the life interest.

(*l*) *Per* Stirling, J., in *Re Sampson*, [1896] 1 Ch., at p. 636, adopted by Farwell, J., in *Re Greenwood*, [1901] 1 Ch. 887, *post*, p. 1487. See *Re Clark*, [1926] Ch. 833.

(*m*) *Re Stulz's Trusts*, 4 D. M. & G. 404.

(*n*) *Durran* v. *Durran*, 91 L. T. 187.

(*o*) *Re Parnham's Trusts*, 46 L. J. Ch. 80; *Samuel* v. *Samuel*, 12 Ch. D. 152; *Hurst* v. *Hurst*, 21 Ch. D. 278. A binding agreement to release would no doubt be equivalent to an actual release, on the principle laid down in *Ancona* v. *Waddell*, 10 Ch. D. 157; see *Robertson* v. *Richardson*, and *Metcalfe* v. *Metcalfe*, *post*, n. (*p*).

always easy to say what operates as a forfeiture. One view is that the clause of forfeiture does not take effect if the assignment or charge is got rid of before any property or income is actually receivable (*p*). Another view is that forfeiture takes place if the charge or assignment continues in force until the period of distribution has arrived (*q*). Some Judges seem to think that the question may depend on whether the assignee or incumbrancer has taken any steps to enforce his rights (*r*). The point is still undecided (*s*).

If the assignment or charge is effected after the interest has fallen into possession, a forfeiture is produced, even if the assignment or charge is got rid of before the assignee or incumbrancer has taken any benefit (*t*). This result, however, can of course only follow where the interest is a life interest.

Where forfeiture is only to take place on the happening of an event whereby, if the income belonged absolutely to the tenant for life, he would be "deprived of the personal enjoyment" of it, then it seems that an assignment or charge does not produce a forfeiture if it is vacated before any income is available to satisfy it (*u*).

VIII.—Conditions against Involuntary Alienation.—(i) *General Principles.*—Mr. Jarman continues (*v*): "Upon the principle which forbids the disposition of property divested of its legal incidents, it is clear that no exemption can be created by the author of the gift, from its liability to the debts of the donee; and property cannot be so settled as to be unaffected by bankruptcy or insolvency, which is a transfer, by operation of law, of the whole estate; and, it is immaterial for this purpose, what is the extent of interest conferred by the gift, the principle being no less applicable to a life interest than to an absolute or transmissible property. Whatever remains in the bankrupt or insolvent debtor at the time of his bankruptcy or insolvency, becomes vested in the person or persons on whom the law, in such event, has cast the property."

Property cannot be given to a man exempt from the operation of bankruptcy.

Thus, in *Brandon* v. *Robinson* (*w*), where a testator, after devising his real and personal property to trustees, upon trust

Brandon v. *Robinson.*

(*p*) *White* v. *Chitty*, L. R. 1 Eq. 372; *Re Parnham's Trusts*, L. R. 13 Eq. 413; 46 L. J. Ch. 80; *Robertson* v. *Richardson*, 30 Ch. D. 623; *Re Broughton*, 57 L. T. 8; *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1 (all cases of forfeiture on bankruptcy).

(*q*) *Samuel* v. *Samuel*, 12 Ch. D. 152.

(*r*) *Lloyd* v. *Lloyd*, L. R. 2 Eq. 722; *Robertson* v. *Richardson*, 30 Ch. D. 623; *Re Broughton*, 57 L. T. 8.

(*s*) *Re Loftus-Otway*, [1895] 2 Ch. 235.

(*t*) *Hurst* v. *Hurst*, 21 Ch. D. 278; *Re Baker*, [1904] 1 Ch. 157.

(*u*) *Re Mair*, [1909] 2 Ch. 280.

(*v*) First ed. p. 815.

(*w*) 18 Ves. 429.

to sell and divide the produce among his children, directed that the share of his son should be invested at interest, in the names of the trustees, during his life; and that the dividends and interest thereof, as the same became payable, should be paid by them from time to time into his own proper hands, or on his order and receipt, subscribed with his own proper hand, to the intent that the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or of any part thereof; and, upon his decease, the principal, together with the interest thereof, to be paid and applied to such persons as would be entitled to any personal estate of A's said son, if he had died intestate. The legatee became bankrupt, and it was held by Lord Eldon, C., that the assignees were entitled to the benefit of the bequest.

Assignees in bankruptcy entitled to benefit of trust for maintenance.

In *Graves* v. *Dolphin* (*x*), where a testator directed trustees to pay an annuity of £500 to his son I. for his life, and declared that it was intended for his personal maintenance and support; and should not, on any account or pretence whatsoever, be subject or liable to the debts, engagements, charges, or incumbrances of his said son, but that the same should, as it became payable, be paid over into the proper hands of him, the testator's said son, and not to any other person or persons whomsoever; and the receipts of the son only were to be sufficient discharges. The son became bankrupt, and it was held by Sir J. Leach, V.-C., that the annuity belonged to his assignees.

Reference in gift will not render valid a subsequent proviso determining estate in fee on bankruptcy.

In *Re Machu* (*y*), certain freehold, copyhold, and leasehold houses and lands were devised and bequeathed to the use of A, her heirs, executors, administrators, and assigns, for her separate use, "subject nevertheless to the proviso hereinafter contained for determining her estate and interest in the event hereinafter mentioned." In a subsequent part of the will was contained a proviso that in case A should at any time be declared a bankrupt then and thenceforth the devise thereinbefore made to her should be void, and the premises should thenceforth go, remain, and be to the use of her children. It was held that the proviso was repugnant and void.

In *Re Dugdale* (*z*), a testatrix gave property upon trust for J., and declared that if he should do, execute, commit, or suffer any act, deed, or thing whereby, or by reason or in consequence whereof, or if by operation of law, he would be deprived of the

(*x*) 1 Sim. 66.
(*y*) 21 Ch. D. 838.
(*z*) 38 Ch. D. 176. See also *Corbett* v. *Corbett*, 14 P. D. 7; *Metcalfe* v. *Metcalfe*, 43 Ch. D. 633.

personal beneficial enjoyment, then the trust for his benefit should cease and the property should be held in trust for other persons : it was held that he took an absolute interest.

Gift may be made defeasible on bankruptcy, etc., before receipt by legatee.

It seems, however, that property may be given to A subject to a provision for forfeiture in the event of his becoming bankrupt before he acquires actual possession, with a gift over in that event (*a*). But the bankruptcy must be a genuine one : thus, in *Re Carew* (*b*), where A, the beneficiary, was adjudicated a bankrupt on his own application, and the adjudication was shortly afterwards annulled on the ground that it ought not to have been made, this was treated as a mere trick and contrivance, the object being to make the gift over take effect, and thus defeat A's creditors.

Re Carew.

Contingent or defeasible interest.

And although property cannot be given absolutely to a person, with a gift over on his bankruptcy or involuntary alienation, yet property in which a person takes a contingent interest, or a vested interest liable to be divested, may be given over on his bankruptcy, etc., before his interest becomes absolutely vested. Thus, in *Pearson* v. *Dolman* (*c*), a fund was given upon trust to pay the income to A until he attained twenty-five, unless he became bankrupt, or compounded with his creditors, or disposed of his interest, in any of which cases the fund was to go over to other persons; on his attaining twenty-five the fund was to be paid to him, and there was a gift over on his dying under that age leaving children; it was held that these trusts were valid and effectual.

In *Re Smith* (*d*), a forfeiture clause held to apply to vested as well as to contingent gifts was held void for repugnancy.

Where trustees have a discretion as to mode of application.

(ii) *Discretionary Trusts.*—As Mr. Jarman points out (*e*) : "the vesting in trustees of a discretion as to the mode in which income is to be applied for the benefit of a *cestui que trust*, does not take it out of the operation of bankruptcy or insolvency; to effect which the discretion of the trustees must extend, not merely to the manner of applying the income for the benefit of the *cestui que trust*, but also to the enabling of them to apply it, either for his benefit, or for some other purpose."

Thus, in *Green* v. *Spicer* (*f*), where a testator devised certain estates to trustees, upon trust to pay and apply the rents and profits to or for the board, lodging, maintenance, and support and benefit of his son R., at such times and in such manner as

(*a*) *Re Goulder*, [1905] 2 Ch. 100; *Kiallmark* v. *Kiallmark*, 26 L. J. Ch. 1 (settlement by deed).
(*b*) [1896] 2 Ch. 311.
(*c*) L. R. 3 Eq. 315.
(*d*) [1916] 1 Ch. 369; *Re Jones' Will*, 23 L. T. 211.
(*e*) First ed., p. 821.
(*f*) 1 R. & My. 395, Taml. 396.

they should think proper, for his life: it being the testator's wish, that the application of the rents and profits for the benefit of his said son might be at the entire discretion of the said trustees; and that his son should not have any power to sell or mortgage or anticipate in any way the same rents and profits. R. took the benefit of an insolvent act, whereupon his interest was claimed by the assignee. Sir J. Leach, M.R., held the assignee to be entitled, on the ground that the insolvent was the sole and exclusive object of the trust. The trustees were bound, he said, to apply the rents for the benefit of R., and their discretion applied only to the manner of their application. The decisions in *Piercy* v. *Roberts* (*g*) (where the gift was of capital) and *Younghusband* v. *Gisborne* (*h*) are to the same effect (*i*).

Re Coleman.

In *Re Coleman* (*k*), a testator directed the income of his property to be applied in the maintenance, education, and advancement of his four children in such manner as his trustees should deem most expedient, until the youngest child attained twenty-one, and then to divide the property equally among the children then living. While the youngest child was still under age, one of the children, J., who had attained twenty-one, assigned all his interest under the will to H. It was held that during the continuance of the trust no child was entitled to the payment of any part of the income, and that H. took no interest in the income, except such monies or property, if any, as might be paid or delivered to or appropriated for J. Consequently, if the trustees paid money or delivered goods to J., they would be liable to H. for the amount of the money or the value of the goods (*l*). But apparently the trustees might apply the money for the benefit of J. in such a way as not to give him anything but a personal right, which would not pass to his assignee, as by paying for his board and lodging.

Distinction where trustees have discretion as to amount.

But if the trust is so expressed that any income not expended by the trustees for the maintenance of the spendthrift may be applied or accumulated for the benefit of other persons, then the spendthrift has no interest which is capable of voluntary or involuntary assignment. Thus, in *Twopeny* v. *Peyton* (*m*), where the trustees had a discretion to apply the whole or such part of the income as they should think fit, for the maintenance

(*g*) 1 Myl. & K. 4.

(*h*) 1 Coll. 400; cited *ante*, p. 860.

(*i*) As to the effect of a discretionary trust under the law of Scotland, see *Chambers* v. *Smith*, 3 A. C. 795.

(*k*) 39 Ch. D. 443.

(*l*) So held acc. in *Re Neil*, 62 L. T. 649. This case and *Re Coleman* were both cases of assignment, not bankruptcy.

(*m*) 10 Sim. 487 (practically overruling the V.-C.'s previous inconsistent decision in *Snowdon* v. *Dales*, 6 Sim. 524). See *The Queen* v. *The Judge of the County Court of Lincolnshire*, 20 Q. B. D. 167.

and support of the *cestui que trust*, who (the testatrix recited) had become a bankrupt, and insane, and for no other purpose whatsoever; Shadwell, V.-C., held that the assignees took no interest.

Re Bullock.

Again, in *Re Bullock* (*n*), where there was a discretionary trust to pay to A or apply for his benefit either the whole, or so much, and so much only of the income of a certain fund as the trustees should in their uncontrolled discretion think fit, and subject thereto to hold the fund and the income thereof in trust for other persons, it was held that the trust for A was valid, and although the income could not be properly paid to A, the whole or part thereof might be applied by the trustees for his maintenance. In this case, the trustee in A's bankruptcy withdrew his claim to receive the income.

In such cases as these, it seems that the trustees can only apply the income in such a way as to give the beneficiary a personal right incapable of passing by assignment, as by providing him with board and lodging (*o*): they must not pay money, or deliver goods, or pay for goods to be delivered to him (*p*).

Creditors entitled to bankrupt's undivided share, if ascertainable.

If the trusts of the property be declared in favour of several, as a man, his wife and children, to be applied for their benefit, at the discretion of the trustees, the man's creditors, in case of his bankruptcy, are entitled to as much of the fund as he would himself have been separately entitled to, after providing for the maintenance of the wife and children (*q*). But in a case (*r*) where the man was entitled to nothing separately, but only to an enjoyment of the property jointly with his wife and children at the discretion of the trustees, it was held that the creditors had no claim. The effect of a trust of this kind is that the trustees have a discretion as to the amount which they can allow

Creditors may be excluded where the trustees have a discretion to exclude the bankrupt.

(*n*) 60 L. J. Ch. 341.

(*o*) See *Godden* v. *Crowhurst*, 10 Sim., at p. 656.

(*p*) See *Re Coleman*, 39 Ch. D. 443, stated above. In *Re Ashby*, [1892] 1 Q. B. 872, Vaughan Williams, J., said, "It seems to me . . . that if the trustees, in the exercise of their discretion, do pay the rents and profits of this estate to the bankrupt, to the extent to which sums are paid to the bankrupt in excess of the amount necessary for his mere support, then the trustee in bankruptcy will be able to insist upon the bankrupt accounting to him for the rents and profits so received." This no doubt is true, but it is submitted that the dictum is erroneous if it is meant to imply that the trustees under the settlement would be justified in paying the income to the bankrupt.

(*q*) *Page* v. *Way*, 3 Bea. 20; *Kearsley* v. *Woodcock*, 3 Hare, 185; *Lord* v. *Bunn*, 2 Y. & C. C. C. 98; *Wallace* v. *Anderson*, 16 Bea. 533. Some of these cases arose on deeds, but the same principles seem to apply to wills.

(*r*) *Godden* v. *Crowhurst*, 10 Sim. 642. The principle for which this case is cited is recognised in *Kearsley* v. *Woodcock*, 3 Hare, 185; and by the Court of Appeal in *Re Coleman*, 39 Ch. D. 443; but the decision itself has been questioned in *Kearsley* v. *Woodcock*; see *Younghusband* v. *Gisborne*, 1 Coll. 400.

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to each object of the trust, so that by allowing to one a merely nominal share they can practically exclude him (*s*). And where the trustees are expressly authorised to apply the income for the benefit of A and his wife and children, or any of them, this authorises them to exclude A altogether, and A's creditors, in the event of his bankruptcy, take only such defeasible interest as A himself had (*t*).

In *Rippon* v. *Norton* (*u*), the objects of a discretionary trust were A and his three children; A became bankrupt, and it was held that A's creditors were entitled to one-fourth of his life interest. But no reasons are given for the decision, which is clearly wrong (*x*).

Life interest may be made to cease on bankruptcy.

(iii) *Life Interest Determinable on Bankruptcy, or other Involuntary Alienation.*—" But though," says Mr. Jarman (*y*), " a testator is not allowed to vest in the object of his bounty, an inalienable interest exempt from the operation of bankruptcy; yet there is no principle of law which forbids his giving a life interest in real or personal property, with a proviso, making it to cease on such event: for whatever objection there may be to allowing a person to modify his own property, in such manner as to be divested on bankruptcy or insolvency (*z*), it seems impossible, on any sound principle, to deny to a third person the power of shifting the subject of his bounty to another, when it can no longer be enjoyed by its intended object. The validity of such provisions was established in the early case of *Lockyer* v. *Savage* (*a*), where £4,000 was settled by the father of a *feme*

(*s*) See *Re Coleman*, 39 Ch. D. 443.

(*t*) *Lord* v. *Bunn*, 2 Y. & C. C. C. 98.

(*u*) 2 Bea. 63. The fact that the original trustees refused to act was not the ground of the decision, as new trustees were appointed by the Court. In *Re Coe's Trust* (4 K. & J. 199) a testator gave a fund upon trust for the maintenance or advancement of his son at the discretion of the trustees, expressing a wish that his son should have the whole fund if he conducted himself to the satisfaction of the trustees, with a gift over of the unapplied part; the trustees paid the money into Court; it was held that as the trustees had declined to exercise their power of depriving the son of the fund and there being no suggestion of misconduct on his part, the Court could not exercise their power, and that the trust for the son was absolute. But this case obviously has nothing to do with the rule discussed in the text.

(*x*) See *per* Fry, J., in *Re Coleman*, 39 Ch. D., at p. 448.

(*y*) First ed., p. 823.

(*z*) As to this, see *Wilson* v. *Greenwood*, 1 Sw. 471; *Ex p. Mackay*, L. R. 8 Ch. 643; *Ex p. Williams*, 7 Ch. D. 138.

(*a*) 2 Stra. 947. " This case (among many others) shows that there is not (as sometimes contended) any real distinction between a trust for A until bankruptcy, and a trust for A for life, with a proviso determining the life interest on bankruptcy: each is equally valid." (Note by Mr. Jarman.) Of course clauses of this nature do not affect arrears of income: *Re Stulz's Trusts*, 4 D. M. & G. 404. See also *South Western Loan Company* v. *Robertson*, 8 Q. B. D. 17, where a charging order under a judgment was held effectual against arrears of income in the hands of trustees. It would seem clear on general principles (see *ante*, p. 1462) that a limitation of a fee simple to A

coverte, for the use of the husband for life, with a direction that *if he failed in the world*, the trustees should pay the produce to the separate maintenance of his wife and children; and the latter trust was held to be good (*b*).

" Indeed, this principle is now so well settled, that the only point on which any doubt can arise is, whether the clause is so framed as to apply to bankruptcy, which we shall see has often been a subject of controversy (*c*).

" It appears that bankruptcy is a forfeiture, under a proviso prohibiting alienation, if the terms of such proviso extend to alienations by operation of law, as well as those produced by the act of the devisee; bankruptcy being regarded as an alienation of the former kind.

Where bankruptcy is a forfeiture under a clause restraining alienation.

" Thus, in *Dommett* v. *Bedford* (*d*), where a testator, after giving an annuity, charged on real estate, to A for life, directed that it should from time to time be paid *to himself only*, and that a receipt under his own hand, and no other, should be a sufficient discharge for the payment thereof; the testator's intent being that the said annuity, or any part thereof, should *not on any account be alienated* for the whole term of his life, or for any part of the said term; and, *if so alienated, the said annuity should cease*. A having become bankrupt, it was held that the annuity had determined.

" So in *Cooper* v. *Wyatt* (*e*), where the overplus of the rents of a moiety of the testator's real estate was directed to be paid into the hands of S., *but not to his assigns*, for the term of his natural life, for his *own sole* use and benefit, with a limitation over if the devisee should, by any ways or means whatsoever, *sell, dispose of, or incumber*, the right, benefit, or advantage, he might have for life, or any part thereof; Sir J. Leach, V.-C., held that bankruptcy was a forfeiture; his Honor considering that the expressions of the testator denoted that the devisee's

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until bankruptcy would be no more valid than a devise of the fee to him subject to a condition purporting to determine his estate on bankruptcy; as to which, see *ante*, p. 1475.

(*b*) *Re Cooper*, 116 L. T. 760 (income undisposed of during bankrupt's life). Where property is given in trust for a person until bankruptcy, and in case of his bankruptcy a discretionary trust is vested in trustees to apply for his benefit the whole or any part of the income, with a gift over, the Court will not interfere with an honest exercise of that discretion, and if the trustees do not apply the whole of the income, the unapplied surplus goes to those entitled under the gift over, *Re Bullock*, 60 L. J. Ch. 341, *ante*, p. 1479.

(*c*) As to bankruptcy produced by the contrivance of the beneficiary with intent to defeat his creditors, see *Re Carew*, [1896] 2 Ch. 311, *ante*, p. 1477. In that case the beneficiary's interest was absolute, and not merely a life interest, but the principle appears to be the same.

(*d*) 3 Ves. 149, 6 T. R. 684.

(*e*) 5 Mad. 482. " A case of doubtful authority ": Davids. Conv. iii 113, note (*b*).

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interest was to cease when the property could be no longer personally enjoyed by him.

Bankruptcy held *not* to be a forfeiture.

"On the other hand, in the case of *Wilkinson* v. *Wilkinson* (*f*), where a testator, after giving certain annuities and other life interests to several persons, provided that in case they should 'respectively *assign or dispose of or otherwise charge or incumber* the life estates, the annuities, and provisions so made to and for them during their respective lives as aforesaid, *so as not to be entitled to the personal receipt, use, and enjoyment thereof*; then the annuity, life estate, or interest, of him, her, or their heirs respectively (*g*), so doing, or attempting so to do,' should cease, and should immediately thereupon devolve upon the persons who should be next entitled thereto. Sir W. Grant, M.R., was of opinion that the testator had not with sufficient clearness expressed an intention that the life estate, which he had given to his son, should cease upon bankruptcy.

"So in the case of *Lear* v. *Leggett* (*h*), where a testator, after bequeathing to his son and daughters the dividends of certain stock for their respective lives, declared that their provisions should not be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever, or by anticipation of the receipt. And in case they, or any or either of them, should charge or attempt to charge, affect, or incumber the same, or any part or parts thereof respectively, then such mortgage, sale or other disposition, or incumbrance so to be made by them, or any or either of them, on his, her, or their interest, should operate as a complete forfeiture thereof, and the same should devolve as if he, she, or they were then dead. The son became bankrupt, and Sir L. Chadwell, V.-C., decided that the bankruptcy was not a forfeiture. . . . The case was afterwards brought before Lord Lyndhurst, C., on appeal, when his Lordship affirmed the decree of the V.-C., observing that the prohibition in *Dommett* v. *Bedford* (*i*) was expressed in much more general and comprehensive terms than in the case before him, and might well be construed to extend to alienations by act of law.

"Where the language of a clause restrictive of alienation does not extend to an alienation *in invitum*, it seems that the seizure of the property under a judicial process sued out against the devisee or legatee does not occasion a forfeiture.

(*f*) Coop. 259, 3 Sw. 515, see p. 528.

(*g*) Sic. orig. as reported.

(*h*) 2 Sim. 479, 1 R. & My. 690. See also *Whitfield* v. *Prickett*, 2 Kee. 608; *Graham* v. *Lee*, 23 Bea. 388; *Re Pixley*, 60 L. T. 710; *Re Harvey*, 60 L. T. 710.

(*i*) 6 T. R. 684, *ante*, p. 1481.

Sale under process of outlawry held no forfeiture, clause requiring positive act.

"Thus, in *R.* v. *Robinson* (*k*), where an annuity of £400 was bequeathed to W. as an unalienable provision for his personal use and benefit, for his life, and not otherwise; and so that the same annuity, or any part thereof, should not be subject or liable to be alienated, or be or become in any manner liable to his debts, control, or engagements; and the annuity was made to cease in case W. should 'at any time sell, assign, transfer, or make over, demise, mortgage, charge, or otherwise attempt to alienate,' the annuity or any part thereof, or should 'make, do, execute, or cause or procure to be made, done and executed, any act, deed, matter or thing whatsoever, to charge, alienate or affect, the said annuity,' or any part thereof. A creditor of the legatee sued him to outlawry. Macdonald, C.B., held, on the authority of *Dommett* v. *Bedford* (*l*), and *Doe* d. *Mitchinson* v. *Carter* (*m*), that the seizure of the annuity under the outlawry, at the suit of the Crown, arising merely from the negative, and not the positive acts of the party, was *not* a forfeiture on the words of the bequest, which required a positive act. He considered the words, in the present case, were not so large as in *Dommett* v. *Bedford*, but were more conformable to those in *Doe* v. *Carter*.

Clause restraining should extend to involuntary alienation.

"These cases show that when it is intended to take away a benefit as soon as it cannot be personally enjoyed by the devisee, it should be made to cease on alienation, not only by his own acts, but by operation of law.

Taking benefit of Insolvent Debtors Act a voluntary alienation.

"It seems that taking the benefit of an insolvent act is construed to be an alienation, when bankruptcy would not, as it requires certain acts on the part of the insolvent (*viz.*, the filing of a petition, schedule, etc.), constituting it a voluntary alienation, as distinguished from a bankruptcy, which partakes more of the nature of a compulsory measure" (*n*).

(*k*) Wightw. 386.

(*l*) 6 T. R. 684.

(*m*) 8 T. R. 57. "A lessee having covenanted not to let, set, assign, transfer, or make over, etc., the indenture of lease, a warrant of attorney to confess judgment given to a creditor for the express purpose of enabling him to take the lease in execution, was held to be a fraud on the covenant, and to enable the landlord to recover in ejectment, under a clause of re-entry, on the breach of any of the covenants of the lease. Lord Kenyon observed, 'If the lease had been taken by the creditor under an adverse judgment, the tenant not consenting, it would not have been a forfeiture; but here the tenant concurred throughout, and the whole transaction was performed for the very purpose of enabling the tenant to convey his term to the creditor.' It will be perceived that neither the decision nor the dictum of the C.J. quite touches the case of a warrant of attorney to confess judgment, given without any special intent to evade the restriction on alienation." (Note by Mr. Jarman.) The distinction was recognised in *Doe* v. *Hawke*, 2 East, 481, and *Avison* v. *Holmes*, 1 J. & H. 530. See also *Seymour* v. *Lucas*, 1 Dr. & Sm. 177. And as to contrivances to evade such a clause, see *Oldham* v. *Oldham*, L. R. 3 Eq. 404.

(*n*) See the cases cited *ante*, p. 1473.

The words " unless he attempt to become bankrupt " do not apply to a bankruptcy *in invitum* (*o*).

Bequest to purchase annuity.

Where a sum of money is given to be invested in the purchase of an annuity for A during his life, and the testator wishes the annuity to cease on A's bankruptcy, it seems that in order to produce this result the annuity must be directed to be purchased in the names of trustees, with a gift over in the event of A's bankruptcy (*p*). It has been already explained that a mere direction for the cesser of an annuity on voluntary alienation, without a gift over, is inoperative, even where the annuity is directed to be purchased in the names of trustees, and that where the annuity is directed to be purchased in the name of the annuitant, a gift over on alienation is inoperative (*q*). The same rules seem to apply to clauses of forfeiture on bankruptcy, etc.

As to validity of condition determining legatee's interest where there is no gift over.

Lord Eldon is sometimes supposed to have intended in *Brandon* v. *Robinson* (*r*) to lay it down that a limitation over to some third person is in all cases essential to the validity of a condition making a life interest cease on bankruptcy. His remarks, however, are not to be taken as going to that extent (*s*); and *Dommett* v. *Bedford* (*t*) and *Joel* v. *Mills* (*u*), in which the life interest was held to cease upon the proviso for cesser without any gift over, are direct authorities to the contrary.

Foreign bankruptcy.

It seems that " bankruptcy " in a will *prima facie* means bankruptcy under English law, and that consequently a life interest determinable on bankruptcy is not necessarily forfeited by the legatee or devisee becoming bankrupt under the law of a foreign country (*x*). However, in *Re Aylwin's Trusts* (*y*), it was held by Wickens, V.-C., that a gift until bankruptcy or insolvency was forfeited by judicial insolvency in Australia, and in *Re James* (*z*) it was held by Kekewich, J., that a Scotch sequestration was equivalent to an English bankruptcy; in that case it was also held that there was no forfeiture, because the meaning of the whole clause showed that the income was not to go over unless the legatee was actually deprived of it, and this

Re Aylwin's Trusts.

(*o*) *Re Evans*, [1920] 2 Ch. 304.
(*p*) See *Day* v. *Day*, 22 L. J. Ch. 878.
(*q*) *Ante*, p. 1471.
(*r*) 18 Ves., see p. 435; and see *per* Wood, V.-C., *Stroud* v. *Norman*, Kay, at p. 330.
(*s*) See *per* Turner, V.-C., *Rochford* v. *Hackman*, 9 Hare, pp. 481, 482.
(*t*) 6 T. R. 684.
(*u*) 3 K. & J. 458.
(*x*) *Re Levy's Trusts*, 30 Ch. D. 119; *Re Hayward*, [1897] 1 Ch. 905; both cases of colonial bankruptcy.
(*y*) L. R. 16 Eq. 585.
(*z*) 62 L. T. 454.

did not happen, as the sequestration was annulled before it became effective (*a*).

Composition with creditors.

Sometimes a life interest is made determinable on the legatee entering into a composition with his creditors (*b*), or becoming insolvent.

"Insolvency" means inability to pay in full.

Where "insolvency" is made a cause of forfeiture, it is not generally necessary that the legatee should have taken the benefit of any Act for the relief of insolvent debtors. It is enough that he is unable to pay his debts in full (*c*).

Insolvent Debtors Acts.

In former days, the case not infrequently happened of property being given to a person until he took the benefit of the Acts for the relief of insolvents: it has been held that executing a deed of inspectorship, under the Bankruptcy Act, 1861, was not (*d*), but that making a composition under the Bankruptcy Act, 1869, was (*e*) a forfeiture under such a clause.

Colonial insolvency.

A declaration of insolvency under a colonial statute may constitute insolvency within the meaning of an English will (*f*).

"Do or suffer."

To "do or suffer" (*g*) or to "do or permit" (*h*) any act causing alienation has been held to include an act done *in invitum*.

"Vested in."

Where the interest is to determine on its becoming "vested in" any other person, a forfeiture is of course produced by an adjudication in bankruptcy (*i*), or by a creditor obtaining a charge under stat. 1 & 2 Vict. c. 110, s. 14 (*k*): or by the tenant for life electing to take against the instrument under which his interest arises (*l*); but not by the filing of a bankruptcy petition or the execution of a composition deed (*m*), nor, it seems, by the making of a receiving order under the Bankruptcy Act,

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(*a*) See *Re Sartoris*, [1892] 1 Ch. 11, *post*, p. 1486.

(*b*) *Sharp* v. *Cosserat*, 20 Bea. 470 (settlement); *Billson* v. *Crofts*, L. R. 15 Eq. 314.

(*c*) *De Tastet* v. *Le Tavernier*, 1 Kee. 161; *Re Muggeridge's Trusts*, Joh. 625; *Freeman* v. *Bowen*, 35 Bea. 17. The legatee is estopped by a recital of such inability contained in a composition deed executed by him: *Billson* v. *Crofts*, L. R. 15 Eq. 314.

(*d*) *Montefiore* v. *Enthoven*, L. R. 5 Eq. 35.

(*e*) *Nixon* v. *Verry*, 29 Ch. D. 196 (settlement by deed).

(*f*) *Re Aylwin's Trusts*, L. R. 16 Eq. 585; *ante*, p. 1484.

(*g*) *Roffey* v. *Bent*, L. R. 3 Eq. 759; *Dixon* v. *Rowe*, 35 L. T. (N.S.) 548 (sequestration); *Re Vaughan*, [1926] Ir. R. 67 (suffer a judgment).

(*h*) *Ex p. Eyston*, 7 Ch. D. 145.

(*i*) The forfeiture relates back to the act of bankruptcy: *Montefiore* v. *Guedalla*, [1901] 1 Ch. 435. See also cases cited in note (*m*), *infra*. As to foreign bankruptcy, see *post*, p. 1486.

(*k*) *Montefiore* v. *Behrens*, 35 Bea. 95.

(*l*) *McCarogher* v. *Whieldon*, L. R. 3 Eq. 236; *Carter* v. *Silber*, [1891] 3 Ch. 553.

(*m*) *Ex p. Dawes*, 17 Q. B. D. 275 (settlement by deed). But of course such an act may be expressly made a cause of forfeiture: *Sharp* v. *Cosserat*, 20 Bea. 470.

1883 (*n*). On the other hand, if the words are "payable to," a forfeiture is produced by a receiving order (*o*).

"Payable to."

"Liable to be deprived."

And if the forfeiture is to take effect on the beneficiary doing or suffering any act or thing whereby he would, if absolutely entitled, "be deprived or liable to be deprived" of the beneficial enjoyment of the gift, it takes effect on his committing an act of bankruptcy (*p*).

Conviction for felony.

But a conviction for felony does not cause a forfeiture under a proviso for cesser in the event of the beneficiary being deprived by operation of law of the "absolute personal enjoyment" of his interest (*q*).

Marriage of woman.

If (in a case not within the Married Women's Property Act, 1882), property is given to a woman subject to a condition against involuntary alienation, the question whether she incurs a forfeiture by marrying depends on the wording of the condition (*r*).

Foreign bankruptcy.

It seems also that if a person domiciled in England is adjudicated bankrupt in a foreign country, this does not cause his property in England to "vest in or be payable to" any other person within the meaning of the ordinary forfeiture clause, because the administrator in the bankruptcy must apply to the English Courts before he can claim the property (*s*). But if the interest is determinable on its becoming "forfeited" to any other person, the clause takes effect on the legatee being adjudicated bankrupt in a foreign country (*t*).

Accrued income.

A clause of forfeiture on bankruptcy or other involuntary alienation does not apply to income which is in the hands of trustees of the will ready for payment to the tenant for life; if

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(*n*) See *Rhodes* v. *Dawson*, 16 Q. B. D. 548; *Re Sartoris*, [1892] 1 Ch. 11; *Re Laye*, [1913] 1 Ch. 298. If the clause of forfeiture is to take effect on an "alienation by law," a receiving order may, it seems, produce a forfeiture: *Re Spearman*, 82 L. T. 302.

(*o*) *Re Sartoris*, *supra*. In this case the C. A. apparently disapproved of the decision of Kekewich, J., in *Re James*, 62 L. T. 454. As to the effect of the words "cease to be payable to," see *Re Brewer's Settlement*, [1896] 2 Ch. 503.

(*p*) *Re Loftus-Otway*, [1895] 2 Ch. 235. See *Re Mair*, [1909] 2 Ch. 280, where the words were simply "would be deprived"; *ante*, p. 1475.

(*q*) *Re Dash*, 57 L. T. 219.

(*r*) *Bonfield* v. *Hassell*, 32 Bea. 217 (deed); *Craven* v. *Brady*, L. R. 4 Eq. 209; 4 Ch. 296; *ante*, p. 1473, n. (*d*).

(*s*) *Waite* v. *Bingley*, 21 Ch. D. 674; *Re Levy's Trusts*, 30 Ch. D. 119; *Re James*, 62 L. T. 454 (as to this case see *Re Sartoris*, [1892] 1 Ch. 11); *Re Hayward*, [1897] 1 Ch. 905. In the last case, Kekewich, J., thought the point settled by *Re Blithman*, L. R. 2 Eq. 23, but it is submitted that the true principle is that stated above, and that it is unnecessary to rely on *Re Blithman*; the judgment in that case is not conclusive and there is strong authority the other way; see *Re Davidson's Settlement Trusts*, L. R. 15 Eq. 383; *Re Levy's Trusts*, 30 Ch. D. 119; *Re Lawson's Trusts*, [1896] 1 Ch. 175; *Re Craig*, 114 L. T. 896.

(*t*) *Re Levy's Trusts*, 30 Ch D. 119; *supra*. Compare *Re Loftus-Otway*, [1895] 2 Ch. 235; *ante*, p. 1475.

the tenant for life incurs a forfeiture in those circumstances the money belongs to his trustee in bankruptcy or other alienee by operation of law. Whether it applies to income which has accrued, but has not been actually received: in other words, whether the period for determining the destination of the income is the time of its being receivable, or the time of its actual receipt, by the trustees of the will: does not seem to have been decided (*u*).

Garnishee order.

It follows that if a creditor of the beneficiary obtains a garnishee order, under which accrued income in the hands of the trustees is paid over to the judgment creditor, this does not operate as a forfeiture under a provision against involuntary alienation in the usual form (*x*).

In *Re Jenkins* (*y*) the testator gave a share in his estate to trustees upon trust to pay the income to his son for life, but directed that any income for the time being payable to him "shall only be paid to him so long as he shall not attempt to assign or charge the same." The son purported to mortgage his life interest. After the date of the mortgage the trustees received a sum of £393 as income of the son's share; of this £254 represented the apportioned part up to the date of the mortgage. Held that the Apportionment Act, 1870, did not apply and that neither the son nor his mortgagee was entitled to the £254.

Receiver.

The appointment of a receiver by way of equitable execution does not cause a forfeiture clause to take effect, at any rate, unless the creditor has been appointed receiver and retained money under the order (*z*).

Effect of bankruptcy in lifetime of testator.

Mr. Jarman continues (*a*): "Sometimes the question arises, whether a proviso of this nature extends to bankruptcy or insolvency occurring in the lifetime of the testator. If such event has left the after-acquired property of the bankrupt or insolvent exposed to the claims of his creditors, then a forfeiture would take place under words sufficiently strong to determine the interest of the devisee or legatee, when the property becomes applicable to any other purpose, than the benefit of the *cestui que trust*.

(*u*) See the rule stated by Stirling, J., in *Re Sampson*, [1896] 1 Ch. 630; *ante*, p. 1474; *Re Clark*, [1926] Ch. 833, where some of the *obiter dicta* in *Re Sampson* are considered.

(*x*) *Sutton Carden & Co.* v. *Goodrich*, 80 L. T. 765; *Re Greenwood*, [1901] 1 Ch. 887, dissenting from *Bates* v. *Bates*, [1884] W. N. 129.

(*y*) [1915] 1 Ch. 46.

(*z*) *Re Beaumont*, 103 L. T. 125. See *Re Potts*, [1893] 1 Q. B., at p. 661. As to the effect of an order of Probate Division, see *Re Carew's Trust*, 103 L. T. 658.

(*a*) First ed., p. 828.

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"As in the case of *Yarnold* v. *Moorhouse* (*b*), where a testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and family, declaring that such dividends should not be capable of being charged with his debts or engagements; and that he should have no power to charge, assign, anticipate, or incumber them; but, that if he should attempt so to do, or if the dividends by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, *or be, or become, applicable to or for any other purpose than for the maintenance of the nephew and his family*, his interest therein should cease, and the stock be held upon trust for his children. Subsequently to the execution of the will, and prior to a codicil confirming it, the nephew took the benefit of the Insolvent Act (1 Geo. 4, c. 119) in the usual way: afterwards the testator died. As it appeared that the Act of 1 Geo. 4 gave to the Insolvent Debtors' Court a control over stock in the public funds, and the future property generally of a discharged prisoner (*c*), the V.-C. held that the insolvency operated as a forfeiture of the legatee's life interest in the stock; and his decree was affirmed on appeal, by Lord Lyndhurst, who thought that, as the dividends were subject, at the discretion of the creditors to be charged with the payment of their debts, the interest was forfeited under the words carrying over the bequest in the event of its being or becoming in any manner applicable to or for any other purpose than for the maintenance of the legatee."

Principle of the cases.

The words of futurity, in such cases, are not permitted to operate so as to defeat what upon the will itself appears to be the manifest intention, namely, that the gift shall be a personal benefit to the legatee, and shall not become payable (through him) to any other person (*d*). And so far has this doctrine been carried, that a forfeiture clause has been held to apply to a bankruptcy which took effect before the date of the will, although it was known to the testator (*e*).

(*b*) 1 R. & My. 364. So in *Seymour* v. *Lucas*, 1 Dr. & Sm. 177, though the words were "thereafter become bankrupt." As to the construction where the settlement is by deed, see *Manning* v. *Chambers*, 1 De G. & S. 282; *Sharp* v. *Cosserat*, 20 Bea. 470; *West* v. *Williams*, [1899] 1 Ch. 132.

(*c*) "The insolvent had also executed to the provisional assignee a warrant of attorney, as required by the Act; but this fact, though very prominently set forth in the Master's report, seems not to have been material, since property of this nature could not, in the then state of the law, be seized under any execution which could have been obtained by virtue of such a warrant of attorney." (Note by Mr. Jarman.)

(*d*) *Trappes* v. *Meredith*, L. R. 7 Ch. 248; *Samuel* v. *Samuel*, 12 Ch. D. 152; *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1; *Re Evans*, [1920] 2 Ch. 304.

(*e*) *Trappes* v. *Meredith*, *supra*; *Ancona* v. *Waddell*, 10 Ch. D. 157. But the doctrine does not apply to other kinds of forfeiture, *e.g.*, on marriage: *Re Chapman*, [1904] 1 Ch. 431; *Chapman* v. *Perkins*, [1905] A. C. 106.

Conversely, if the status or act of the legatee still leaves him in the personal enjoyment of the gift, there is no forfeiture. Therefore, if, after having become bankrupt, the legatee, before the first payment of income falls due, procures an annulment of his bankruptcy, forfeiture is avoided (*f*). So where a testator bequeathed certain reversionary interests in personalty in trust for his children, subject to a proviso for forfeiture if by act or operation of law the interests should be aliened whereby the same should vest in any other person; one of the children was a bankrupt at the time of the testator's death, but within a year afterwards and before the interests fell into possession she became entitled to other property by the sale of which she paid off all her debts and costs, but the bankruptcy was not annulled till two years after such payment: it was held by Kekewich, J., that as the personal enjoyment by the legatee as regards the reversions had not been interfered with, there was no forfeiture (*g*).

No forfeiture if, before any payment is due, the bankruptcy is annulled.

The cases were considered in *Re Forder* (*h*) and the principle deduced from them was stated by Lawrence, L.J., to be "the annulment will be in time to save forfeiture if it takes place before any income becomes payable to the beneficiary, but it will not be in time to save the forfeiture if it takes place after the trustees have received income which can properly be treated as payable to or ascertained or appropriated for the beneficiary."

Re Forder.

But in *Cox* v. *Fonblanque* (*i*) it was held that this principle was not applicable where the condition of solvency was precedent. In that case, a testator directed his executors to invest so much of his residuary estate as would produce £100 a year, and to pay the same to A (if not at the testator's death an uncertificated bankrupt or otherwise disentitled to receive and enjoy the same) during his life, or until he should become bankrupt or assign the annuity, or do or suffer something whereby the same would become payable to some other person; and after the determination of that trust, or in the event of its failure, then, after the testator's death, to sink into the residue. A was an uncertificated bankrupt at the testator's death; but

Distinction where solvency is a condition precedent, *qu.*

(*f*) *White* v. *Chitty*, L. R. 1 Eq. 372; *Lloyd* v. *Lloyd*, L. R. 2 Eq. 722; *Trappes* v. *Meredith*, L. R. 9 Eq. 229; *Re Parnham's Trusts*, 46 L. J. Ch. 80; *Robins* v. *Rose*, 43 L. J. Ch. 334; *Ancona* v. *Waddell*, 10 Ch. D. 157 (though the annulment was not formally completed till long after). It is otherwise if any payment has fallen due: *Re Parnham's Trusts*, L. R. 13 Eq. 413; *Robertson* v. *Richardson*, 30 Ch. D. 623; *Hurst* v. *Hurst*, 21 Ch. D. 278; *Re Broughton*, 57 L. T. 8; *Re Loftus-Otway*, [1895] 2 Ch. 235. See *ante*, p. 1475.

(*g*) *Metcalfe* v. *Metcalfe*, 43 Ch. D. 633, affirmed on another point, [1891] 3 Ch. 1, *ante*, n. (*d*).

(*h*) [1927] 2 Ch. 291, 321.

(*i*) L. R. 6 Eq. 482.

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within six months afterwards the bankruptcy was annulled. It was held by Lord Romilly, M.R., that the gift nevertheless failed.

Composition with creditors or insolvency.

And it seems the principle does not apply where the act or event on which forfeiture is to take effect is not in its nature such as to deprive the legatee of the personal enjoyment of the legacy; as where there is a gift over on his compounding with his creditors, or becoming insolvent; in such a case a forfeiture is incurred, even if the composition or insolvency takes place during a prior life interest, and does not affect the legatee's interest (*k*).

Accrued share.

In *Dorsett* v. *Dorsett* (*l*) a residuary legatee under a will became bankrupt, and in accordance with a clause in the will he thereby forfeited his original share: he afterwards obtained his certificate and subsequently became entitled to a further share, subject to the same limitations as the original share: it was held by Romilly, M.R., that the accrued share was also forfeited. *Sed quære.*

Order in lunacy.

An order in lunacy appointing a receiver does not operate as a forfeiture (*m*).

Treaty of Peace Order.

As to the effect of a charge under the Treaty of Peace Order, 1919, see the cases in the footnote (*n*).

Restraint on anticipation.

IX.—Restraint on Anticipation by Married Woman.—When property is given to a woman for her separate use (whether the separate use be created by express words (*o*) or by the effect of the Married Women's Property Act, 1882 (*p*)), a restraint upon alienation or anticipation may be annexed to the separate use (*q*), but "the restraint is annexed to the separate estate

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(*k*) *Sharp* v. *Cosserat*, 20 Bea. 470; *Muggeridge's Trusts*, Johns. 625. These were both cases of settlements *inter vivos*.

(*l*) 30 Bea. 256.

(*m*) *Re Marshall*, [1920] 1 Ch. 284.

(*n*) *Re Hallenstein*, [1922] 1 Ch. 355; *Re Biedermann*, [1922] 2 Ch. 771; *Re Neuberger's Settlement*, [1923] 1 Ch. 508; *Re Levinstein*, [1921] 2 Ch. 251; *Re Chamberlain's Settlement*, [1921] 2 Ch. 333; *Re Schiff*, [1921] 1 Ch. 149; *Public Trustee* v. *Wolf*, [1923] A. C. 544.

(*o*) It is immaterial that the restraint on anticipation is imposed first and the separate use is attached afterwards: *Baggett* v. *Meux*, 1 Col. 138; *Re Molyneux's Estate*, 6 Ir. R. Eq. 411.

(*p*) *Baggett* v. *Meux*, 1 Coll. 138; 1 Ph. 627; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661; *Re Lumley*, [1896] 2 Ch. 690 (settlement).

(*q*) "The old way of expressing a trust for a married woman was, that the trustees should pay into her proper hands, and upon her own receipt only, yet this Court always said she might dispose of that interest, and her assignee would take it: as, if there was contract, entitling the assignee, this Court would compel her to give her own receipt, if that was necessary to enable him to receive it. It was not before Miss Watson's case that these words 'not to be paid by anticipation,' etc., were introduced. I believe these were Lord Thurlow's own words; with whom I had much conversation upon it. He did not attempt to take away any power the law gave her, as incident to property, which, being a creature of equity, she could not have at law: but, as under the words of the settlement it would have been hers absolutely,

only, and the separate estate has its existence only during coverture; whilst the woman is discovert, the separate estate, whether modified by restraint or not, is suspended and has no operation, though it is capable of arising upon the happening of a marriage. The restriction cannot be considered distinctly from the separate estate of which it is only a modification " (*r*).

Forfeiture on alienation.

Where a married woman is restrained from anticipation, an assignment by her of her interest is wholly inoperative, and therefore does not cause a forfeiture under a clause containing a gift over on alienation (*s*). If, however, the clause prohibits not only alienation, but attempted alienation, an assignment, although inoperative, causes a forfeiture (*t*).

Right to receive value of annuity, or stop accumulation of income.

It has been explained elsewhere that if an annuity is bequeathed or directed to be purchased for the benefit of a person he can insist on having the capital value paid to him (*u*), and that if property is given to a person absolutely, with a direction that the income shall be accumulated for his exclusive benefit during a certain time, he can stop the accumulation and have the property handed over to him (*x*). These rules, however, do not apply in the case of a married woman restrained from anticipation (*y*).

Future coverture.

A restraint on anticipation may be made to extend to every coverture, present or future, or may be restricted to an existing or contemplated coverture (*z*).

Corpus and income.

A restraint on anticipation may apply to both corpus and income or to income only (*a*).

Accrued income.

Where the income of property is given to a married woman, subject to a restraint on anticipation, income accruing *de die in diem*, but not yet actually payable (such as accruing rents or

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so that she could alien, Lord Thurlow endeavoured to prevent that by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation; reasoning thus : that equity, making her the owner of it, and enabling her, as a married woman, to alien, might limit her power over it " : *Per* Lord Eldon, in *Brandon* v. *Robinson*, 18 Ves. at p. 434. The same explanation is given by Lord Brougham in *Woodmeston* v. *Walker*, 2 R. & My., at p. 205.

(*r*) *Per* Lord Langdale, M.R., *Tullett* v. *Armstrong*, 1 Bea. 1; 4 My. & C. 377. The earlier cases of *Newton* v. *Reid*, 4 Sim. 141; and *Brown* v. *Pocock*, 5 Sim. 663, are overruled. See also *Barton* v. *Briscoe*, Jac. 603; *Jones* v. *Salter*, 2 R. & M. 208; *Woodmeston* v. *Walker*, 2 R. & M. 197; *Re Wheeler's Settlement Trusts*, [1899] 2 Ch. 717.

(*s*) *Re Wormald*, 43 Ch. D. 630.

(*t*) *Re Porter*, [1892] 3 Ch. 481, where the assignment was inoperative on another ground.

(*u*) *Ante*, p. 1109.

(*x*) *Ante*, p. 536.

(*y*) *Re Spencer*, 30 Ch. D. 183; *Re Ross*, [1900] 1 Ch. 162.

(*z*) *Re Gaffee*, 1 Mac. & G. 541; *Hawkes* v. *Hubback*, L. R. 11 Eq. 5 (settlement); *Re Molyneux's Estate*, 6 Ir. R. Eq. 411.

(*a*) *Baggett* v. *Meux*, 1 Coll. 138, *supra*; *Cooper* v. *Macdonald*, 7 Ch. D. 288; see *Shute* v. *Hogge*, 58 L. T. 546 (settlement); *Crosby* v. *Church*, 3 Bea. 485; *Hanchett* v. *Briscoe*, 22 Bea. 496.

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interest) cannot be dealt with (*b*), but the restraint does not apply to income actually received by the trustees, or to arrears of income, such as overdue rents or interest (*c*).

Barring entail where restraint only affects life estate.

In *Cooper* v. *Macdonald* (*d*), a testator devised real estate in trust for his daughter in tail, with a clause restraining her from alienating or anticipating the income during her life : it was held that this did not prevent her from barring the entail and devising the property by her will.

Capital value of annuity.

So if a married woman is entitled to receive the capital value of an annuity bequeathed to her, with a restraint on anticipation, on her death during coverture the fund passes to her representatives (*e*).

Release of testamentary power.

If a life interest in personal property is given to a married woman subject to a restraint on anticipation, with a testamentary power of appointment over the corpus, she can, by unacknowledged deed, release the power, notwithstanding the restraint on anticipation : and the same rule seems to apply to real property (*f*).

Restraint void for remoteness.

A restraint on anticipation may be void for remoteness. If, for example, an appointment is made to an object of the power who was not in existence at the time of its creation, a superadded restraint on anticipation is void and will be rejected, so that the appointment is absolute (*g*).

Domicil.

Where a married woman is restrained from anticipation, the fact that she is domiciled in a foreign country where such a restraint is not recognised, does not affect its operation under English law (*h*).

No distinction as to income bearing or not income bearing fund.

It was formerly considered that there was a difference between a restraint on anticipation and a restraint on alienation (*i*), and

(*b*) *Re Brettle*, 2 D. J. & S. 79. In this case the wording of the clause was special, but the decision does not appear to have turned on it. See *Hood Barrs* v. *Heriot*, *infra*.

(*c*) *Hood Barrs* v. *Heriot*, [1896] A. C. 174, where *Harnett* v. *MacDougall*, 8 Bea. 187; *Pemberton* v. *M'Gill*, 1 Dr. & Sm. 266; *Rowley* v. *Unwin*, 2 K. & J. 138, and other older authorities are referred to. See also *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48; *Bolitho* v. *Gidley*, [1905] A. C. 98; *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559; *Cox* v. *Bennett*, [1891] 1 Ch. 617; *Pillers* v. *Edwards*, 71 L. T. 788.

(*d*) 7 Ch. D. 288. A judgment against a married woman cannot be satisfied out of property which she is restrained from anticipating, but if by her will she directs her debts to be paid, this makes the property assets : *Sprange* v. *Lee*, [1908] 1 Ch. 424.

(*e*) *Re Ross*, [1900] 1 Ch. 162.

(*f*) *Re Chisholm*, [1901] 2 Ch. 82. See *Heath* v. *Wickham*, 5 L. R. Ir. 285.

(*g*) *Fry* v. *Capper*, Kay, 163, *ante* p. 276, where the cases as to separable gifts are referred to. As to the expediency of applying the rule against perpetuities to restraints on anticipation, see *Re Ridley*, 11 Ch. D. 645, and Gray on Perpetuities.

(*h*) *Peillon* v. *Brooking*, 25 Bea. 218.

(*i*) *Re Ellis' Trusts*, L. R. 17 Eq. 409. In its original form the restraint on anticipation clearly applied to income only : *ante*, p. 1490, n. (*q*). Hence the doubt.

that a restraint on anticipation was inapplicable to a sum of cash or a fund which was not producing income, and that in such a case the corpus was payable to the *feme covert* during coverture (*k*), although a different rule prevailed if the property consisted of land or of an income bearing fund (*l*). But in *Re Bown* (*m*), the Court of Appeal laid down that under a bequest to a married woman for her separate use, followed by a clause restraining anticipation, the efficacy of the restraint depends not on whether the gift is of an income bearing fund or of cash, but on whether the testator has or has not shown an intention that the trustees of his will shall keep the fund and only pay the income, if any, to the married woman. In that particular case the testator bequeathed a fund upon trust for A for life and after her death directed the trustees to pay it to B, a married woman, for her separate use without power of anticipation : it was held that the clause restraining the legatee from anticipation was satisfied by being applied to the bequest while it was reversionary : when the bequest fell into possession the restraint ceased to operate (*n*). It follows from this principle that if a testator directs a legacy to be raised and paid to a legatee for her separate use without power of anticipation, and directs that a share of residue shall be held upon trust for her for her separate use without power of anticipation, she is entitled to receive the legacy, but not the share of residue (*o*). And where there is no direction to pay or transfer, but the property is directed to be held in trust for a married woman restrained from anticipation, the mere fact that it is reversionary does not make the restraint cease to operate when the property falls into possession (*p*).

Re Bown.

There is no distinction between a restraint on anticipation and a restraint upon alienation (*q*).

Anticipation and alienation.

A woman upon whom property has been settled with a restraint on anticipation may, while discovert, so deal with it as to put an end to the restraint (*r*).

Extinguishment of restraint.

(*k*) *Re Croughton's Trusts*, 8 Ch. D. 460; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Coombes*, [1883] W. N. 169; *Armitage* v. *Coates*, 35 Bea. 1; *Re Taber*, 46 L. T. 805.

(*l*) *Baggett* v. *Meux*, 1 Coll. 138; 1 Ph. 627; *Re Sarel*, 10 Jur. (N.S.) 876; *Re Gaskell's Trusts*, 11 Jur. (N.S.) 780; *Re Sykes's Trusts*, 2 J. & H. 415; *Re Ellis' Trusts*, L. R. 17 Eq. 409; *Re Benton*, 19 Ch. D. 277.

(*m*) 27 Ch. D. 411.

(*n*) So in *Re Millward*, 87 L. T. 476.

(*o*) *Re Grey's Settlements*, 34 Ch. D. 712; *Re Fearon*, 45 W. R. 232; *Re Spencer*, 30 Ch. D. 183; *Re Bankes*, [1902] 2 Ch. 333 (settlement); *Russell* v. *Lawder*, [1904] 1 Ir. R. 328.

(*p*) *Re Tippett's and Newbould's Contract*, 37 Ch. D. 444; *Re Holmes*, 67 L. T. 335.

(*q*) *Re Currey*, 32 Ch. D. 361. See also the same case as reported 56 L. T. 80.

(*r*) *Buttanshaw* v. *Martin*, John. 89.

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The Court may bind the interest of a married woman restrained from anticipation.

Since January 1, 1882, notwithstanding that a married woman is restrained from anticipation, "the Court may, if it thinks fit, when it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property" (*s*).

And under the Married Women's Property Act, 1893, s. 2, where proceedings are brought by or on behalf of a married woman, the Court may order the costs of the opposite party to be paid out of property belonging to her subject to a restraint on anticipation.

In the last edition, pp. 1518 *seq.*, there is a Section on "What words will create a separate use under the old Law"; as this is gradually becoming obsolete, the Section is omitted.

What Words will create a Restraint on Anticipation.—No technical form of words is necessary to create a restraint upon anticipation, but the intention must be clear (*t*).

Thus a direction that no sale or mortgage of the property or the rents arising from it shall take place during the life of a woman to whom the rents and profits have been given for her separate use, is sufficient to create a restraint upon anticipation (*u*); and a declaration that a married woman who is a devisee in fee to her separate use shall not sell, charge, or incumber the property, has been held to attach a restraint on anticipation to the corpus (*x*). The words "free from her debts or engagements, whether any such might be contracted by herself or any husband," create a restraint on anticipation (*y*).

But if a testator gives property to a woman absolutely, and adds that it is his "wish and request" that she should not sell or dispose of it, these words do not create a restraint on anticipation (*z*).

Precatory words.

In *Re Wolstenholme* (*a*), a testator gave a share of his residue upon trust for each of his children for life (in the case of daughters for their separate use), with a general power of appointment by deed or will, subject to a clause of forfeiture in the event of the income of the share ceasing from any cause during the life of the child, to be payable "into his or her own hands as an inalienable personal provision." One of the children,

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(*s*) Conveyancing Act, 1881, s. 39, now replaced by section 169 of the Law of Property Act, 1925.

(*t*) See *Wagstaff* v. *Smith*, 9 Ves. 520.

(*u*) *Goulder* v. *Camm*, 1 D. F. & J. 146.

(*x*) *Baggett* v. *Meux*, 1 Coll. 138, affirmed 1 Ph. 627, and see *Steedman* v. *Poole*, 6 Ha. 193 (leaseholds).

(*y*) *White* v. *Herrick*, 21 W. R. 454.

(*z*) *Re Hutchings to Burt*, 59 L. T. 490.

(*a*) 43 L. T. 752.

a married woman, assigned her share to trustees, and it was held by Malins, V.-C., that the assignment was operative on the ground that the attempted restraint on alienation was wholly void on the general principle already considered (*b*). But might it not be void in the case of sons and unmarried daughters and yet valid in the case of married daughters?

Trust for payment of income when due.

By a trust for the separate use of a married woman and a declaration that the receipt of herself or the persons to whom she should appoint the income *after the same should become due* should be effectual, it was held that a restraint on anticipation was created (*c*). On the other hand, a direction to pay the income from time to time, or as it shall become due, or into the proper hands of the *feme covert* (*d*), or even upon her personal appearance and receipt (*e*), will not take away the power of anticipation.

In *Alexander* v. *Young* (*f*), the rule requiring clear words was carried to its full extent, Wigram, V.-C., holding that a trust for the separate use of a married woman for life, and after her death as she should appoint, but no appointment by deed to come into operation until after her death, did not forbid anticipation.

Power of appointment and trust in default.

Cases have occurred in which a power to appoint the annual income of property is given to a married woman during her life, followed by a trust in default of appointment to pay the income into her hands, with a restraint on anticipation so expressed as to make it doubtful whether, as a matter of strict grammatical accuracy, it applies only to the power of appointment or only to the trust in default of appointment, and whether the married woman is consequently free, in the one case to assign her life interest, and in the other to exercise the power of appointment. Some narrow-minded decisions of Shadwell, V.-C., for a time made the law uncertain, but they have been either expressly or impliedly overruled, and in a case of this kind effect is now given to the obvious intention of the testator that the married woman should be debarred from disposing of the income until it actually falls due (*g*).

(*b*) *Ante*, p. 537.

(*c*) *Field* v. *Evans*, 15 Sim. 375. See *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Re Smith*, 51 L. T. 501. The decision in *Acton* v. *White*, 1 S. & St. 429, is explained in *Baker* v. *Bradley*, *supra*.

(*d*) *Pybus* v. *Smith*, 3 B. C. C. 340; 1 Ves. jun. 189; *Parkes* v. *White*, 11 Ves. 209; *Acton* v. *White*, 1 S. & St. 429 (*supra*, note (*c*)); *Glyn* v. *Baster*, 1 Y. & J. 329.

(*e*) *Ross's Trust*, 1 Sim. (N.S.) 196; *Wagstaff* v. *Smith*, 9 Ves. 520.

(*f*) 6 Hare, 393.

(*g*) *Barrymore* v. *Ellis*, 8 Sim. 1; *Brown* v. *Bamford*, 11 Sim. 127; 1 Ph. 620; *Medley* v. *Horton*, 14 Sim. 222; see *Moore* v. *Moore*, 1 Coll. 54; *Harrop* v. *Howard*, 3 Ha. 624; *Harnett* v. *Macdougall*, 8 Bea. 187; Lewin on Trusts; Vaizey on Settlements, pp. 832 *seq.*

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Executory trust.

Where a testator after a gift of real and personal estate to trustees for his daughter directed that in case she should marry her share of the estate should be so settled that she might enjoy the income thereof during her life for her separate use, it was held that the trust should be carried into execution, with a restraint upon anticipation (*h*).

Implication.

Where two separate provisions are made by will in favour of a woman, and a restraint on anticipation is expressly attached to one of them, it may by implication be extended to the other (*i*).

Conditions in partial restraint of marriage.

X.—Conditions in Restraint of Marriage.—(i) *Conditions in Partial Restraint of Marriage.*—Mr. Jarman continues (*k*) : "It is now proposed to treat of conditions in restraint of marriage (*l*).

Distinction in regard to real and personal estate.

The numerous and refined distinctions on this subject, however, do not apply to devises of, or pecuniary charges upon, real estate (*m*), but are confined exclusively to personal legacies; and with regard to the latter, they owe their introduction to the ecclesiastical Courts, who, in the exercise of their jurisdiction over personal legacies, it is well known, borrowed many of their rules from the civil law.

Rule of the civil law.

"By this law, all conditions in wills restraining marriage, whether precedent or subsequent, whether there was any gift over or not, and however qualified, were absolutely void (*n*); and marriage simply was a sufficient compliance with a condition requiring marriage with consent, or with a particular individual, or under any other restrictive circumstances (*o*); but this doctrine did not apply to widows.

What are valid restraints on marriage by the law of England.

"Our Courts, however, have not adopted this rule in its unqualified extent, but have subjected it to various modifications. 'By the law of England,' says an eminent judge, 'an injunction

(*h*) *Re Dunnill's Trusts*, Ir. R. 6 Eq. 322 (further proceedings [1926] Ir. R. 126). See the cases cited *ante*, p. 882.

(*i*) *Re Lawrenson*, [1891] W. N. 28.

(*k*) First ed., p. 836.

(*l*) To constitute a breach of a condition of this nature the marriage must of course be a valid one : *Re M'Loughlin's Estate*, 1 L. R. Ir. 421. If a marriage is valid it constitutes a breach, although solemnised under a false name and by means of false statements : *Re Rutter*, [1907] 2 Ch. 592. See *post*, p. 1508, n. (*d*).

(*m*) *Reves* v. *Herne*, 5 Vin. Abr. 343, pl. 41; *Harvey* v. *Aston*, 1 Atk. 361; *Reynish* v. *Martin*, 3 Atk. 330. As to conditions in partial restraint of marriage annexed to gifts of real estate, see *Tricker* v. *Kingsbury*, 7 W. R. 652, and *post*, p. 1499, and as to conditions in total restraint, *post*, pp. 1510 *seq.* Money arising from the sale of lands is subject to the same rule as personal legacies : *Bellairs* v. *Bellairs*, L. R. 18 Eq. 510.

(*n*) Godolph. Orph. Leg. p. 1, c. 15, quoted by Younger, J., in *Re Hewett*, [1918] 1 Ch., at p. 465.

(*o*) *Ib.* p. 3, c. 17.

to ask consent is lawful, as not restraining marriage generally (*p*). A condition that a widow shall not marry, is *not* unlawful (*q*). An annuity during widowhood (*r*), a condition to marry or not to marry T. is good (*s*). A condition prescribing due ceremonies and place of marriage is good (*t*); still more is the condition good which only limits the time to twenty-one (*u*), or any other reasonable age (*x*), provided it be not used as a cover to restrain marriage generally ' " (*y*). Conditions not to marry a Papist (*z*); or a Scotchman (*a*); or any person within certain near degrees of kindred (*b*); or not to marry any but a Jew (*c*), have also been held good.

Other conditions in partial restraint of marriage.

In *Re Hewett* (*d*) the testator gave an annuity to an unmarried woman with whom he cohabited. By a codicil, made in anticipation of the birth of a son subsequently born, he gave her an annuity of £1,200 for life and declared that if she should marry after his death she should be paid £800 in lieu of £1,200, and directed his trustees after her marriage to apply £400 per annum for his son until twenty-one and thereafter to pay £400 per annum to his son until her death. It was held that the

Re Hewett.

(*p*) *Sutton* v. *Jewke*, 2 Ch. Rep. 95; *Creagh* v. *Wilson*, 2 Vern. 572; *Ashton* v. *Ashton*, Pre. Ch. 226; *Chauncy* v. *Graydon*, 2 Atk. 616; *Hemmings* v. *Munckley*, 1 B. C. C. 304; *Dashwood* v. *Bulkeley*, 10 Ves. 230; *Lloyd* v. *Branton*, 3 Mer. 108; *Re Whiting's Settlement*, [1905] 1 Ch. 96. See further as to conditions requiring consent, especially with reference to the question whether a gift over is required, *post*, p. 1500.

(*q*) See *Lloyd* v. *Lloyd*, 2 Sim (N.S.) 255, *post*, p. 1513. Mr. Jarman cites in support of this proposition *Jordan* v. *Holkham*, Amb. 209. In that case a testator devised land to his wife during widowhood, with a proviso that if she married during the life of the testator's daughter, the daughter should enter into possession. Lord Hardwicke seems to have thought that though a devise during widowhood, with remainder over on marriage at any time, is good, yet a remainder over on marriage within a limited time, as in the case at bar, is bad.

(*r*) See *Re Ross*, [1900] 1 Ch. 162. Mr. Jarman cites in support of this proposition *Barton* v. *Barton*, 2 Vern. 308, but that was not the case of an annuity.

(*s*) *Jarvis* (*or Jervois*) v. *Duke*, 1 Vern. 19; *Bertie* v. *Falkland*, 3 Ch. Cas. 129; *Falkland* v. *Bertie*, 2 Vern. 333. See also *Randal* v. *Payne*, 1 B. C. C. 55, *ante*, p. 1446; *Davis* v. *Angel*, 4 D. F. & J. 524. The case of *W*—— v. *B*——, 11 Bea. 621, where there was a condition against marriage with a certain person, is too shortly reported to be intelligible (see *post*, p. 1503, n. (*m*)). The condition subsists as long as the persons live: *Re Bathe*, [1925] 1 Ch. 377.

(*t*) In *Haughton* v. *Haughton*, 1 Moll. 611 (a case of real estate), a condition requiring marriage to be according to the rites of the Quakers was held valid.

(*u*) *Stackpole* v. *Beaumont*, 3 Ves. 89.

(*x*) *Younge* v. *Furse*, 8 D. M. & G. 756 (twenty-eight).

(*y*) *Per* Lord Thurlow, in *Scott* v. *Tyler*, 2 B. C. C., at p. 488.

(*z*) *Duggan* v. *Kelly*, 10 Ir. Eq. Rep. 295.

(*a*) *Perrin* v. *Lyon*, 9 East, 170 (real estate).

(*b*) *Re Chapman*, [1904] 1 Ch. 431, *S. C. sub nom. Chapman* v. *Perkins*, [1905] A. C. 106.

(*c*) *Hodgson* v. *Halford*, 11 Ch. D. 959. As to this case, which was that of an appointment under a special power, see Farwell on Powers (3rd ed.), 337, 479. See also *Re Knox*, 23 L. R. Ir. 542.

(*d*) [1918] 1 Ch. 458. The judgment contains a valuable discussion of the authorities.

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condition was valid as the object and intention of the testator was to make provision for his son and not to restrain the marriage of the mother.

Condition apparently partial may be too general in effect.

On the other hand, a condition not to marry a man who is not seised of an estate in fee, or of perpetual freehold of the annual value of £500, is said to be too general, and therefore void (*e*); and a condition not to marry a relation by blood is void (*f*).

Professions and callings.

In an old collection of cases (*g*) there is a note by the compiler (*h*) to this effect: "A devise upon condition not to marry at all, or not to marry a person of such a profession or calling, is void by our law, whether there be a limitation over or not: but if it were upon condition not to marry a Papist, or a certain person by name, it may be good. 1 Vern. 20." It is submitted that the rule as to marrying persons of certain professions or callings is too widely expressed, and that the question in each case is whether the restraint is reasonable. The case of *Jenner* v. *Turner* (*i*) seems to have been rightly decided on this principle. There a testatrix devised real estate to her brother and his sons in tail, and declared that if he should marry a domestic servant, or any person who had been a domestic servant, the devise should be null and void, and in lieu thereof she devised the real estate to other persons: it was held by Bacon, V.-C., that the condition was valid. So a condition restraining a devisee from marrying "a man beneath her in life, that is to say, below her in social position," is valid (*k*).

Waiver of condition by testator.

Where a testator bequeaths property upon condition that the legatee marries T, and the legatee marries someone else during the testator's lifetime and with his assent, this does not relieve the legatee from the condition so as to entitle him to the legacy (*l*). It is not clear whether the same rule applies where the condition is that the legatee shall not marry before a certain age, and he (or she) marries under that age with the testator's assent (*m*).

(*e*) *Keily* v. *Monck*, 3 Ridg. P. C. 205. See *Long* v. *Dennis*, 4 Burr. 2052, where the condition was against marrying a woman not having a competent marriage portion, unless with the consent of the trustees.

(*f*) *Re Lanyon*, [1927] 2 Ch. 264.

(*g*) 1 Eq. Ca. Ab. 110, pl. 1, marg.

(*h*) As to the identity of the compiler, see 16 Ch. D., p. 193 n.

(*i*) 16 Ch. D. 188; *Re Bathe*, [1925] 1 Ch. 377.

(*k*) *Greene* v. *Kirkwood*, [1895] 1 Ir. R. 130.

(*l*) *Davis* v. *Angel*, 4 D. F. & J. 524. The decision in *Smith* v. *Cowdery*, 2 S. & St. 358, professes to follow *Clarke* v. *Berkeley* and other cases where the condition required marriage with consent; these cases rest on a special rule; *post*, p. 1507. See *Violett* v. *Brookman*, 26 L. J. Ch. 308.

(*m*) *Younge* v. *Furse*, 8 D. M. & G. 756. Compare the cases on gifts until marriage, *post*, pp. 1513, 1514.

Condition that legatee shall marry.

It will be remembered that where property is given to a person on condition of his marrying, he has his whole life to perform the condition (*n*).

Marriage during testator's lifetime.

The general rule applicable to clauses of forfeiture on bankruptcy, etc., namely that such a clause takes effect if the bankruptcy, etc., occurs during the lifetime of the testator, does not apply to clauses of forfeiture on marriage : it is a question of construction in each particular case whether the clause applies only in the case of marriage after the testator's death (*o*).

Condition in partial restraint of marriage annexed to gift of real estate.

In saying that " the numerous and refined distinctions " on the subject of conditions in restraint of marriage do not apply to devises of, or pecuniary charges on, real estate (*p*), Mr. Jarman seems to refer to the general principle that if a condition annexed to such a devise or charge is good at all, it does not require a gift over to make it valid. The existence of this principle is expressly or tacitly recognised in many of the old books (*q*), where it is said to be based on the rule that on breach of a condition the heir of the testator could enter, and in a modern case in Ireland (*r*), Christian, L.J., laid it down as a general rule that the *in terrorem* doctrine does not apply to devises of real estate. In that case, however, the condition was directed against the re-marriage of a widow, and was not, therefore, a condition in partial restraint of marriage.

Condition requiring marriage with consent.

(ii) *Conditions requiring Consent.*—In the case of conditions requiring marriage with consent, or prohibiting marriage without consent (*s*), it is clear that there is a distinction between gifts of personal legacies and moneys arising from the sale of land on the one hand, and devises of land and bequests of money charged upon land on the other. For under a gift to A of land, or money charged on land, upon condition that A marries with the consent of X, the condition is precedent, and A takes nothing unless he marries in accordance with the condition (*t*); so if land is devised to A subject to a condition that he shall not marry without the consent of X, the condition is subsequent, and if he marries without consent, his estate is

Real estate.

(*n*) *Randal* v. *Payne*, 1 B. C. C. 55; *post*, p. 1504. So if the condition is that the legatee shall marry a particular person, the gift is in suspense during their joint lives : *Kiersey* v. *Flahaven*, [1905] 1 Ir. R. 45.

(*o*) *Re Chapman*, [1904] 1 Ch. 431, [1905] A. C. 106 (*Chapman* v. *Perkins*). It may be doubted whether the decision in *Greene* v. *Kirkwood*, [1895] 1 Ir. R. 130, can be supported.

(*p*) *Ante*, p. 1496.

(*q*) See the cases cited *ante*, p. 1496, and the note at the end of *Harvey* v. *Aston*, 1 Atk., at p. 381.

(*r*) *Duddy* v. *Gresham*, 2 L. R. Ir. 442; stated *post*, p. 1513.

(*s*) *Ante*, p. 1496, and other authorities cited in note (*p*).

(*t*) *Reves* v. *Heine*, 5 Vin. Abr. 343, pl. 41; *Harvey* v. *Aston*, 1 Atk. 361; and note on p. 381; *Reynish* v. *Martin*, 3 Atk. 330.

divested (*u*). It is clear that no gift over is required where the condition is precedent, and it is said that the same rule applies to conditions subsequent, but there does not seem to be any clear authority on the latter point (*x*).

Condition to ask consent, when *in terrorem*.

With regard to gifts of personalty, including money arising from the sale of lands (*y*), Mr. Jarman points out (*z*) that "to make a condition to ask consent effectual, there must be a bequest over in default, otherwise the condition will be regarded as *in terrorem* only (*a*).

(*u*) *Fry* v. *Porter*, 1 Mod. 300.

(*x*) See Mr. Jarman's statement of the rule as applied to legacies charged on real estate in aid of the personalty, *post*, p. 1504. For this statement he cites *Reynish* v. *Martin*, 3 Atk. 330; but in that case the condition was precedent, and according to Lord Hardwicke there is a distinction between conditions precedent and subsequent, for he says: "Where the condition is precedent, the legatary takes nothing till the condition is performed, and consequently has no right to come and demand the legacy; but it is otherwise where the condition is subsequent, for in that case the legatary has a right, and the Court will decree him the legacy; *but this difference only holds where the legacy is a charge on the real assets.*" In *Fry* v. *Porter*, 1 Mod. 300, and *Aston* v. *Aston*, 2 Vern. 452, there was a devise over. *Haughton* v. *Haughton*, 1 Moll. 611 (*ante*, p. 1497, n. (*t*)), is sometimes cited in support of the statement that in the case of real estate a condition subsequent in partial restraint of marriage is effectual without a gift over, but it would appear that the will contained a devise over, for one of the arguments was that the condition was void, and that consequently "the devise over" was void. As to whether the rule applies where real and personal estates are given together, see *Duddy* v. *Gresham*, 2 L. R. Ir. 442, stated *post*, p. 1513.

(*y*) See *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255; *Bellairs* v. *Bellairs*, L. R. 18 Eq. 510; in both these cases the condition was in total restraint of marriage, but the principle is obviously the same.

(*z*) First ed., p. 837.

(*a*) As to the *in terrorem* doctrine, see *ante*, p. 1442. The rule that a condition subsequent making marriage at any age without consent a cause of forfeiture, is valid if accompanied by a gift over, has been affirmed by the C. A. in *Re Whiting's Settlement*, [1905] 1 Ch. 96; following *Dashwood* v. *Lord Bulkeley*, 10 Ves. 230, and *Lloyd* v. *Branton*, 3 Mer. 108. The earlier cases cited by Mr. Jarman are *Sutton* v. *Jewke*, 2 Ch. Rep. 95; *Hicks* v. *Pendarvis*, Freem. 41; *Bellasis* v. *Ermin*, 1 Ch. Cas. 22; *Stratton* v. *Grymes*, 2 Vern. 357; *Aston* v. *Aston*, 2 Vern. 452; *Semphill* v. *Bayly*, Pre. Ch. 562; Sel. Cas. in Ch. 26; *Harvey* v. *Aston*, 1 Atk. 361; *Chauncy* v. *Graydon*, 2 Atk. 616; *Reynish* v. *Martin*, 3 Atk. 330; *Wheeler* v. *Bingham*, 3 Atk. 364; *Clarke* v. *Parker*, 19 Ves. 14. "Two cases, indeed, may be cited which may seem to militate against the rule ascribing this effect to a bequest over—*Underwood* v. *Morris*, 2 Atk. 184; and *Jones* v. *Suffolk*, 1 B. C. C. 528; but the authority of the former was doubted by Lord Loughborough in *Hemmings* v. *Munckley*, 1 B. C. C. 304; *S. C.* 1 Cox, 38; and denied by Lord Thurlow, in *Scott* v. *Tyler*, 2 B. C. C., at p. 488; and, in the other (*Jones* v. *Suffolk*), it is to be inferred from the judgment, though the fact is not distinctly stated, that one of the persons whose consent was required was dead, and, consequently, the gift over on marriage without consent failed; and although it cannot be advanced, it is conceived, as a general principle, that where the act or event which is to give effect to the gift over and defeat the prior defeasible gift, becomes impossible, the former is defeated, and the latter is rendered absolute (*ante*, p. 1458); yet where the effect of a contrary construction would be, as in the present case, to impose a general restraint on the marriage of the first devisee or legatee, after the death of the person whose consent is required, the case seems to fall within the principle on which conditions restraining marriage generally have been considered as void; the necessary consequences of which would be, that the first legacy is absolute, and the substituted gift fails. The same observations apply to the case of *Peyton* v. *Bury*, 2 P. W. 626." (Note by Mr. Jarman (1st ed.), p. 837.)

"Different reasons have been assigned for allowing this operation to a bequest over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely *in terrorem*, which might otherwise have been presumed (*b*). Others have said that it was the interest of the legatee over which made the difference, and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the Court was bound to give effect. Whatever might be the real ground of the doctrine, it was held that where the testator only declared, that in case of marriage without consent, the legatee should forfeit what was before given, but did not say what should become of the legacy, in such case the declaration was wholly inoperative (*c*).

In terrorem doctrine as to conditions subsequent; and precedent.

"This observation, it will be seen, refers to conditions subsequent, and certainly it is in regard to them only that it can be made with confidence; for though in many of the cases already cited the condition was precedent, yet there are, on the other hand, not a few such cases in which a compliance with a condition to marry with consent, though unaccompanied by a bequest over, has been enforced.

"On examining these cases, however, it seems that in each of them there was some circumstance which afforded a distinction; and though some of these distinctions may appear to savour of excessive refinement, and were not recognised by the judges who decided the cases, yet in no other manner than by their adoption can many of the modern cases be reconciled with the stream of general authorities. But it is impossible that the reader should receive without some degree of jealousy a plan for reconciling these cases, when an eminent Judge (*d*) expressed an opinion that they were so contradictory as to justify the Court in coming to any decision it might think proper. With diffidence, therefore, the writer submits that, according to the authorities, conditions *precedent* to marry with consent, unaccompanied by a bequest over in default, will be held to be *in terrorem*, unless in the following cases.

Conditions precedent when not *in terrorem*.

"First, Where the legatee takes a provision or legacy in the alternative of marrying without the consent, *Creagh* v. *Wilson* (*e*), *Gillet* v. *Wray* (*f*). In *Creagh* v. *Wilson* this principle is

Where the legatee takes an alternative provision.

(*b*) That this is the true reason is, it is submitted, shown by the authorities, which give to a clause of revocation or cesser the same effect as a gift over, *ante*, p. 1442.

(*c*) *Per* Sir W. Grant, in *Lloyd* v. *Branton*, 3 Mer., at p. 108.

(*d*) See Lord Loughborough's judgment in *Stackpole* v. *Beaumont*, 3 Ves., at p. 98.

(*e*) 2 Vern. 572, 1 Eq. Ca. Ab. 111, pl. 5.

(*f*) 1 P. W. 284.

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not expressly stated to have governed the decision, but it can be accounted for only on this ground. The smallness of the alternative legacy could make no difference, if the principle be, as apparently it is, that the testator, by providing for the event of the condition being broken, shows that he did not intend it to be *in terrorem* only. In *Gillet* v. *Wray* the alternative provision was an annuity of £10; and Lord Cowper held, that as the legatee was provided for, equity could not relieve (*g*).

Where legacy is given upon an alternative event.

"Secondly, Where marriage with consent is only one of two events, on either of which the legatee will be entitled to the legacy; as where it is given on marriage with consent, or attaining a particular age, *Hemmings* v. *Munckley* (*h*), *Scott* v. *Tyler* (*i*). In these cases *neither* of the events happened. In *Hemmings* v. *Munckley*, the legatee married without consent, and died before attaining the required age. In *Scott* v. *Tyler* the alternative event was reaching a particular age unmarried, and the legatee defeated the gift *quacunque via*, by marrying without consent before that age.

Where marriage with consent is restricted to minority.

"Thirdly, Where marriage with consent is confined to minority, *Stackpole* v. *Beaumont* (*j*). Lord Loughborough, in his judgment in this case, observed that it was perfectly impossible to hold that restraints on marriage under twenty-one could be dispensed with, now (*i.e.*, since the Marriage Act of 26 Geo. 2, c. 33) that such marriage was contrary to the political law of the country, unless [if by licence] with the consent of parents (*k*): and the testator merely places trustees in the room of parents (*l*).

(*g*) The same principle was applied in *Re Nourse*, [1899] 1 Ch. 63. "The case of *Hicks* v. *Pendarvis*, 2 Freem. 41, *S. C.* 2 Eq. Ca. Ab. 212, pl. 1, in which this principle is denied, is of no authority. In *Holmes* v. *Lysaght*, 2 B. P. C. Toml. Ed. 261, the circumstance of another legacy being given free from any such condition of marrying with consent, was not regarded as an alternative provision, so as to bring it within this exception. Against this decision, however (which was made in the Irish Court of Exchequer), there was an appeal to the House of Lords, which was compromised. But the case of *Reynish* v. *Martin*, 3 Atk. 330, seems to go to the same point." (Note by Mr. Jarman.) In *Re Nourse*, *supra*, *Reynish* v. *Martin* was distinguished.

(*h*) 1 B. C. C. 303, 1 Cox, 39. See also *Re Brown's Will*, 18 Ch. D. 61.

(*i*) 2 B. C. C. 431. And see *Gardiner* v. *Slater*, 25 Bea. 509, where, however, there was also a gift over.

(*j*) 3 Ves. 89. See also *Hemmings* v. *Munckley*, 1 B. C. C. 304, referred to *supra*, where the age on which the legatee was to become entitled, independently of the condition of marrying with consent, was eighteen; and *Scott* v. *Tyler*, 2 B. C. C. 431, where it was, as to one moiety, twenty-one, and the other twenty-five.

(*k*) See now the Schedule to the Guardianship of Infants Act, 1925.

(*l*) "The Courts seem to have inclined greatly to confine marriage conditions to marriage during minority, or within the period fixed for the payment of the legacy: *Knapp* v. *Noyes*, Amb. 662; *Osborn* v. *Brown*, 5 Ves. 527; *King* v. *Withers*, Cas. temp. Talb. 117, *S. C.* 1 Eq. Ca. Ab. 112, pl. 10." (Note by Mr. Jarman.) See also *Duggan* v. *Kelly*, 10 Ir. Eq. Rep. 473; *West* v. *West*, 4 Gif. 198. However, in *Younge* v. *Furse*, 8 D. M. & G. 756, a condition precedent not to marry under twenty-eight was held effectual, though there was no gift over, and no other circumstance to bring it within either

Observations.

"In all such cases, therefore, the legatee must comply with the condition imposed on him by the will, although there is no bequest over. They certainly show the anxiety of the Judges of later times to limit as much as possible the rule adopted from the civil law, which regards such restraining conditions as being *in terrorem* only; and suggest the necessity of great caution in its application to all other cases of conditions precedent, since it is not easy to calculate whether future Judges will adopt the distinctions which modern cases present, or treat them as getting rid altogether of the *in terrorem* doctrine, as applicable to conditions precedent (*m*). Such, indeed, we may collect was the intention of Lord Loughborough, who in *Stackpole* v. *Beaumont* made a general and indiscriminate attack on the qualified adoption of the rule of the civil law, as applicable either to personal legacies or legacies charged on real estates, conditions precedent or subsequent. His decision may, and it is conceived does, rest on solid grounds; but his lordship's observations do not evince that respect for authority and established principles which has characterised his successors.

Marriage necessary, when.

"But it should be remembered that no question exists as to the applicability of the *in terrorem* doctrine to conditions *subsequent* (*n*); and here it may be observed, that, admitting it to the fullest extent in regard to conditions precedent; yet, in such case a legacy given on marriage with consent cannot be claimed by the legatee while *unmarried*, as the doctrine dispenses only with the consent, not with the marriage itself (*o*).

Residuary bequest does not amount to a gift over.

"It has been decided that where a condition of this nature is annexed to a specific or pecuniary bequest, a residuary clause in the same will is not equivalent to a positive bequest over, in rendering the condition effectual (*p*), unless there is an express direction that the forfeited legacy shall fall into the residue (*q*)."

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of the three categories mentioned above. And a condition against marriage at any age without consent is good: *Re Whiting's Settlement*, [1905] 1 Ch. 96.

(*m*) "Such a conclusion would overturn *Reynish* v. *Martin*, 3 Atk. 330, stated *infra*, and many other cases decided upon great deliberation." (Note by Mr. Jarman.)

(*n*) See *Marples* v. *Bainbridge*, 1 Mad. 590; *Wheeler* v. *Bingham*, 3 Atk. 364; *Bellasis* v. *Ermin*, 1 Eq. Ca. Abr. 110, pl. 1; *Garret* v. *Pritty*, 2 Vern. 293; *Stratton* v. *Grymes*, *ib.* 357; *Re Whiting's Settlement*, [1905] 1 Ch. 96. *W.*— v. *B.*—, 11 Bea. 621, where the condition was not to marry any daughter of A., seems also referable to this ground; for "and" could not (as appears to have been argued) be changed into "or" so as to understand a gift over, on breach of one alternative during the life of T., to T.'s *widow;* while, without the change, there was no gift over corresponding accurately with the condition.

(*o*) *Garbut* v. *Hilton*, 1 Atk. 381. See also *Gray* v. *Gray*, 23 L. R. Ir. 399.

(*p*) *Semphill* v. *Bayly*, Pre. Ch. 562; *Paget* v. *Haywood*, cit. 1 Atk. 378; *Scott* v. *Tyler*, as reported Dick. 712; which overrule *Amos* v. *Horner*, 1 Eq. Ca. Abr. 112, pl. 9.

(*q*) *Wheeler* v. *Bingham*, 3 Atk. 364; *Lloyd* v. *Branton*, 3 Mer. 108, over-

Neither does a direction that legacy shall fall into fund for paying debts, if there are no debts.

And it was held in *Keily* v. *Monck* (*r*), that a direction that a forfeited legacy should fall into a fund created for payment of debts and legacies, there being no deficiency in the general personalty to occasion a resort to that fund, was not equivalent to a gift over: and a dictum to the same effect of Lord Keeper Harcourt (*s*), was cited in support of that opinion. The ground of this opinion was, that in order to constitute such a gift over, there must appear a clear distinct right vested in a third person; but as there was no necessity to resort to the fund, there was no person who had such a right; there was therefore no gift over. It is conceived, however, that this reasoning could not be extended so as to include a case where a clear undoubted gift over lapses (*t*).

Effect where legacy is chargeable on real and personal estate.

Mr. Jarman continues (*u*): "As the rule which denies effect to a condition restraining marriage, unless accompanied by a bequest over, is (we have seen) confined to bequests of personal estate (*x*), it follows that where a condition of this nature is annexed to a legacy which is charged on real estate, in aid of the personalty, the condition will, so far as the latter (which is the primary fund) is capable of satisfying the legacy, be invalid; while, to the extent that it becomes an actual charge on the real estate, it will be binding and effectual (*y*).

Whether condition requiring marriage with consent is broken by a *first* marriage without consent.

"It is remarkable, that in the early cases of conditions to marry with consent annexed to devises of land, no attempt was made to argue that the condition was not broken, or rendered impossible by marriage without consent, as the devisee might survive his wife or her husband, and then be in a situation to comply with the condition. Upon this principle Lord Thurlow, in *Randal* v. *Payne* (*z*), held that a gift in case J. and M. did not

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ruling the *dictum* in *Reves* v. *Herne*, 5 Vin. Abr. 343, pl. 41, and Mr. Roper's suggestion, 1 Rop. Leg. 327. See also *Ellis* v. *Ellis*, 1 Sch. & Lef. 1.

(*r*) 3 Ridg. P. C. 205. Legacies, charged on real in aid of the personal estate, were there given to the testator's daughters, payable on their respective days of marriage, subject to a proviso, that if either married without consent, or a man not seised of an estate in fee or of perpetual freehold of the annual value of £500, she would forfeit her legacy, which was then to sink as in the text; one daughter married with consent, but her husband had not the requisite estate. Lord Clare was of opinion that she was nevertheless entitled to her legacy on either of two grounds: first, that the legacy was pecuniary and there was no gift over; or secondly, that even if it were held that the legacy was a charge on the realty, the condition was illegal at common law, being too generally in restraint of marriage. See *post*, p. 1511.

(*s*) Pre. Ch. 350.

(*t*) This paragraph is taken verbatim from the third edition of this work (Vol. II, p. 43) by Messrs. Wolstenholme and Vincent.

(*u*) First ed., p. 842.

(*x*) Including money arising from the sale of land, *ante*, p. 1500.

(*y*) *Reynish* v. *Martin*, 3 Atk. 330. As to mixed gifts of realty and personalty, see *ante*, p. 1500 n. (*x*).

(*z*) 1 B. C. C. 55, *ante*, p. 1446. See also *Page* v. *Hayward*, 2 Salk. 570; *Davis* v. *Angel*, 4 D. F. & J. 524; *Malcolm* v. *O'Callaghan*, 2 Mad. 349.

marry into certain families did not arise on their marrying into other families, as they had their whole life to perform the condition; but in a modern case (*a*), a devise subject to a condition of this nature was held to be forfeited by marriage into another family. There were circumstances distinguishing it from *Randal* v. *Payne*, particularly a legacy payable at twenty-one or marriage, by way of alternative provision, which showed that the testator had a *first* marriage in contemplation."

The same argument might arise with regard to a bequest of personal estate if the case were one of those in which a condition precedent may be enforced without a gift over (*b*). Thus, in *Clifford* v. *Beaumont* (*c*), where a legacy was given by the testator to his daughter L., payable upon her marriage "with such consent and approbation as aforesaid" (the reference being to a clause requiring marriage "if before twenty-one with the consent of trustees"): the legatee married under twenty-one and without consent, and Lord Loughborough decided that the legacy was not then payable (*d*). Afterwards, having attained twenty-one, she married a second husband, and claimed the legacy; but Sir J. Leach, M.R., thought himself precluded from allowing the claim by the previous decision. That decision, however, appears in fact to have left the point untouched; and Sir J. Leach's judgment has consequently been questioned (*e*).

Legatee marrying in testator's lifetime.

Mr. Jarman continues (*f*): "It has been decided, that a requisition to marry with consent, imposed by a testator on his daughters, then spinsters, did not apply to a daughter, who afterwards married in the testator's lifetime, and was a widow at his death (*g*). The contrary construction would have produced the absurdity of obliging the legatee to marry again, in order to provide for her children, if any, by her first husband. And in such a case, it seems, if the legatee marry with her father's consent, or even his subsequent approbation (*h*), she will be entitled to all the benefit attached by him to marrying with the consent required; as it is impossible to suppose that a testator could intend to place a daughter, marrying with his own consent, in a worse situation than if she had married with that

(*a*) *Lowe* v. *Manners*, 5 B. & Ald. 917.
(*b*) *Vide ante*, p. 1501.
(*c*) 4 Russ. 325.
(*d*) *Stackpole* v. *Beaumont*, 3 Ves. 89.
(*e*) See *Beaumont* v. *Squire*, 17 Q. B. 905.
(*f*) First ed., p. 843.
(*g*) *Crommelin* v. *Crommelin*, 3 Ves. 227; *Hutcheson* v. *Hammond*, 3 Br. C. C. 128.
(*h*) *Wheeler* v. *Warner*, 1 S. & St. 304.

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of his trustees (*i*)." The substance of the condition is to guard against an improvident marriage, and to this end the control of the testator himself is equivalent to that of his deputies : the condition is substantially performed. But a condition not to marry before a given age (*k*), or requiring marriage with A (*l*), or not to marry again (*m*), is in no sense performed by the testator giving his consent to a marriage before the prescribed age, or to a marriage with someone else than A, or to a second marriage (as the case may be). Possibly he intended the legacy to stand freed from the condition : but he could only effect that object (at least since the stat. 1 Vict. c. 26) by some means authorised by that statute (*n*). So a condition not to marry after the testator's death without the consent of persons named in the will, is not waived by the testator giving his consent to the marriage (*o*).

Re Park.

In *Re Park* (*p*), the testator gave property in trust for his son for life, and on his death in case he should marry "with the consent and approbation of my said wife and my said trustees" in trust for the son's children, but if he should marry without such consent or if he should marry with such consent and have no child who attained twenty-one, then over. The son married in the testator's lifetime, with his consent. After the marriage the testator made a codicil which confirmed the will. The son's wife died in the testator's lifetime and the son survived him and died without having married again or had any issue. It was held (1) that the son's marriage fulfilled the condition of the will : (2) that the codicil had not the effect of requiring the marriage to take place after the testator's death : (3) that the gift over took effect.

Assent to marriage, when presumed.

In the absence of direct evidence, assent will be presumed, where no objection to the legatee's title is taken for a long

(*i*) *Clarke* v. *Berkeley*, 2 Vern. 720; *Parnell* v. *Lyon*, 1 V. & B. 479; *Coventry* v. *Higgins*, 14 Sim. 30; *Tweedale* v. *Tweedale*, 7 Ch. D. 633.

(*k*) *Younge* v. *Furse*, 8 D. M. & G. 756.

(*l*) *Davis* v. *Angel*, 4 D. F. & J. 524.

(*m*) *Bullock* v. *Bennett*, 7 D. M. & G. 283; *West* v. *Kerr*, 6 Ir. Jur. 141. The circumstance that the restriction was in the form of a limitation during widowhood appears not to have been essential to these decisions.

(*n*) In *Smith* v. *Cowdery*, 2 S. & St. 358, before the Act, a condition not to marry A was held dispensed with by testator consenting to marriage with A. This case was relied on by Wood, V.-C., in *Violett* v. *Brookman*, 26 L. J. Ch. 308, as authority for holding, upon a will dated 1850, that forfeiture for breach of a condition, not to dispute another document, had been waived by the testator's acts. *Sed qu.* The V.-C. also held that simple confirmation of the will by codicil subsequently executed set up the gift free from the condition. *Sed qu.* And see *Cooper* v. *Cooper*, 6 Ir. Ch. 217.

(*o*) *Lowry* v. *Patterson*, Ir. R. 8 Eq. 372.

(*p*) [1910] 2 Ch. 322. See *Re Grove*, [1919] 1 Ch. 249 (condition to make a settlement).

period of time after the alleged forfeiture has taken place (*q*). Assent may also be presumed from other circumstances, for, as Mr. Jarman points out (*r*), "It seems that the assent of trustees will sometimes be presumed from the non-expression of their dissent, according to the maxim, *qui tacet consentire videtur*, especially if the express assent were withheld with a fraudulent intent (*s*); but where the consent is required to be *in writing*, it is not clear that any misconduct on the part of the trustees would be a ground for dispensing with it. Thus, in *Mesgrett* v. *Mesgrett* (*t*), though the trustee was actuated by the motive of inveigling the legatee into a match without his consent, in order to transfer the portion to one of his own children, yet the Lord Keeper laid some stress on the circumstance that a consent in writing was not required; and Lord Eldon, in *Clarke* v. *Parker* (*u*), observed that it would be difficult to support the decision if it had been. On the other hand, Lord Hardwicke, in *Strange* v. *Smith* (*x*), held that the mother, whose consent *in writing* was required, had, by making the offer to, and permitting the addresses of, the intended husband, given consent to her daughter's marriage, which she could not retract, though there appears to have been no written consent; a circumstance to which his lordship does not once advert, nor, which is still more singular, does Lord Eldon, in his comments on this and the other cases, in *Clarke* v. *Parker*, notice it.

Consent in writing.

"Sir John Leach (*y*) thought that the inadvertent omission of a trustee, who approved the marriage, to give a consent *in writing*, would not have invalidated it; but in the case before his Honor, the requisite consent was held to have been contained in a letter written by the trustee before the marriage, though a more formal writing was in contemplation (*z*).

"The Courts are disposed to construe liberally the expressions of persons whose consent is required (*a*), especially if they have sanctioned, by their acquiescence, the growth of an attachment between the parties (*b*). In *Pollock* v. *Croft* (*c*), a general permission to the legatee to marry according to her discretion,

Expressions of consent, how construed.

(*q*) *Re Birch*, 17 Bea. 358.
(*r*) First ed., p. 843.
(*s*) *Mesgrett* v. *Mesgrett*, 2 Vern. 580; *Berkley* v. *Ryder*, 2 Ves. sen. 533.
(*t*) 2 Vern. 580.
(*u*) 19 Ves., at p. 12.
(*x*) Amb. 263.
(*y*) *Worthington* v. *Evans*, 1 S. & St. 165.
(*z*) See also *Le Jeune* v. *Budd*, 6 Sim. 441.
(*a*) *Daley* v. *Desbouverie*, 2 Atk. 261; but as to which, see *Clarke* v. *Parker*, 19 Ves., at p. 12; *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225; *Re Smith*, 44 Ch. D. 654.
(*b*) *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225.
(*c*) 1 Mer. 181; see also *Mercer* v. *Hall*, 4 B. C. C. 326.

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appears to have been deemed sufficient, without any further consent.

As to marriage in wrong name.

"A consent to a marriage with A., of course, is no consent to a marriage with B., though B. should, for the purpose of the marriage, and with the fraudulent design of deceiving the trustees as to his identity, assume the name of A. (*d*) (supposing the marriage, under such circumstances, to be lawful) (*e*).

Trustees withholding consent.

"It seems, that if trustees withhold their consent from a vicious, corrupt, or unreasonable cause, the Court of Chancery will interfere (*f*); but in such a case the *onus* of proof would lie on the complaining party, and it would not be incumbent on the trustee to assign any reason for his dissent, even although the person whose consent is required be the devisee over (*g*), notwithstanding the doubt thrown out by Lord Hardwicke, in *Harvey* v. *Aston* (*h*), and by Lord Mansfield, in *Long* v. *Dennis* (*i*) : but of course the refusal of such a person would be viewed with particular jealousy. And where a trustee refuses either to assent or dissent, the Court will itself exercise his authority, and refer it to the Master to ascertain the propriety of the proposed marriage (*k*).

Retracting consent.

"It seems that consent once given, with a knowledge of the circumstances, and where there is no fraud, cannot be retracted (*l*) without an adequate reason, unless it be given upon a condition, (as that of the intended husband making a settlement (*m*),) which is not performed; but actual withdrawal in such a case must be unnecessary, since a conditional consent is no consent until the performance of the condition.

(*d*) Where (as sometimes occurs) a person drops his real name and assumes another, without any authority, a marriage by the adopted name (being the name by which he is generally known) is clearly valid. And even the adoption of a false name, *pro hac vice*, will not, under the statute of 3 Geo. 4, c. 75, invalidate a marriage, unless the misnomer is known to both parties. See *Re Rutter*, [1907] 2 Ch. 592, referred to *ante*, p. 1496, n. (*l*).

(*e*) *Dillon* v. *Harris*, 4 Bli. (N.S.) 321. In this case, the marriage was had with a person whom the testator had prohibited the legatee from associating with or having any further knowledge of : expressions which Lord Brougham appeared to think did not necessarily extend to marriage; but Lord Tenterden (whom Lord Brougham consulted) seems to have inclined to a contrary opinion. However, this point did not arise, according to the adjudged construction.

(*f*) See judgments in *Clarke* v. *Parker*, 19 Ves., at p. 18; *Dashwood* v. *Lord Bulkeley*, 10 Ves., at p. 245; *Peyton* v. *Bury*, 2 P. W., at p. 628.

(*g*) 19 Ves., at p. 22.

(*h*) 1 Atk., at p. 380.

(*i*) 4 Burr. 2052.

(*k*) *Goldsmid* v. *Goldsmid*, Coop. 225, 19 Ves. 368.

(*l*) *Lord Strange* v. *Smith*, Amb. 263; *Merry* v. *Ryves*, 1 Ed. 1; *Le Jeune* v. *Budd*, 6 Sim. 441; *Re Brown*, [1904] 1 Ch. 120.

(*m*) *Dashwood* v. *Lord Bulkeley*, 10 Ves. 230. It seems that a settlement after marriage is sufficient to satisfy such a conditional consent, *ib.* 244; *Daley* v. *Desbouverie*, 2 Atk. 261.

"Where the consent of several persons is required, all must concur; and the consent of two out of three, the third not expressly dissenting, is insufficient (*n*).

Consent of all.

"Whether a renouncing executor or trustee must concur, is not quite clear upon the authorities. Lord Hardwicke, in *Graydon* v. *Hicks* (*o*), held that a consent, which was to be obtained of the testator's 'executor,' was not rendered unnecessary by his renunciation. On the other hand, Sir John Leach, V.-C., (before whom Lord Hardwicke's decision was not cited,) held (*p*), that where the marriage was to be with the consent of 'trustees,' the concurrence of one who had not acted, and had renounced the executorship, (he being also executor,) was not necessary." And this was followed by Lord Plunket, C. Ir., in *Boyce* v. *Corbally* (*q*), where, though *Graydon* v. *Hicks* was cited, he held that a legacy with a gift over in case of marriage without the consent of the executors "after named," was not forfeited by marriage without the consent of one of the persons named who had declined to act.

Renouncing executor and trustee; his consent not necessary.

"A consent, required to be given by several persons *nominatim*, of course, cannot be exercised by survivors; and in *Peyton* v. *Bury* (*r*), it was so decided, though the persons were also appointed executors, whose office survives; in which, however, Lord Thurlow seems not to have fully concurred (*s*); his Lordship's opinion being, that the required consent of 'guardians,' might be given by a survivor, though he admitted that it was collateral to the office" (*t*). And with this agrees the decision in *Dawson* v. *Oliver-Massey* (*u*), where it was held that a condition precedent to marry with consent of "parents," was well performed after the death of the father by marrying with the consent of the mother. The Court read the will as requiring marriage to be "substantially with proper parental consent—with the consent of the parents or parent, *if any*." On this principle it has been held, that a condition not to marry A without the written consent of the testator applies only to marriage during the testator's lifetime; and that marriage with A after the testator's death, and without any written consent

Whether survivors can give consent.

(*n*) See *Clarke* v. *Parker*, 19 Ves. 1.
(*o*) 2 Atk. 16.
(*p*) *Worthington* v. *Evans*, 1 S. & St. 165.
(*q*) 2 Ll. & Go. 102. See also *Ewens* v. *Addison*, 4 Jur. (N.S.) 1034; *White* v. *McDermott*, I. R. 7 C. L. 1.
(*r*) 2 P. W. 626.
(*s*) See *Jones* v. *Earl of Suffolk*, 1 B. C. C. 528.
(*t*) See this point, in regard to powers generally, 1 Powell Dev., Jarm. 239.
(*u*) 2 Ch. D. 753. See also *per* Lord Eldon, *Grant* v. *Dyer*, 2 Dow., at p. 84. In *Peyton* v. *Bury*, *supra*, the condition was subsequent: so that the effect of the decision was to make the legacy absolute. The power of giving or withholding consent does not generally pass to the representative of the last-surviving executor or trustee, *per* Lord Eldon, *supra*.

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being left by him, was no breach (*x*). Where, however, the consent of guardians is required to marriage, then, if there are no guardians, an application must be made to the Court for the appointment of guardians, and the consent of the guardians so appointed must be obtained to satisfy the condition. The consent of a guardian appointed by the infant would not be sufficient (*y*).

Subsequent approbation.

"It seems to be clear," says Mr. Jarman (*z*), "that approbation subsequent to a marriage, is not in general a sufficient (*a*) compliance with a condition requiring consent; but Lord Hardwicke, in *Burleton* v. *Humfrey* (*b*), took a distinction between the words 'consent' and 'approbation,' holding the latter to admit subsequent approval, where coupled with the former, disjunctively; but he decided the case principally on another ground, and in regard to the admission of subsequent consent the authority of the case has been questioned (*c*).

Instance of equitable relief.

"Where a term was limited to trustees, upon trust to raise portions for daughters upon marriage with consent, and upon condition that the husband should settle property of a certain value; and the marriage was had with the requisite consent, but the settlement was omitted by the neglect of the trustee; the Court relieved against a forfeiture, upon a settlement being ultimately made (*d*).

"Against" consent, construed *without*.

"It remains only to be observed, that in a case (*e*) in which the devise was on marrying *with* consent, and the limitation over on marrying *against* consent, the word 'against' was construed *without*, to make it alternative to the other gift."

It would appear from the authorities above cited to be doubtful whether the following conditions in partial restraint of marriage are good unless there is a gift over: a condition annexed to a devise of land that the devisee shall not marry without consent (*f*), or shall not marry a person of a particular rank in life or occupation (*g*).

Void as regards personal estate, and, *semble*, as to real estate.

(iii) *Conditions in Total Restraint of Marriage*.—With regard to personal estate, (including money arising from the sale of

(*x*) *Booth* v. *Meyer*, 38 L. T. 125; *Curran* v. *Corbett*, [1897] 1 Ir. R. 343.
(*y*) *Re Brown's Will*, 18 Ch. D. 61.
(*z*) First ed., p. 847.
(*a*) *Fry* v. *Porter*, 1 Ch. Cas. 138; *Reynish* v. *Martin*, 3 Atk. 330.
(*b*) Amb. 256.
(*c*) See *Clarke* v. *Parker*, 19 Ves., at p. 21.
(*d*) *O'Callaghan* v. *Cooper*, 5 Ves. 117.
(*e*) *Long* v. *Ricketts*, 2 S. & St. 179. See also *Creagh* v. *Wilson*, 2 Vern. 572; *Re Brown*, [1904] 1 Ch. 120.
(*f*) *Ante*, p. 1500, n. (*x*).
(*g*) *Jenner* v. *Turner*, 16 Ch. D. 188.

land, and, of course, a mixed fund (*h*),) there is no doubt that, subject to the exceptions to be presently mentioned, a condition in total restraint of marriage is void (*i*), and Mr. Jarman says (*k*), that "even in regard to devises of real estate, it seems to be generally admitted (though the point rests rather on principle than decision), that unqualified restrictions on marriage are void, on grounds of public policy. Though (*l*), where lands were devised to A. in fee, with an executory limitation over if she married with any person born in Scotland, or of Scottish parents, the devise over was held to be valid, as not falling within this principle; it is evident, from Lord Ellenborough's few remarks, that he would have considered a devise over, defeating the estate of the prior devisee on marriage generally, to be void."

In support of the proposition laid down by Mr. Jarman, there may be cited the following authorities (*m*) : Sheppard's Touchstone (*n*), *Fry* v. *Porter* (*o*), *Harvey* v. *Aston* (*p*), *Lowe* v. *Peers* (*q*), *Long* v. *Dennis* (*r*), *Keily* v. *Monck* (*s*), *Egerton* v. *Earl Brownlow* (*t*), and *Cooke* v. *Turner* (*z*), all of which either expressly state or impliedly assume that a condition in general restraint of marriage is illegal by the rules of the common law, from which it follows that such a condition cannot be annexed to a gift of real estate (*a*). In *Jenner* v. *Turner* (*b*) and *Greene* v. *Kirkwood* (*c*), the rule that such a condition is void in the case of real estate is taken for granted.

In *Jones* v. *Jones* (*d*), too, it was said by Blackburn, J., that there was strong authority that where the object of the will was

(*h*) *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255; *Morley* v. *Rennoldson*, 2 Ha. 570; [1895] 1 Ch. 449; *Bellairs* v. *Bellairs*, L. R. 18 Eq. 510; *Re Wright*, [1907] 1 Ch. 231; *Re Bellamy*, 48 L. T. 212.

(*i*) *Ib.*; the principle is discussed in *Re Hewett*, [1918] 1 Ch. 458, *ante*, p. 1497.

(*k*) First ed., p. 842.

(*l*) *Perrin* v. *Lyon*, 9 East, 170.

(*m*) For many of these I am indebted to an article by Mr. T. Cyprian Williams in the L. Q. R. xii, 36, agreeing with Mr. Jarman's conclusions. (Note by C. Sweet.)

(*n*) P. 132.

(*o*) 1 Mod. 300.

(*p*) Com. 726; 1 Atk. 361.

(*q*) 4 Burr. 2225. Wilmot's Cas. 364.

(*r*) 4 Burr. 2052.

(*s*) 3 Ridg. P. C. 205.

(*t*) 4 H. L. C., at p. 125.

(*z*) 15 Mee. & W. 727. "The state, from obvious causes, is interested that its subjects should marry; and therefore it will not in general allow parties, by contract or by condition in a will, to make the continuance of an estate depend on the owner not doing that which it is or may be the interest of the state that he should do" : *per* Rolfe, B.

(*a*) In *Allen* v. *Jackson*, 1 Ch. D., at p. 399, a general restraint on marriage is assumed to be against the policy of the law of England.

(*b*) 16 Ch. D. 188.

(*c*) [1895] 1 Ir. R. 130.

(*d*) 1 Q. B. D. 279.

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to restrain marriage and to promote celibacy, the Court would hold such a condition to be contrary to public policy and void. In that case a testator devised land to three women, A, B, and C, to possess and enjoy the same jointly during their lifetime, and when any or some of them should die he gave their shares to be possessed and enjoyed by D and her daughter E, during their lifetime, provided that E continued single, otherwise if she should marry her share was to go to the others, share and share alike. E married; and it was held that her estate thereupon ceased; for that there appeared to be no intention to promote celibacy, but only that if C married she should be maintained by her husband. Blackburn, J., said, " The real question seems to be whether the testator intended to discourage marriage or not." And Lush, J., said : " The question is whether we are to construe this devise as a provision for the testator's niece while she remains single, or as a condition that she shall remain in a state of celibacy under the penalty of losing her share " (*e*).

Condition precedent.

All the preceding cases were cases of conditions subsequent. It seems, however, that a condition precedent may be so expressed as to amount to a condition in total restraint of marriage, and to be therefore void. Thus a condition precedent requiring the legatee to marry a person seised of hereditaments of the clear yearly value of £500 has been held to be void (*f*). It is said that the same rule applies where property is given to a person if he lives to a certain age (not being a reasonable age) without having married (*g*), or where the condition requires the legatee to contract an impossible marriage, such as marriage with the consent of a person who the testator knows is certain not to give it (*h*).

It will be remembered that a condition precedent that the devisee or legatee shall marry a certain person is good, being only in partial restraint of marriage, and no gift over is required (*i*).

(*e*) Against Mr. Jarman's view may be cited : *Earl of Arundel's Case*, Jenk. 243, 3 Dyer, 342, where it seems to be laid down that a condition against marriage is void in the case of an estate tail, but not in the case of a fee; there, however, the question was one of repugnant, not of illegal, conditions : *Bellairs* v. *Bellairs*, L. R. 18 Eq. 510, where Jessel, M.R., accepted without examination the statement of counsel to the effect that there is no rule of the common law making void conditions in restraint of marriage; that this statement is inaccurate appears abundantly from the authorities cited above. It was suggested by Christian, L.J., in *Duddy* v. *Gresham*, 2 L. R. Ir. 443, that the judgment in *Bellairs* v. *Bellairs* is not accurately reported.

(*f*) *Keily* v. *Monck*, 3 Ridg. P. C. 205. See *Re Lanyon*, [1927] 2 Ch. 264, 272.

(*g*) See the passage quoted from Lord Thurlow's judgment in *Scott* v. *Tyler*, 2 Br. C. C. 488, *ante*, p. 1497, and *Younge* v. *Furse*, referred to *ib.* n. (*x*).

(*h*) See *Keily* v. *Monck*, 3 Ridg. P. C. 205.

(*i*) *Ante*, p. 1499.

Conditions against re-marriage.

The only real exception to the rule that a condition in total restraint of marriage is void seems to occur in the case of gifts to persons who are or have been married. It is clear that a gift by a testator to his widow on condition of her not marrying again is good (*j*), and the doctrine has been extended to a gift to a married woman by a testator who is not her husband (*k*). It has been held that where the corpus of personalty is given, there must be a gift over on re-marriage, otherwise the condition is considered to be merely *in terrorem* (*l*). But this doctrine does not apply to a devise of real estate (*m*).

In terrorem doctrine does not apply to real estate, *semble*.

In *Duddy* v. *Gresham* (*n*), a testator gave his real and personal estate to his wife on condition that she should retire into a convent and not marry: there was no gift over: the reasons given by the Judges differed, but Ball, C., and Christian, L.J., were clearly of opinion that if it had been a devise of real estate only the condition against re-marriage would have been good: "the *in terrorem* doctrine does not apply to a devise of real estate": Christian, L.J., was, however, of opinion that as the realty and the personalty were given together, the realty followed the same rule as the personalty, and that the condition was *in terrorem* and void. This opinion was accepted as correct by Byrne, J., in *Re Pettifer* (*o*).

Condition against second marriage of a man.

In *Allen* v. *Jackson* (*p*), a testatrix gave the income of property to her niece and her niece's husband during their joint lives and to the survivor for life, with a proviso that if the husband survived his wife and married again, the property should go over; this event happened, and it was held that the gift over took effect. James, L.J., thought that even if the will had imposed the condition without a gift over it would have been valid.

Gift to mother of illegitimate child.

In *Potter* v. *Richards* (*q*), a testator gave an annuity to a single woman by whom he had had an illegitimate child, on condition that she should remain single, declaring his reason to be that if she married the child would be neglected: Kindersley, V.-C., held that the reason was good and that the condition was valid.

Limitation until marriage.

An apparent exception to the general principle is the rule that a gift of a life interest until marriage is good; "for the purpose of intermediate maintenance will not be interpreted

(*j*) *Barton* v. *Barton*, 2 Vern. 308; *Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255; *Morley* v. *Rennoldson*, 2 Ha. 570. As to gifts during widowhood, see *post*, p. 1514.

(*k*) *Newton* v. *Marsden*, 2 J. & H. 356.

(*l*) *Marples* v. *Bainbridge*, 1 Madd. 590.

(*m*) *Newton* v. *Marsden*, 2 J. & H. 356.

(*n*) 2 L. R. Ir. 442.

(*o*) [1900] W. N. 182.

(*p*) 1 Ch. D. 399.

(*q*) 24 L. J. Ch. 488.

maliciously to a charge of restraining marriage" (*r*). "This is not a subtlety of our law only: the civil law made the same distinction" (*s*). It is a question of construction in each case whether the testator has created a condition or a limitation (*t*).

Marriage during testator's lifetime.

Where property is given to a person for life, or until he shall marry, and he marries during the testator's lifetime, but after the date of the will, the gift fails, even if the marriage takes place with the knowledge and approval of the testator (*u*).

Gift during widowhood.

A gift during widowhood is equivalent to a gift for life or until the legatee marries again (*v*). The somewhat fine distinction between such a gift and a gift to a widow "so long as she shall continue single and unmarried," has been already referred to (*w*), as has also the peculiar rule of construction adopted in cases where a testator gives a life interest to his widow, with a gift over in the event of her marrying (*x*).

Condition to assume name or arms.

XI.—Condition to assume a Name or Arms.—Mr. Jarman continues (*y*): "An obligation is frequently imposed on a devisee or legatee to assume the testator's name; and in such case the question arises, whether the condition is satisfied by the voluntary assumption of the name, or requires that the devisee or legatee should obtain a licence or authority from the Crown, or the still more solemn sanction of the legislature, unless (as commonly happens) the instrument imposing the condition prescribes one of those modes of procedure.

Whether satisfied by voluntary assumption.

"In the case of *Lowndes* v. *Davies* (*z*), where a testator constituted A. his lawful heir, on condition he changed his name to G., it was held that A.'s unauthorised assumption of the name was sufficient.

(*r*) *Scott* v. *Tyler*, Dick. 712; *Heath* v. *Lewis*, 3 D. M. & G. 954; *Potter* v. *Richards*, 24 L. J. Ch. 488; *Evans* v. *Rosser*, 2 H. & M. 190. And see *Right* v. *Compton*, 9 East, 267; *Bullock* v. *Bennett*, 7 D. M. & G. 283; *Webb* v. *Grace*, 2 Phill. 701; *Re Hewett*, [1918] 1 Ch. 458, *ante*, p. 1497; *Re Paine*, [1882] W. N. p. 77.

(*s*) *Per* Wilmott, C.J., Wilm. Op. 373. It was said by Blackburn, J., in *Jones* v. *Jones*, 1 Q. B. D. 279, stated *ante*, p. 1511, that the discretion does not hold in gifts of real estate.

(*t*) See the cases cited in the last two notes, and *Re Elliott*, [1918] 1 Ir. R. 41.

(*u*) *Bullock* v. *Bennett*, 7 D. M. & G. 283; *Andrew* v. *Andrew*, 1 Coll. 686; *Re King's Trusts*, 29 L. R. Ir. 401.

(*v*) *Jordan* v. *Holkham* (*Holcombe*) Amb. 209, *ante*, p. 1497, note (*q*); *Evans* v. *Rosser*, 2 H. & M. 190. As to the effect of divorce on a gift of an annuity "to my wife so long as she continues my widow," see *Re Boddington*, 25 Ch. D. 685; *ante*, p. 1253. As to a gift during spinsterhood, see *Re Mason*, [1910] 1 Ch. 695.

(*w*) *Ante*, p. 1155.

(*x*) *Ante*, p. 1334.

(*y*) First ed., p. 848.

(*z*) 2 Scott, 71.

Barlow v. *Bateman.*

"So, in the case of *Barlow* v. *Bateman* (*a*), a testator gave a legacy of £1,000 to his daughter, upon condition that she married a man *who bore the name and arms of Barlow*; and in case she married one who should not bear the name and arms of Barlow, he gave the legacy to another. The daughter married a person whose name was Bateman, but who, three weeks before the marriage, called himself Barlow, and this was held to be a compliance with the condition; the Master of the Rolls, Sir J. Jekyll, observing, that the usage of passing Acts of Parliament for the taking upon one a surname, was but modern, and that anyone might take upon him what surname, and as many surnames as he pleased, without an Act of Parliament. It was suggested that the husband might, after receiving the legacy, resume his old name, and the Court was requested to make an order that he should retain it, but this was refused." The decision of the M.R. was, however, reversed in the House of Lords, probably on the ground urged in argument that the testator intended a person of his own family, and originally bearing the name of Barlow (*b*).

"So, in the case of *Doe* d. *Luscombe* v. *Yates* (*c*), where a condition was imposed upon devisees *not bearing the name of Luscombe*, that they within three years after being in possession, should procure their names to be altered to Luscombe by Act of Parliament; it was held that this requisition did not apply to an individual who, before he came into possession (*d*), had voluntarily and without any special authority assumed the name of Luscombe; he being, it was considered, a person 'bearing the name' within the meaning of the will" (*e*).

Where mode of assumption is specified.

But where a testator expressly requires a name to be taken by Act of Parliament, or any other specified mode, or under the King's licence (*f*), the devisee or legatee must comply with the

(*a*) 3 P. W. 65. The terms of the will are not accurately stated in the report, which Mr. Jarman follows. The condition was that the legatee should marry with a person of the surname of Barlow; it did not require him to bear the arms of Barlow. The husband admitted that he assumed the name on the occasion of his marriage in order to entitle himself to the legacy.

(*b*) 2 Br. P. C. 272. See *Leigh* v. *Leigh*, 15 Ves. 92, and other cases cited *post*, Chap. XLI, on gifts to persons of the testator's name, etc.

(*c*) 5 B. & Ald. 544. See also *Hawkins* v. *Luscombe*, 2 Sw. 375; *Re Croxon*, [1904] 1 Ch. 252.

(*d*) "He was under age at the time, and this perhaps is not an immaterial circumstance, as Lord C. J. Abbott observed that 'a name assumed by the voluntary act of a young man *at his outset into life*, adopted by all who know him, and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually his name, as if he had obtained an Act of Parliament to confer it upon him.'" (Note by Mr. Jarman.) No such distinction, however, can be collected from the authorities. See Davidson, Conv. iii, 360, note.

(*e*) As to gifts to persons of a prescribed name, *vide Jobson's Case*, Cro. El. 576, and other cases cited, *post*, pp. 1624 *seq.*

(*f*) "The King's licence is nothing more than permission to take the name,

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requirement, and no other mode falling short of the specified mode can be substituted for it (*g*).

Christian name or surname.

In *Bennett* v. *Bennett* (*h*), a condition requiring the assumption of the name of M. was held to be complied with by the baptism of the successor to the estate in that name, without the adoption of the name as a surname. And if the condition requires the devisee to assume and use "the surname of S. alone or together with his family surname," he may use the prescribed name either before or after his own surname (*i*). In *D'Eyncourt* v. *Gregory* (*j*), on the other hand, where the condition required a devisee named W. to take and use "the surname of G.," it was held that the assumption and use of the name G. before that of W. was not a compliance with the condition.

Condition of "using" a name.

Questions sometimes arise how a condition requiring a person to "use" a name must be complied with (*k*).

Grant of arms.

The proper mode of complying with a condition requiring a devisee or legatee to take and bear a certain coat of arms is to obtain a grant of arms from the College of Arms (*l*), and therefore if a condition requires that the arms should be "lawfully" assumed, the condition cannot be complied with in any other way (*e.g.*, by a mere voluntary assumption) (*m*). The question whether a condition simply requiring the devisee to bear a certain coat of arms (without using the word "lawfully") can be performed by a mere voluntary assumption and use of the arms, does not appear to have been decided, but the better opinion is that it cannot (*n*). Of course, if the condition provides that every devisee who at the time he becomes entitled to the estate does not bear a certain coat of arms, he shall assume it, then the condition does not affect a devisee who in fact bears the arms at the time he becomes entitled under the devise, although he has assumed them unproperly and without authority (*o*).

Conversely, the fact that a person is entitled to bear certain

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and does not give it. A name, therefore, taken in that way, is by voluntary assumption": *per* Lord Eldon, in *Leigh* v. *Leigh*, 15 Ves., at p. 100.

(*g*) *Per* Abbott, C.J., in *Doe* d. *Luscombe* v. *Yates*, 5 B. & Ald. 544.

(*h*) 2 Dr. & Sm. 266.

(*i*) *Re Eversley*, [1900] 1 Ch. 96.

(*j*) 1 Ch. D. 441; *Re Llangattoch*, 33 T. L. R. 250; a composite surname including the surname is not sufficient: *Re Berens*, [1926] Ch. 596.

(*k*) See *Re Drax*, 75 L. J. Ch. 317.

(*l*) A royal licence or warrant to use certain arms is practically inoperative unless the arms are "exemplified" in the College of Arms; see the cases cited in the next two notes.

(*m*) *Re Croxon*, [1904] 1 Ch. 252; *Re Berens*, [1926] Ch. 596.

(*n*) *Ib.*; *Austen* v. *Collins*, 54 L. T. 903, [1886] W. N. 91. And see the note in Davidson, Conv. iii, 361.

(*o*) *Re Croxon*, *supra*.

arms does not operate as a compliance with a condition requiring him to use them (*p*).

In *Austen* v. *Collins* (*q*), it was held that a condition requiring a devisee to bear certain arms was complied with by obtaining a grant from the College of Arms of the right to use a slightly different coat of arms, the College having refused to grant the right to use the identical arms.

Name and arms clause.

Not infrequently, a will making a strict settlement of real estate contains a name and arms clause requiring every future owner of the property to assume the name and arms of the testator (*r*).

Gift over on breach of condition.

It has been already noticed that if land is devised subject to a name and arms clause, with a gift over on breach, this gift over is good if annexed to an estate tail, but void in the case of an estate in fee simple (*s*). A devise of an estate in fee simple can, however, be made subject to a condition precedent requiring the devisee to take a name and arms, and a condition subsequent requiring every future owner to take and use a name and arms, with a gift over on breach, may be annexed to such a devise if their operation is confined to the period allowed by the rule against perpetuities (*t*). And the gift over, to be effectual, must be so framed that the proviso for cesser and the limitation over fit one another (*u*). The gift over will also be void if it is repugnant to the original gift: as where an estate is devised to a person in fee, subject to a name clause, with a gift over on breach to the person "next in remainder" (*v*).

Gift over by reference to entailed realty.

Where personalty is settled subject to a name and arms clause, with a gift over by reference to the limitations of settled real estate, the gift over is effectual, notwithstanding that the real estate has been disentailed (*w*).

No gift over common law condition.

In *Re Evans' Contract* (*x*) the testator devised his estate to trustees, giving his daughter and granddaughter and her husband successive equitable life interests, with remainder to the granddaughter's sons in tail male. There was a proviso that every person becoming entitled as tenant for life or tenant

(*p*) *Bevan* v. *Mahon-Hagan*, 31 L. R. Ir. 342.

(*q*) 54 L. T. 903; a condition to assume arms of which a grant cannot be obtained is void: *Re Berens*, [1926] Ch. 596.

(*r*) See the well-known note in Davidson, Conv. iii, 356. For an instance of a name and arms clause taking effect on a life estate, see *Re Michell*, [1892] 2 Ch. 87.

(*s*) *Ante*, p. 1415. Mr. C. Sweet's opinion was that the condition itself is good, if it is what is called a common law condition, *ante*, p. 349.

(*t*) *Bennett* v. *Bennett*, 2 Dr. & Sm., at p. 275; *Re Cornwallis*, 32 Ch. D. 388. Vaizey on Settlements, 1270.

(*u*) *Re Catt's Trusts*, 2 H. & M. 46.

(*v*) *Musgrave* v. *Brooke*, 26 Ch. D. 792.

(*w*) *Re Cornwallis*, 32 Ch. D. 388.

(*x*) [1920] 2 Ch. 469.

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in tail in possession, and the husband of every such person, should within twelve calendar months assume the testator's name and arms. There was no gift over on non-compliance with the proviso. Neither the testator's daughter or granddaughter nor the husband of either assumed the name and arms. It was held that the granddaughter could make a good title under the Settled Land Acts, for if there was a condition it was a common law condition of which the testator's heir alone could take advantage by entry, which he had not done, and there was not anything to show that it was the intention of the testator that the estate should go over on non-compliance with his desires.

Time for performance.

The question within what period a condition requiring the assumption of a name, or name and arms, must be performed, where no time is limited by the will, has been already considered (*y*).

"Entitled."

Sometimes a devisee is required to assume a name (or name and arms) on becoming "entitled" to the estate: in such a case "entitled" generally means "entitled in possession" (*z*).

"Actual possession."

A person may be "entitled to the actual possession or receipt of the rents and profits" within the meaning of a clause of this kind, although the testator's widow is entitled to the actual possession of part of the property and the rents of the remainder are exhausted by the charges (*a*).

Condition requiring residence.

XII.—Condition requiring Residence.—Another condition frequently imposed on a devisee is that he shall "reside" in a particular house. The terms of the will are generally such as to leave no doubt that personal residence to some extent is required (*b*); but where no period is fixed for the duration of the residence, it is almost impossible to enforce the condition; for, on the one hand, it may be contended that the devisee must live in the house always; and, on the other, that if he constantly keeps up an establishment there it will be sufficient if he goes there only once in his life (*c*). In *Fillingham* v. *Bromley* (*d*),

(*y*) *Ante*, p. 1452, *Gulliver* v. *Ashby*, 1 W. Bl. 607; *Lowndes* v. *Davies*, 2 Scott, 71. As to the circumstances in which performance is excused see *ante*, pp. 1454 *seq.*

(*z*) *Re Finch*, 17 Ch. D. 211. Compare *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391, where the interest devised was reversionary.

(*a*) *Re Varley*, 62 L. J. Ch. 652, and see the cases on shifting clauses to take effect on a devisee becoming entitled to the possession of another estate, etc.; *Re Edwards*, [1910] 1 Ch. 541 (second point).

(*b*) See cases, *ante*, p. 1265. In *Roe* d. *Sampson* v. *Down*, 2 Chitty, 529, a gift of a residence to A for life in case she should choose to live and reside there was held to take effect although A never actually resided in the house, she having shown an intention to do so.

(*c*) *Per* Wood, V.-C., Kay, at p. 545. See, however, *Stone* v. *Parker*, 29 L. J. Ch. 874, where this difficulty was not alluded to.

(*d*) T. & R. 530. See also *Potter* v. *Richards*, 24 L. J. Ch. 488, where an annuity was given on condition that the annuitant should reside in a certain

this difficulty was held insurmountable, and a purchaser was compelled by Lord Eldon to take a title depending on the invalidity of the condition. "Suppose (said the L.C.) the devisee had been a member of parliament, and had had a house in London, would you say he did not live and reside at J.?" Even should the devisee be required to reside in the house during a defined period (*e*), or to make it his principal or usual place of abode (*f*), the condition may still be frustrated, for personal presence in the specified place for any part of a day is sufficient residence for that day; and it is not necessary to pass the night of that day there (*g*). But a condition requiring a devisee to reside and dwell in a house and make it his principal place of abode, is sufficiently definite to create a forfeiture if the devisee states that he never has resided in the house and does not intend to do so (*h*). Or, if the devisee were to let the house, or the greater part of it, this would probably cause a forfeiture (*i*). It will depend on the particular terms of the will whether a forced absence or departure from the house, as where the devisee becomes bankrupt and the assignees sell to a purchaser who turns the devisee out (*k*), is a breach of the condition. A life annuity given to A, during her life, so long as she and B should live together, but to cease when A and B should cease to reside together, was held not to be determined by the death of B (*l*). A condition of residence is, as a general rule, inapplicable to an infant (*m*).

Re Wright.

In *Re Wright* (*n*), a testator gave a house to trustees upon trust to permit C. to occupy the same, "subject to the proviso hereinafter mentioned and to her residing upon the said premises

town so long as she lived. Kindersley, V.-C., doubted whether the condition was not void for uncertainty. See also *Ridgway* v. *Woodhouse*, 7 Bea. 437; *Re Ingilby*, 6 T. L. R. 446 (condition requiring a priest to be resident). A condition not to reside in a particular place may be void on the ground of public policy, *ante*, p. 1438.

(*e*) *Walcot* v. *Botfield*, Kay, 534; *Re Moir*, 25 Ch. D. 605; *Re Vivian*, 36 T. L. R. 657.

(*f*) *Wynne* v. *Fletcher*, 24 Bea. 430; *Dunne* v. *Dunne*, 3 Sm. & Gif. 22, 7 D. M. & G. 207.

(*g*) *Per* Wood, V.-C., *Walcot* v. *Botfield*, Kay, at p. 550; *per* Jessel, M.R., *Astley* v. *Earl of Essex*, L. R. 18 Eq., at p. 295. In *Re Moir*, 25 Ch. D. 605, Bacon, V.-C., held that a condition to reside in a house "for at least six months (but not necessarily consecutively) in every year" was satisfied by keeping up an establishment and occasionally visiting the house. See *Tagore* v. *Tagore*, 1 Ind. App. 387.

(*h*) *Dunne* v. *Dunne*, *supra*. "A wilful non-occupation would be equivalent to a refusal to occupy": *per* Kindersley, V.-C., in *Stone* v. *Parker*, 29 L. J. Ch., at p. 874. Compare also *Re Wright*, stated below, where the legatee of a leasehold house let the whole of it except one room, and it was held that she had not resided in it within the meaning of the condition.

(*i*) *Re Wright*, [1907] 1 Ch. 231.

(*k*) *Doe* v. *Hawke*, 2 East, 481; *Doe* d. *Shaw* v. *Steward*, 1 Ad. & Ell. 300.

(*l*) *Sutcliffe* v. *Richardson*, L. R. 13 Eq. 606.

(*m*) *Ante*, p. 1455.

(*n*) [1907] 1 Ch. 231.

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during her lifetime" : in a subsequent part of the will the testator declared that the use and occupation were given on condition that C. should remain single, and that in the event of her marrying she was to forfeit the bequest and it was to fall into residue : she married, and ceased to reside in the house : it was held by Kekewich, J., that the two clauses should be read together, and that the words "residing during her lifetime" meant during her lifetime while she was capable of residing, namely, as a spinster, and that the condition as to residence consequently did not apply after her marriage. It is submitted that the testator intended C.'s right of occupation to be conditional on her residing in the house and remaining unmarried, and that she incurred a forfeiture by breaking the condition as to residence.

Voluntarily.

A woman does not "voluntarily" cease to make a house her permanent home when, in pursuance of her husband's injunction, she goes to live with him at another house (*o*).

Effect of the Settled Land Act, 1925, on conditions as to residence.

In this connection, regard must be paid to section 106 of the Settled Land Act, 1925 (replacing with amendments sections 51 and 52 of the Settled Land Act, 1882), the effect of which is that a clause requiring residence and forfeiting the estate in the event of non-residence when annexed to the estate of a tenant for life or person having the powers of a tenant for life, is regarded as a provision which puts him into a position inconsistent with the exercise of his statutory powers; a tenant for life may therefore sell or demise the settled property, notwithstanding a clause of forfeiture on non-residence, and he will be entitled for his life to the income arising from the proceeds of sale, or to the rents arising under the demise (*p*). But if the tenant for life breaks the terms of a condition of residence before exercising his statutory powers, the forfeiture takes effect (*q*).

Option to reside.

It may be mentioned that where the will gives to A an option to reside or occupy, A must exercise the right before he becomes tenant for life under the Settled Land Acts (*r*).

In *Re Simpson* (*s*), the testator bequeathed a leasehold house to the trustees upon trust to permit his wife to occupy it during her widowhood with a provision that the rent, outgoings and repairs should be paid out of his general estate. After residing

(*o*) *Re Wilkinson*, [1926] Ch. 842.

(*p*) *Re Paget's S. E.*, 30 Ch. D. 161; *Re Ames*, [1893] 2 Ch. 479; *Re Edwards' Settlement*, [1897] 2 Ch. 412; *Re Eastman's S. E.*, 68 L. J. Ch. 122, explained in *Re Trenchard*, *infra*; *Re Richardson*, [1904] 2 Ch. 777; *Re Fitzgerald*, [1902] 1 Ir. R. 162; *Re Patten*, [1929] 2 Ch. 276.

(*q*) *Re Haynes*, 37 Ch. D. 306; *Re Trenchard*, [1902] 1 Ch. 378.

(*r*) *Re Anderson*, [1920] 1 Ch. 175; *Re Gibbons*, [1920] 1 Ch. 372.

(*s*) [1913] 1 Ch. 277, and following *Re Trenchard*, 16 T. L. R. 525; see further *Re Trenchard*, [1902] 1 Ch. 378.

for 14 years the widow sold the house under the Settled Land Act, 1887. The rent and outgoings had amounted to £160 p.a. Held, she was not entitled to be paid £160 p.a. out of the general estate in lieu of the rent and outgoings, as this was not a provision to induce her to abstain from exercising her statutory power of sale.

Condition that a legatee shall not dispute the will.

XIII.—Various Conditions.—Mr. Jarman continues (*t*): "Sometimes a testator imposes on a devisee or legatee a condition that he shall not dispute the will. Such a condition is regarded as *in terrorem* only, at least, where the subject of disposition is personal estate; and, therefore, a legatee will not by having contested the validity or effect of the will, forfeit his legacy, where there was *probabilis causa litigandi* (*u*), unless, it seems, the legacy be given over upon breach of the condition (*x*). This doctrine has never been applied to devises of real estate."

Devise of real estate.

The validity of such a condition, annexed to a devise of land, was called in question in *Cooke* v. *Turner* (*y*), where certain life interests in real estate were given to the testator's daughter subject to a proviso that if she disputed the will, the gifts in her favour should be revoked and she should only receive out of the rents an annuity of £300 and that the surplus rents should be accumulated for the benefit of the persons entitled in remainder. It was argued that the condition was void as being contrary to the liberty of the law (*z*); but it was answered by the Court, that it was no more so than a condition not to dispute a person's legitimacy, which was good (*a*): that, in truth, there was not any policy of the law on the one side or the other: that conditions said to be void as trenching on the liberty of the law were such as restrained acts which it was in the interest of the state to be performed, as marriage, trade, agriculture, and the like; but it was immaterial to the state whether land was enjoyed by the heir or the devisee, and, therefore, the condition was good, and the devisee had, by disputing the will, forfeited the devise in her favour (*b*).

(*t*) First ed., p. 849.

(*u*) *Powell* v. *Morgan*, 2 Vern. 90; *Loyd* v. *Spillet*, 3 P. W. 344; *Morris* v. *Burroughs*, 1 Atk. 399. And see *Phillips* v. *Phillips*, [1877] W. N. 260.

(*x*) *Cleaver* v. *Spurling*, 2 P. W. 526; 1 Rep. 304; *Stevenson* v. *Abington*, 11 W. R. 935. A gift to the executors of the first legatee will not suffice: *Cage* v. *Russel*, 2 Vent. 352.

(*y*) 15 M. & Wel. 727; 14 Sim. 493; 15 Sim. 611; 16 Sim. 482.

(*z*) Citing Shep. Touchst. 132; which, however, says only that "such conditions as are against the liberty of law, as that a man shall not marry, or the like are void"; not that a condition not to dispute a will is against the liberty of law. And see *Anon.*, 2 Mod. 7.

(*a*) *Stapilton* v. *Stapilton*, 1 Atk. 2.

(*b*) As a matter of fact no forfeiture was incurred, for the proceedings by which the validity of the will was questioned were taken by the trustees under the direction of the Court: *Cooke* v. *Cholmondeley*, 2 Mac. & G. 18; *Massy* v. *Rogers*, 11 L. R. Ir. 409.

Remarks on *Cooke* v. *Turner*.

The decision was cited in some earlier editions of this work as establishing the proposition that a condition not to dispute a will is valid in the case of real estate without a gift over, but it is submitted that it is not an authority for that proposition; first because the condition was enforced by a clause of revocation (*c*); secondly, because the direction to pay the daughter out of the rents £300 a year in the event of her disputing the will would in any event have made the *in terrorem* doctrine inapplicable (*d*); and thirdly, because the direction to accumulate the surplus rents was in effect a gift over. But the case is so far an authority for the proposition that the *in terrorem* doctrine does not apply to devises of real estate, that the Court did not refer to the point in its judgment.

Condition not to dispute will of another person.

The validity of a condition that the devisee shall not dispute another testator's will was assumed in *Violett* v. *Brookman* (*e*), although there was no gift over on breach : the only question was whether the testator had, by concurring in the acts alleged as a breach, waived the condition; and it was held, that he had; and further, that he had not re-imposed it by subsequent codicils, which simply confirmed the will.

What amounts to a breach.

On the question what acts amount to a breach of a condition not to take any action or proceeding, or not to make a claim against the testator's estate, reference may be made to the cases mentioned below (*f*).

Frivolous actions against trustees.

In *Adams* v. *Adams* (*g*), a testator devised his real estate to trustees in trust to pay certain annuities to his son for life and after his death to his unborn sons in fee, with a condition of forfeiture if the son interfered with the management of the testator's real or personal estate. It was held by Fry, L.J., and by the Court of Appeal, that the annuitant had incurred a forfeiture by bringing frivolous and groundless actions against the trustees alleging non-payment of the annuities, and that the trustees had wasted the estate : if the actions had been brought *bona fide* in defence of the annuitant's rights no forfeiture would have been incurred.

Condition too wide.

A devise on condition not to take any proceedings at law or in equity relating to the testator's estate is too wide : it would

(*c*) See *ante*, p. 1443. (*d*) *Ante*, p. 1442.

(*e*) 26 L. J. Ch. 308. *Evanturel* v. *Evanturel*, L. R. 6 P. C. 1 (Canadian appeal) may be usefully perused with reference to such conditions, and with reference to the question whether legal proceedings are a breach if abandoned before judgment. Under French law such a condition imports that the testator intended only to forbid the contestation of his will upon frivolous and vexatious grounds. The English law seems to be substantially similar; see *Adams* v. *Adams*, [1892] 1 Ch. 369.

(*f*) *Warbrick* v. *Varley*, 30 Bea. 347; *Re Allen*, 12 Times L. R. 299.

(*g*) [1892] 1 Ch. 369. See *Wilkinson* v. *Dyson*, 10 W. R. 681; *Lewes* v. *Lewes*, 6 Sim. 304, referred to *ante*, p. 1470, n. (*x*).

prevent the devisee from asserting or defending his right to the devised estate against a wrongdoer, and is wholly void (*h*).

In *Re Williams* (*i*), the testator provided that in case any action or other proceeding for the administration of his estate should be commenced by any beneficiary as plaintiff, the costs of all parties should be retained and paid out of the plaintiff's share. It was held that the provision did not apply to an action based on wilful default, and if it had applied the provision would have been void for repugnancy.

In *Boughton* v. *Boughton* (*k*), a testator before 1837 devised real estate to A and gave a contingent legacy to B subject to a clause of forfeiture in the event of her disputing the will : the devise failed, because the will was not executed so as to pass real estate; B was the testator's heiress-at-law : it was held that she must elect.

Condition of claiming legacy.

A testator in bequeathing a legacy sometimes imposes the condition that the legatee shall claim the legacy within a certain time; if he fails to comply with the condition, the legacy is forfeited (*l*), although he was in ignorance of the condition (*m*).

Decree in administration action.

It has been decided, that where there is a testamentary gift to such members of a class as shall claim within a specified time, a general decree for the administration of the estate before the time specified is equivalent to a claim by the legatees, though they may not be parties to the suit (*n*). But this rule does not apply to an order for limited administration made on summons (*o*).

Condition of return.

A legacy may be given upon condition that the legatee returns to England within a certain time. Such a condition is *prima facie* precedent (*p*).

In a Scotch case (*Auld* v. *Pinney*, referred to in the Solicitors' Journal, Vol. 54, p. 399) the testator bequeathed a share to the three children of his brother, and declared that the provisions in their favour should only take effect " in the event of his and their returning to Scotland within the period of three years from the date of my decease and thereafter continuing to reside permanently in Scotland." One of the children had married an

(*h*) *Rhodes* v. *Muswell Hill Land Co.*, 29 Bea. 560; *Re Williams*, [1912] 1 Ch. 399.
(*i*) [1912] 1 Ch. 399.
(*k*) 2 Ves. sen. 12.
(*l*) *Tulk* v. *Houlditch*, 1 V. & B. 248.
(*m*) *Hawkes* v. *Baldwin*, 9 Sim. 355; *Burgess* v. *Robinson*, 3 Mer. 7; *Powell* v. *Rawle*, L. R. 18 Eq. 243; *Re Lewis*, [1904] 2 Ch. 656; *Horrigan* v. *Horrigan*, [1904] 1 Ir. R. 271.
(*n*) *Tollner* v. *Marriott*, 4 Sim. 19. Compare *Franco* v. *Alvares*, 3 Atk. 342.
(*o*) *Re Hartley*, 34 Ch. D. 742.
(*p*) *Priestley* v. *Holgate*, 3 K. & J. 286. The decision in *Murphy* v. *Broder*, Ir. R. 9 C. L. 123, is *contra*.

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American citizen who lived in America. It was held to be *contra bonos mores* to hold the condition of forfeiture applicable to her (*q*).

Widowhood.

If a testator bequeaths an annuity to his wife so long as she shall continue his widow, she is not entitled to it if the marriage is dissolved (*r*).

Various other examples of conditions have been incidentally referred to in earlier parts of this chapter (*s*).

Conditional gift to charity.

Cases frequently occur in which property is given to a charity, subject to a condition or gift over in certain events (*t*).

As to whether a legacy substituted by a codicil is subject to a condition contained in the will, see *Re Joseph* (*u*).

(*q*) See *Wilkinson* v. *Wilkinson*, L. R. 12 Eq. 604, *ante*, p. 1438.

(*r*) *Re Boddington*, 25 Ch. D. 685; *Re Kettlewell*, 98 L. T. 23.

(*s*) *Croskery* v. *Ritchie*, *ante*, p. 1456, n. (*a*). *Re Dickson's Trust* and *Colston* v. *Morris*, *ante*, p. 1442. *Robinson* v. *Wheelwright*, *Re Earl of Sefton*, *ante*, p. 1445. *Re Beard*, [1908] 1 Ch. 383; *Re Robinson*, *ante*, p. 1451. See also *Poole* v. *Bott*, 11 Hare 33 (condition to enter into a bond not to illegally cohabit); *Re Glubb*, [1900] 1 Ch. 354 (condition that charity should obtain equal sum from the public); *Galway* v. *Barden*, [1899] 1 Ir. R. 508 (condition to enter a calling); *Re Knox*, [1912] 1 Ir. R. 288 (condition to become a British subject); *Browne* v. *Browne*, [1912] 1 Ir. R. 272 (condition to settle property legatee should become "possessed of or entitled to"); *Re Crumpe*, [1912] 1 Ir. R. 485 (annuity to cease on return to England).

(*t*) *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; *Re Tyler*, [1891] 3 Ch. 252; *Re Beard's Trusts*, [1904] 1 Ch. 270; *Re Blunt's Trusts*, [1904] 2 Ch. 767; *Re Emson*, 74 L. J. Ch. 565.

(*u*) [1908] 2 Ch. 507.

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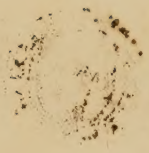
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